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## ERRATUM.

It is suggested by RANEY, J., that the following be substituted for the syllabus in *Turn of Enterprise et al. v. State ex rel. Attorney General*, page 17:

Under supreme court rule 17, a motion by appellee to dismiss an appeal for failure of appellant to file a transcript of the record with the clerk of the supreme court on or before the first day of the term to which the appeal is returnable, cannot be granted at such term unless notice of such motion has been served on the appellant or his attorney.

THE  
Southern Reporter.  
VOLUME IV.

(40 La. Ann. 340)

STATE *et al.* v. ISABEL.

(Supreme Court of Louisiana. March 23, 1883.)

ON MOTION TO DISMISS.

1. CRIMINAL LAW—APPEAL—WHEN LIES.

When a party, charged with violating a parish ordinance inflicting a fine for certain prohibited acts, appears and files a plea or demurrer admitting the act, but setting up the nullity of the ordinance, the case involves a contestation as to constitutionality or legality of the fine or penalty imposed, and is appealable to this court.

2. SAME.

The state and police jury having both joined in the appeal, and, the defendant being duly cited, all proper parties are certainly before us; and even if the joinder of appellants was unnecessary, it obviates all ground of objection to absence of parties which is urged in the motion.

ON THE MERITS.

1. INTOXICATING LIQUORS—ILLEGAL SALE—EFFECT OF LICENSE.

Because a retailer of spirituous liquors has paid his license, he does not become on that account exempt from the operation and effect of a police regulation, thereafter ordained by the police jury, in so far as his subsequent act in violation thereof is concerned.

2. SAME.

An ordinance passed and promulgated subsequent to the issuance of a license to a retailer of spirituous liquors, denouncing a penalty of fine against its violation by such person as shall keep his saloon open after 10 o'clock P. M., is not amenable to the charge of being an *ex post facto* or retroactive law, unless the act sought to be punished was committed antecedent to its passage.

(Syllabus by the Court.)

Appeal from First justice's court, parish of Jefferson; W. R. CHAPMAN, Judge.

Prosecution by the state of Louisiana and the police jury of the parish of Jefferson, right bank, against W. J. Isabel, for the alleged violation of a parish ordinance. Plaintiffs appeal.

*Gervais Leche*, Dist. Atty., and *H. U. Gauthier*, for appellants. *W. L. Thompson*, for appellee.

(December 5, 1887.)

ON MOTION TO DISMISS.

FENNER, J. The police jury of the parish of Jefferson passed an ordinance forbidding the keeping open of taverns, coffee-houses, and retail liquor shops after 10 o'clock at night or earlier than 4 o'clock in the morning, and inflicting, as a penalty for its violation, a fine of \$20 for each offense. Defendant,

v. 480.no.1—1

prosecuted for such a violation, filed a written plea, in which he expressly admits the facts charged, but sets up that the ordinance was null and void, because he had paid licenses to the state and parish, and the ordinance passed after such payment was *ex post facto*. The justice sustained the plea or demurrer, from which judgment the appeal is taken.

The motion to dismiss is based on two grounds, viz.: (1) That the case is unappealable. This is untenable. It is apparent from the above statement that the case involves a contestation as to the constitutionality or legality of a fine or penalty imposed by a municipal corporation. This authorizes an appeal to this court under article 81 of the constitution. (2) That the proper persons are not make parties to the appeal. Both the state and police jury are parties appellant, and the defendant was duly cited as appellee. What other party is required, we cannot conceive. It may have been unnecessary for both the state and police jury to join in the appeal, but certainly their joinder obviates all possible defect of parties. The motion to dismiss is therefore denied.

(March 26, 1888.)

#### ON THE MERITS.

WATKINS, J. The defendant was arrested on the charge of having violated the following ordinance of the police jury of the parish of Jefferson, right bank, viz.: "All tavern and coffee-house keepers and retailers of spirituous liquors are forbidden to keep their houses open later than 10 o'clock P. M., or to open them earlier than 4 o'clock A. M., following: provided, that they shall be allowed to keep open on each Saturday night until 12 o'clock, under penalty of a fine of \$20 for each and every contravention, unless they are authorized to do so by special permission from the police jury." On the trial the defendant filed a demurrer to the proceedings against him under the foregoing ordinance, on the grounds, substantially, viz.: (1) That he had paid a state and parish license as a retailer of spirituous liquors previous to the enactment of the ordinance in question, under which he is entitled to keep his place of business open until 12 o'clock at night; hence it violates the law. (2) That this ordinance, passed and promulgated subsequently to the issuance of his said licenses, if intended to control him in the exercise of all or any of his rights thereunder, is an "*ex post facto* law, which is null and void and retrospective, and, therefore, he prays to be hence dismissed," etc. The justice of the peace sustained the demurrer, and dismissed the proceedings against the defendant; and on his decision the jurisdictional contention of legality *vel non* of the ordinance is here presented by the state and parish of Jefferson.

1. Said ordinance was enacted on the 23d of March, 1887, and defendant's violation of it is laid on Monday the 19th of July following. He relies on the provisions of section 1 of act 18 of 1886, as authority for keeping his place of business open until 12 o'clock at night. That act is commonly known as the "Sunday Law." It provides "that from and after the 31st day of December, 1886, all stores, shops, saloons, and all places of public business, which are or may be licensed under the law of the state of Louisiana, or under any parochial or municipal ordinance, and all plantation stores, are hereby required to be closed at 12 o'clock on Saturday night, and to remain closed continually for twenty-four hours," etc. There is no mention made of any other than Saturday night; and Sunday night is included, by necessary inference only. Argument is not needed to demonstrate the fallacy of defendant's contention in this particular. This statute is one which contains prohibitions and penalties alone. It does not purport to grant any privileges to any one. It was enacted and promulgated antecedent to the said ordinance of the police jury, and it is, in no sense inconsistent therewith.

2. It appears from the record that the defendant paid for and procured his

state and parish licenses on the 28th of February, 1857, antecedent to the adoption of said ordinance, and hence his contention that if intended to apply to such persons as may have procured their state and parish licenses previously, it is an *ex post facto* and retrospective law, and cannot be enforced against him. In answer to this proposition the plaintiff's counsel contends that the police jury had ample warrant, in Rev. St. § 2743, par. 6, for the enactment of the ordinance, as a police regulation; and in this view he is correct, for that section provides that "the police juries shall have power to make all such regulations as they may deem expedient; \* \* \* to regulate the police of taverns and houses of public entertainment, and shops for retailing liquors, in their respective parishes," etc. It is an established fact that the alleged violation of the ordinance occurred long after its adoption. We cannot understand in what respect it is an *ex post facto* or retroactive law. A statute is said to be an *ex post facto* law when it is intended to punish crimes or offenses committed antecedent to its enactment; and is said to be retroactive when it is to be applied to past transactions. But neither view has any application here; because the act sought to be punished occurred subsequent to the adoption of the ordinance. We are referred to no provisions of law in force at the time the defendant procured his licenses, under the authority of which he was entitled to keep open his establishment until 12 o'clock at night, and the privilege of enjoying which the ordinance in question purports to abridge. And we are not aware of any. But, if there was, it would not result therefrom that the ordinance in question was either an *ex post facto* or retroactive law. The defendant's counsel cites our opinion in *Police Jury v. Arleans*, 84 La. Ann. 646, as conclusive against the enforcement of said ordinance. An examination of it discloses that the defendant was proceeded against for an alleged violation of a police jury ordinance relating to ferries, and he was sought to be condemned to pay a fine, or in default thereof to be sentenced to a term of imprisonment. Resistance was made on the ground that the police jury was not warranted by the law in passing an ordinance denouncing the penalty of fine and imprisonment against the violation of the ferriage law, enforceable in a criminal proceeding in the name of the parish. The court sustained this view, and held that the law, "while providing for punishment by fine, expressly declares that the same may be recovered by suit brought in the name of the parish," etc. Rev. St. § 2750. But the question here is not whether the police jury could promulgate and enforce an ordinance directing proceedings against the violations of her police regulations by indictment or information, but whether it could enforce such an ordinance at all. It is not applicable.

We are of opinion that the ordinance drawn in question is a police regulation, which the police jury had a right to ordain, and that it is not answerable to the charge of being an *ex post facto* or retrospective law; and that the justice of the peace erred in sustaining the defendant's demurrer, and in dismissing the prosecution. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed that the cause be remanded and reinstated for further proceedings according to law and the views herein expressed; the cost of appeal to be paid by the defendant and appellee, and that of the lower court to await the final decision of the cause therein.

(40 La. Ann. 286)

DENIS v. GAYLE et al.

(Supreme Court of Louisiana. March 26, 1883.)

1. JUDGEMENT—ACTION TO DECLARE INOPERATIVE—ACTION OF NULLITY—DISTINCTION. The action of a creditor to have a judgment recognizing a homestead in favor of his judgment debtor declared inoperative and void, for the reason that the condi-

tions which were the motive of the judgment have ceased to exist, must not be confounded with the action for the nullity of the judgment, as provided in section 8 of chapter 6 of the Code of Practice.

3. **SAME.**

Such an action rests on the principle that if anything should happen to destroy the force of a judgment, it will cease to have effect either against the parties or their heirs.

3. **HOMESTEAD—CONDITIONS FOR EXISTENCE OF—SUBSEQUENT FAILURE.**

The debtor who claims a homestead under act 53 of 1865 must combine in him at least three conditions,—he must own the property, he must occupy it as a residence, and he must have a family dependent upon him for support. A judgment declaring a property as his homestead on those conditions will cease to have effect as soon as the conditions or any one of them cease to exist.

4. **SAME.**

On proper showing such a judgment will be declared inoperative and avoided.

5. **SAME.**

As soon as the judgment becomes inoperative, the judicial mortgages which had been properly inscribed against the owner of the property, recognized as his homestead, and which were dormant, become executory against the property, even in the hands of a third possessor, by virtue of a sale from the original owner.

6. **SAME.**

The owner of a property exempt from seizure as his homestead cannot sell such property free of the mortgages inscribed against it before the sale.

7. **SAME.**

He has the legal right to sell the property, but it passes to the purchaser burdened with the judicial mortgages duly inscribed against the vendor.

TODD, J., dissenting.

(*Syllabus by the Court.*)

Appeal from district court, parish of Point Coupee; JOHN YOIST, Judge.

Suit by Charles A. Denis against A. C. Gayle and others, in which plaintiff seeks to annul a former judgment rendered in a kindred case by the supreme court of Louisiana. Defendants appeal from a judgment favorable to plaintiff.

W. W. Leaks, for appellants. Thos. H. Hewes, for appellee.

POCHE, J. The main question presented for discussion in this case is to determine whether the owner of an immovable, which has judicially been recognized as his homestead under the act of 1865, (Rev. St. 1870, § 1691,) can sell such property free of judicial mortgages duly inscribed against him in the parish wherein the property is situated. Plaintiff, as the transferee of two judgments rendered against the defendant Gayle, seeks to enforce the judicial mortgage resulting therefrom against a tract of land and improvements thereon, now owned by the other defendant, J. L. Kingsbury, under a sale made to him in February, 1883, by Gayle, which property had been judicially declared to be exempt from seizure as the latter's homestead, in the suit of *Gerson v. Gayle*, 34 La. Ann. 337. The relief which he prays for is a decree declaring that by reason, and as an effect, of the sale made by Gayle to Kingsbury, the judgment rendered in the suit above mentioned, and reported in 34 La. Ann. 337, had become inoperative and of no effect, and should therefore be avoided, and declaring further that the judicial mortgage resulting from the judgments hereinabove recited, inscribed before the date of said sale, attaches to and affects said property as having been acquired by Kingsbury subject to said mortgage. Defendants first pleaded the following exceptions: (1) Want of jurisdiction in the district court to annul a judgment rendered by the supreme court; (2) the misjoinder of Kingsbury as a party to this suit, because he was not a party in the judgment sought to be annulled; (3) that the demand for nullity is inconsistent with an action to enforce a judicial mortgage; (4) want of proper parties, because Ben Gerson and Wheeler & Pierson were necessary parties; (5) no cause of action, because the petition contains no allegations of fraud, error, or ill-practice in connection with the judgment sought to be annulled, the correctness of which is not even ques-

tioned; (6) the prescription of one year. Their exceptions having been overruled, the defendants filed a general denial, reserving the benefit of their exceptions, and they now appeal from a judgment in favor of plaintiff.

At a glance of the exceptions filed by defendants it appears that they are predicated on a misapprehension of the true nature of plaintiff's demand, and that they could apply only to an action of nullity under the provisions of section 3, art. 604 *et seq.*, of the Code of Practice, for causes existing previous to, or contemporaneous with, the rendition of the judgment sought to be annulled. But, as suggested by defendants themselves in their fifth exception, the present action involves no charge of fraud, error, ill-practice, or other ground of nullity, as characterizing the judgment to be herein discussed, at the time that it was rendered, or in any way connected with it at the date of its rendition. Plaintiff does not in any manner question the correctness of the judgment in its disposition of the issues then tendered to the court for solution; hence, he does not put at issue the right of Gayle to his homestead, as therein recognized, under the conditions and circumstances then existing. His contention is simply that the reasons on which the judgment was founded and from which it derived its vitality having ceased to exist, the judgment itself, having exhausted and completed its entire mission, has become extinct, without force or effect or life. The issues which he now tenders had no being or existence at the time that the judgment was rendered, hence they were not elements in the consideration of the cause, and therefore the judgment could not be *res adjudicata* as to his present cause of action, which has arisen since the rendition of that judgment, and is entirely disconnected with or independent of the state of the case then disposed of. In the case of *Lemantier v. McCearly*, 37 La. Ann. 133, which involved the contested custody of a child, and in which the defendant was met with a judgment intrusting her with such custody "temporarily or for the present," as an argument that she was thereby stripped of that right, at the date of the case then on trial, this court said: "The restriction in that judgment, whether right or wrong, could not and did not compel a like restriction in the judgment now before us under different conditions and state of facts, as we have shown, and while we may recognize it as *res adjudicata* as to the matters and issues there existing, it can have no legal effect upon those now shown in the instant case. For, as stated, we think there is no cause for any limitation or restrictions over the rights of the defendant touching the care and control of the child." The same principle came under the consideration of this court in the case of *Davidson v. City of New Orleans*, 32 La. Ann. 1248, in which the following conclusions were expressed: "It is easy to conceive \* \* \* and it is plain that cases may arise in which causes, occurring subsequently to the rendition of judgments, may render their execution illegal and inequitable and violative of rights not within the contemplation of the court when the judgment was rendered, and not intended to be foreclosed thereby." And in that opinion plaintiff's right to sue for a decree declaring a judgment previously rendered against her inoperative was recognized. On the merits in the same case, reported in 34 La. Ann. 170, the nature of the cause was held to be "a suit to have that judgment declared inoperative, because of what has occurred since it was pronounced, and which could not have been pleaded before it was rendered." And, sustaining plaintiff's contention, the court recognized the principle involved in the demand in the following language: "If the parties have appealed from the judgment, and it is confirmed by the sentence of a competent superior tribunal, they shall forever be bound by it thereafter; yet, if anything should happen to destroy its force, it will cease to have effect, either against the parties or their heirs." It is on that principle that plaintiff's present action rests, and on its strength his suit must be sustained as unaffected by defendant's exceptions, which were properly overruled. *Calvi v. Williams*, 35 La. Ann. 322.

## ON THE MERITS.

The facts alleged by plaintiff are fully substantiated by the record, and hence the question to be discussed is purely one of law. In support of their proposition that under the sale to Kingsbury, Gayle's property, which had been judicially recognized as his homestead, passed free of the judicial mortgage resulting from the judgments in favor of Ben Gerson & Son and of Wheeler & Pierson, defendants rely almost exclusively on the decision rendered by our immediate predecessors in the case of *Van Wickle v. Landry*, 29 La. Ann. 330. Such was the practical result of that decision. But in the opinion is to be found the following language: "It is conceded that a party, in whose favor a certain quantity of property has been adjudicated as exempt from seizure, may sell the exempted property, and his vendee would acquire a title unincumbered by the mortgage granted before such adjudication." If, as the terms of the opinion seem strongly to indicate, the conclusion reached by the court had been conceded by the parties, it is not a violent presumption to consider that the principle did not emanate from the court, and that the *dictum* is not precisely a judicial precedent. But be that as it may, the case is liable to just criticism, as having gone far beyond the plain scope of the homestead act of 1865. In another part of the same opinion the following declaration is made and is actually used as a consideration tending to the conclusion adopted by the majority of the court: "If we cannot decree the enforcement of the mortgage now because of a legal obstacle, if the law exempts the property from seizure so unqualifiedly that a mortgage, voluntarily imposed on it by the debtor, is held not to bind it, and if the exemption is so complete that the owner may convey the property by an unincumbered title, it would seem that no future contingency can revivify a mortgage thus declared extinct." But a mere reference to the statute is sufficient to show that none of the premises of the proposition can find any sanction in its plain and unambiguous meaning, and that the act contains no language to justify even a suspicion of any legislative intent to impair or affect in any manner the existing laws of Louisiana on the binding force and effect of mortgages, either legal, judicial, or conventional. Hence, the provisions of law which declare that the judicial mortgage which results from the inscription in the proper office of a valid final judgment takes effect and may be enforced against all the immovables which the debtor actually owns or may subsequently acquire, have not been altered or otherwise impaired by the enactment of that statute. Civil Code, art. 3328. Its title is an act "to exempt from seizure and sale a homestead and other property," and in its body it purports or attempts to do nothing more. The homestead, which it exempts from seizure and sale, is defined to be "one hundred and sixty acres of ground, and the buildings and improvements thereon occupied as a residence, and *bona fide* owned by the debtor, having a family or mother or father or person or persons dependent on him for support." Under the plainest rules of construction the debtor who claims the exemption must combine in himself four indispensable conditions: (1) He must be the *bona fide* owner of the land; (2) he must occupy the premises as a residence; (3) he must have a family or person or persons dependent on him for support; (4) the property must not exceed in value two thousand dollars. Numerous adjudications of this court are authority for the assertion that the absence of any one of those conditions in the debtor will defeat his claim for exemption, and that to entitle him to the homestead all the conditions must co-exist at the very time that the claim is propounded. *Tilton v. Vignes*, 33 La. Ann. 240; *Galligar v. Payne*, 34 La. Ann. 1057; *Bossier v. Sheriff*, 37 La. Ann. 263. Hence, it follows that if subsequently to the judgment which recognizes the exemption any one or all of the conditions which were required to justify its rendition should cease to exist, the right to the homestead must fall.

Under a proper construction of the statutes, the judgment does not create a homestead, and under it the debtor does not acquire a vested right to the homestead. The judgment must be construed as a declaration of the co-existence of the conditions of the law which authorizes the exemption, and which must be understood as written in the judgment. In the case of *Calvit v. Williams*, 35 La. Ann. 324, the court said: "It is a judgment which the court, by reason of its continuing jurisdiction over the subject-matter, can revoke on a proper showing, and thus render inoperative. No reservation of power to that effect was necessary in the original decree. It exists and can be exercised as a matter of course." Under the authority of our laws on the subject of judicial mortgages, the legal effect of the two judgments now owned by plaintiff was a judicial mortgage against Gayle's property now under discussion from the moment that they were inscribed in the proper office, and the effect of the judgment which recognized his right to the same as a homestead was to suspend the execution of the judgments against that property as long as the conditions under which the law granted the exemption continued to exist in fact and in law. The judicial mortgage which resulted from those judgments has the following effects: (1) That the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor; (2) that if the mortgaged thing goes out of the debtor's hands, the creditor may follow it in whatever hands it may have passed, in so much that the third possessor of it is obliged to pay the debt for which the thing is mortgaged, or to relinquish it to be sold, that the creditor may be paid out of the proceeds thereof. Civil Code, art. 3397. Now, by the sale and delivery of the property to Kingsbury, Gayle became at once stripped of two of the essential conditions under which the property had been judicially declared to be his homestead. He then ceased to own it, and also to occupy it as a residence; and at that very moment the judicial mortgage which attached to it, and which had not been canceled or in the least impaired by the homestead judgment, followed the property as an incumbrance in the hands of the new owner. At the moment that the exemption ceased, the mortgage, which had been only dormant, not extinct, became executory with all its pristine force and vitality. Having severed all his connections with the property thus sold, Gayle could no longer extend over it a shield of protection, in the shape of an exemption from seizure and sale, which was personal to himself. His rights were then restricted to the proceeds of the sale, and these were not screened from the pursuit of his creditors under his homestead judgment. How, then, can it be argued that the land which had ceased to be his property could be shielded in the hands of a third person, under the effect of a judgment rendered inoperative by his own acts? It is thus made manifest that the views expressed in the *Van Wickle Case* find no sanction in the fundamental principles of our laws, and an examination of all the subsequent decisions of this court on the statute now under discussion shows that they all fairly antagonize the spirit of that decision, which can be considered as practically overruled. The views expressed and the conclusions reached by the court in the case of *Chaffe v. McGehee*, 38 La. Ann. 278, squarely bear out this assertion, and settle our jurisprudence adversely to the doctrine of the case in question. The homestead law is therein expounded as follows: "Hence the homestead only exists *sub modo*; \* \* \* a mortgage will bind a debtor's property against everything but homestead rights, and \* \* \* though inoperative as long as the property is subject to the conditions constituting the homestead, it will become operative the moment these conditions cease to exist. Thus a judicial mortgage, while inoperative against the pre-existing homestead, would unquestionably attach to the property when it ceased to be a homestead." The decision in the case of *Hardin v. Wolf*, 29 La. Ann. 333, which defendants invoke as sustaining the theory of the *Van Wickle* opinion, cannot avail them, because that case was in terms and com-

pletely overruled in the decision of *Nugent v. Carruth*, 32 La. Ann. 444, by the same bench which had rendered both the *Van Wickie* and the *Hardin* opinions, and thus the doctrine, since uniformly followed, which requires a strict construction of homestead and other exemption laws, was solidly constructed. All these considerations lead forcibly to the conclusion, adopted by the lower court, that the judgment which recognized the property now in suit as Gayle's homestead has since become inoperative, and that it should therefore be avoided, in so far as plaintiff's judicial mortgage is concerned, and that the property passed to the purchasers burdened with said mortgage. Judgment affirmed.

TODD, J., (*dissenting*.) Plaintiff is the transferee of two judgments against the defendant Gayle, rendered in favor of Ben Gerson & Son and Wheeler & Pierson, respectively, and duly recorded in the mortgage office in the parish of Point Coupee, where certain immovable property of the judgment debtor was situated. Ben Gerson & Son, before the transfer of their judgment to the plaintiff, attempted to enforce it against the said immovable property, then in possession of Gayle, the debtor, but by a decree of this court rendered on appeal, the property in question was declared to be the homestead of Gayle and as such exempt from seizure. See *Gerson v. Gayle*, 34 La. Ann. 337. Subsequently to this decree, Gayle sold this property to Kingsbury, his co-defendant; and by reason of this sale by the judgment debtor, and his removal therefrom, the plaintiff, as the owner of said judgments and subrogee of the judicial mortgages claimed to result from their inscription, seeks by this action to have the said decree of this court, recognizing Gayle's homestead on the property, declared inoperative and void, and the property now legally subject to the mortgages; and this presents the sole issue for determination. In the case of *Van Wickie v. Landry*, 29 La. Ann. 330, it was expressly held (quoting) "that a mortgage on property exempt under the homestead act cannot be enforced; and the owner of said property may sell the same free from the mortgage he has imposed upon it." In that case the property was declared free from a mortgage that the debtor himself had sought to impose upon it; and where the act of the debtor in giving the mortgage might have been reasonably construed as waiving the exemption under the homestead, *a fortiori* would the exemption apply to a mortgage not expressly consented, but resulting from the operation of the law. If the property was free from the mortgage while it was occupied as a homestead, and if it was not inalienable,—as was likewise held,—it would seem to follow as a logical sequence that if sold, or when sold, it would be sold and acquired by the purchaser free of mortgage. This decision has never been overruled. It is however claimed that the cases of *Hardin v. Wolf*, 29 La. Ann. 333, and *Chaffe v. McGehee*, 33 La. Ann. 273, are opposed to it. The question determined in the first case mentioned was whether the right of homestead or the exemption could be waived; and while it was held that it could not be waived in advance by the debtor, yet we find in one of the concurring opinions delivered it was expressly held that the property subject to it could be sold. In the other case (*Chaffe v. McGehee*) the debtor had abandoned the homestead, and moved out of the state, but the title to the property still remained in him. It had never been sold or disposed of. And under these circumstances it was held that it was subject to seizure. This was a material condition which distinguished it from the instant case. The question involved in the present litigation has in my opinion been settled, and settled adversely to the plaintiff. Holding these views, I therefore dissent.

(40 La. Ann. 24)

## MAYEWSKI v. HIS CREDITORS.

(Supreme Court of Louisiana. February 12, 1893.)

1. **INSOLVENCY—DISCHARGE OF INSOLVENT—OPPOSITION.**

An opposition to an insolvent's cession and discharge, grounded on a charge of fraud, is in the nature of an answer, and citation to the insolvent is unnecessary.

2. **SAME.**

On the trial of such opposition, the insolvent is a competent witness in his own behalf.

3. **SAME.**

If an insolvent debtor is shown to have committed any "kind of fraud to the prejudice of his creditors," whether it is specially denounced in the statute or not, he may be proceeded against and condemned, under Rev. St. § 1808.

4. **SAME.**

Rev. St. §§ 1808, 1804, relate to different classes of fraud. One provides for frauds *per se*, and the other for presumptive frauds.

5. **SAME.**

While the insolvent law is a highly penal statute, it is not a criminal law; and the charge made against the plaintiff is not a criminal, but a civil, one. Hence the court *a quo* had jurisdiction.

6. **SAME.**

Section 1805, Rev. St. is a valid and constitutional law.

7. **SAME.**

The penalty that is denounced by this statute is not imprisonment for debt; and the statute does not conflict with the act of 1840, which abolished the writ of *ca. sa*.

8. **SAME.**

One state or government cannot, in virtue of its criminal laws, punish acts committed against the laws of another state; but in a civil proceeding, like the instant one, proof of fraud or theft committed in another state by an insolvent debtor will sustain a charge of fraud that is made against him in the courts of this state.

9. **SAME.**

To support a charge of fraud under the insolvent law, it is unnecessary that the proof should show that the mass of creditors have been injured by the fraudulent acts of the insolvent debtor, whereby the amount of property applicable to their demands has been reduced. It will suffice if the proof shows that the insolvent obtained goods, under a false and fraudulent pretense, from a single, individual creditor.

10. **REHEARING—ADDITIONAL EVIDENCE.**

Additional and extraneous evidence, not offered on the original trial of the suit, cannot be introduced on the trial of an application for a rehearing, unless it is based, wholly or in part, on the ground of it being newly-discovered testimony.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; F. A. MONROE, Judge.

Plaintiff, W. M. Mayewski, seeks by this proceeding to be put under the protection of the insolvent law of the state of Louisiana. Opposition by Emile S. Levy & Co. From a judgment debarring him from the benefit of said law, and condemning him to one year's imprisonment, plaintiff appeals.

A. J. Lewis and Farrar & Kruttschnitt, for appellant. Harry H. Hall, for appellees.

**WATKINS, J.** The plaintiff resides in New Orleans, and is an importer and jobber in fancy goods. On the 11th of November, 1886, he sought the benefit of the insolvent law of this state, on the ground that he was unable to meet his business engagements on account of his inability to realize on his assets, or collect debts that were due him. His schedules show total assets of \$9,481.81, and liabilities of \$13,479.90. On the 22d of December, 1886, Emile S. Levy & Co., of the city and state of New York, filed an opposition to the plaintiff's discharge, in which they make a charge of fraud against him, based upon the following state of facts, viz.: That on the 20th of August, 1886, he visited their store with the view of purchasing goods, and, upon the faith of his statement that he was worth \$8,000 over and above his debts and liabilities, they sold him a bill of \$557.81, on a credit of 80 days from the 30th of September, provided the said insolvent, upon his return to New Orleans,

would send them a written statement of his assets and liabilities, like the one he had made them verbally. This he consented to do. On the faith of his representation and promise, they subsequently shipped him the goods. He failed to make them a statement, and they wrote him on the subject. On the 12th of September he wrote them a letter, inclosing a statement showing his assets to be \$9,729.06, and his liabilities \$458.40. On the 4th of November he gave notice to his creditors—opponents, among the number—that he was utterly insolvent, and that he could not pay more than 20 cents on the dollar of his indebtedness; and he also submitted to them a statement of his business, as follows, viz.: Assets, \$6,800; liabilities, \$13,818.50. Opponents aver that said indebtedness existed wholly or in greater part when the foregoing statement was made to them, and said goods were furnished by them; and that said statement was false and fraudulent, and was so made by said insolvent willfully and knowingly, for the purpose of fraudulently obtaining said goods from them, and for the sole purpose of deliberately swindling them of the value of their property. They aver that these acts of the insolvent constitute a fraud on them, within the statute, and that no part of their claim has been paid. They pray for his arrest and confinement until he shall give bond for his appearance and answer, and that he shall be adjudged guilty of fraud, deprived of the benefit of the insolvent law, and that he be sentenced to imprisonment for a term of three years. To this opposition the insolvent excepted that the charges were too vague and general to justify the decree prayed for, and disclose no cause of action. This exception was overruled, and he filed an answer which embraced the following points, viz.: (1) A general and a special denial of the charge of fraud. (2) That the charge made is essentially a criminal one, and that the court *a quo* was without jurisdiction to entertain it. (3) If it is construed to be a civil proceeding, then section 1805, Rev. St., authorizing it, is unconstitutional and void, being in violation of articles 2, 5, 6, 7, and 8 of the state constitution, and the fourth, fifth, and sixth amendments of the federal constitution; because, if this proceeding be entertained, he would still be exposed to another prosecution, before the courts having criminal jurisdiction, and be thereby placed twice in jeopardy for the same alleged offense. (4) If this be a civil proceeding, he is entitled to a citation and service of petition. (5) A claim of \$10,000 for a malicious prosecution. On these issues the case was tried by a jury, and they found the plaintiff guilty of fraud. Thereupon the court pronounced judgment against him, decreeing that he be forever deprived of the benefit of the insolvent law of the state, and that he be imprisoned for one year in the parish prison. From this judgment the insolvent has appealed.

1. In this court it is suggested, in argument and brief of opponents, that the insolvent has no appealable interest, and that his appeal should be dismissed *propria motu* for want of jurisdiction *ratione materiae*. We are of opinion that he has sufficient interest in the question of his deprivation *vel non* of the benefit of the state insolvent law to warrant his appeal. But the estate of an insolvent is like that of a deceased person, and the amount to be distributed is over \$9,000.

2. This is not a suit, in the ordinary acceptance of the term. The cession of an insolvent is made in conformity to special provisions of the law, to which an opposition is in the nature of an answer. No citation is necessary, because the insolvent is in court on his own petition.

3. The evidence introduced by the opponents fully establishes all the averments contained in their petition. There was none introduced by the defendant. For reasons best known to himself, he thought it expedient to remain silent, notwithstanding he had the opportunity to explain his course of dealing with opponents, and the disparity between the statement of the 12th of September and that of the 4th of November, 1886, whereby it appears that his assets had been diminished by the sum of \$2,929, and his liabilities

increased by the sum of \$12,353. The argument is made that it is questionable whether the insolvent had the right to testify, because the statute authorized the opponents to require, under certain averments, the written answers of the insolvent. But this statute does not preclude him from testifying, and we think he had that right, and could have exercised it if he had been desirous of so doing. In his schedule of assets he placed his "stock and fixtures" at \$5,000, and his "book-accounts" at \$3,354.92; the two aggregating \$8,354.92. If, as stated in the sworn petition which accompanies his schedules, his state of insolvency was brought about through his inability to collect debts that were due him, and to realize on his stock of goods, how can he account for the deficit of \$4,998.58? For, if his "book-accounts" and "stock and fixtures" were converted into cash, there would still be a shortage, to that extent, unaccounted for. It is evident that opponents furnished the insolvent with \$557.81 worth of goods in the latter part of the month of August, upon the faith of his representations that he was worth \$9,729.06 over and above his liabilities, whereas his real situation was such, that two months afterwards his values, if counted as cash, amounted to \$4,998.58 less. In other words, his representations to opponents were false, or he had sustained losses in the interim to the extent of \$14,727.64. But neither the petition nor schedules pretend to account for such losses. Had he been possessor of the assets he claimed to have in September, there had been withdrawn at least \$4,998.58 prior to the 4th of November, of which he had rendered no account, and offered no explanation whatever. It is provided by Rev. St. § 1803, that "every insolvent debtor shall also be considered as guilty of fraud who shall have passed simulated deeds for the purpose of conveying the whole or part of his property, and depriving his creditors thereof; or who shall have knowingly omitted to declare any of his property, rights, or claims in his schedule; or purloined his books, or any of them, altered, changed, or made them anew, always with an intent to defraud his creditors; or committed any other kind of fraud, to the prejudice of his creditors." The plain significance of this statute is that if an insolvent debtor has been proved to have passed simulated deeds for the purpose of depriving his creditors of his property, or to have knowingly omitted any of his property from his schedule, or to have "committed any other kind of fraud, to the prejudice of his creditors," he "shall be considered guilty of fraud." Proof having been made of any fraud on the part of an insolvent debtor, to the prejudice of his creditors, he shall be considered *ipso facto* a fraudulent debtor, and treated as such. In addition, section 1804, Rev. St., provides that if a debtor, who has voluntarily surrendered his property to his creditors, shall have done either of certain acts therein enumerated, or "any such act," it shall be held "presumptive evidence of fraud;" but this presumption may be rebutted. Those two sections provide for different classes of frauds, one for frauds *per se*, and the other for a class of presumptive frauds. Does the proof bring the plaintiff within the compass of either? Has he committed any kind of fraud, to the prejudice of opponents? If one who has passed a simulated title to his property for the purpose of depriving his creditors of it "shall be considered guilty of fraud," and one who shall have knowingly omitted to declare any of his property in his schedule "shall be considered guilty of fraud," why should not the person be so considered who has not only failed to disclose his insolvency, but asserted his solvency, to another, in order to enable him to buy his goods upon terms of credit? Does not the one act, as well as the other, injure the creditor? Is not the fraudulent purpose and intent just as clearly discernable in one as in the other? If one is more flagrant than the other, it is the last; because it is through the fraudulent concealment of his insolvency, and the false assertion of his solvency, that the credit was given, and the injury inflicted. That this was the course of plaintiff's conduct is undenied and undeniable. But counsel for the insolvent strenuously insist that it is not sufficient to

prove acts of fraud upon a single, individual creditor,—*i. e.*, acts by which an individual creditor is injured,—but that the proof must show that the mass of creditors have been injured by the reduction, through fraudulent devices of the insolvent debtor, of the amount of property applicable to their demands. His reliance is on the provisions of sections 1802, 1804, 1808, Rev. St. This question was directly presented and decided in *Montesquieu v. Hew*, 4 La. 52, and from which we make the following extracts, viz.: "To sustain their opposition to the surrender of property, and discharge of the insolvent from custody, his opponents rely on the fraudulent and thieving manner in which he contracted the debt towards them; and, to support the charges of fraud and theft, they introduced in evidence the record of a suit tried in the district court, wherein it appears that they, as plaintiffs, recovered from the present appellant \$30,000 as damages on account of a theft by him committed in Paris, in stealing from their ancestor jewelry to that amount." Again: "The evident intention of the legislature, as ascertained by the preamble to act of 1808, is to exclude from its benefit all fraudulent debtors. The seventeenth section specifies particular acts of a debtor, which shall deprive him of the benefits and privileges accorded by the law. Does this specification of frauds preclude allegation and proof of others, which would demonstrate the debtor to have been dishonest in the transaction by which he became indebted to any one of his creditors, and fix on the former the character of a fraudulent debtor, and, according to the preamble, one who has deprived an honest individual of the community of his property? We think not. \* \* \* The act now under consideration received a construction by the supreme court of the territory of Orleans, in 1810, contrary to the claims of the appellant." *Brown's Case*, 1 Mart. (La.) 159. In the case cited the insolvent was convicted of fraud, and the judgment was affirmed in this court. A careful examination of acts 16 and 17 of 1808—and particularly of sections 17 and 19 of the former, and 5 of the latter—will disclose that the causes enumerated therein for the insolvent debtor's deprivation of the benefit of the law are nearly identical with those of Rev. St. § 1802 *et seq.* But those contained in Rev. St. § 1809, add to the list, "also, all those whose losses shall have been occasioned by gambling, dissipation, and debauch." The decision quoted from seems to meet the objection urged by plaintiff's counsel, under the law as at present in force. If we were to express our opinion on it as a new question, we would feel inclined to differ from the views therein expressed; but, when we take into consideration the great length of time that that opinion has been suffered to remain undisturbed, we may safely rest our approval of it on the conservative doctrine of *stare decisis*.

4. Counsel further insist that, while the instant law is not a penal statute, yet the charge made against him is a criminal one, and therefore several consequences result that are destructive of this proceeding. Let us first ascertain whether the one prepared is a criminal charge. It is that Mayewski obtained from opponents goods on the faith of his false statement that he was solvent. Now, while, at common law and in some of the states, it is regarded as a false pretense for a person to make a misrepresentation of an existing condition, or with regard to the ownership of specified assets, on the faith of which credit is given, yet it is an open question in England whether or not it is a false pretense to obtain goods on the representation that a person is a man of means, when in truth he is not. 2 Whart. Crim. Law, §§ 1135-1138. Hence, rather a nice question is presented,—whether the insolvent's act is cognizable by a criminal court or not. But its decision is not necessary to the determination of this case. We have only to deal with the question in hand. It is quite certain that, while the insolvent law is a highly penal statute, it is not a criminal law, and no charge under it could be a criminal charge. It is not a good argument to insist that, because the plaintiff might be proceeded against under section 813, Rev. St., for obtaining goods under false

pretenses from the opponents, therefore the court *a quo* has no power to determine whether, under section 1807, he had been guilty of fraud upon them or not. If so, then, for a like reason, the argument would be a good one that he could not be criminally prosecuted because he might be proceeded against on a charge of fraud. In this way he might escape both the penalty of one statute and the punishment of the other. We cannot anticipate what might be the result of a prosecution of the insolvent in the future. Had he been convicted, and suffered the punishment therefor, and that proceeding be tendered as a bar to the present inquiry, we should have felt constrained to have passed upon the tangible issue thus formulated. At present we cannot. The conclusion reached on this question necessarily disposes of the plaintiff's exception to the jurisdiction of the court *a quo*.

5. Plaintiff's counsel insist that the provisions of section 1805, Rev. St. 1870, are in conflict with articles 2, 5, 6, 7, and 8, Const. 1879, (denominated the "Bill of Rights,") and therefore unconstitutional and void. There is but one essential difference between those articles of the present constitution and the corresponding articles of the constitution of 1868, which were in force when the statutes were revised; and that consists in the proviso to article 5, which declares that no person shall be twice put in jeopardy of life or liberty for the same offense, etc. We have already reached the conclusion that the insolvent is not being prosecuted, and it does not appear that he has been prosecuted; consequently it is manifest that this contention is groundless. The quoted articles, with slight modifications, have been imported from the fourth, fifth, and sixth amendments to the federal constitution into our own, and the charge of unconstitutionality in that respect, is equally groundless.

6. His further contention is that the plaintiff's arrest and confinement, in pursuance of the provisions of the insolvent law, would be virtually an imprisonment for debt, and therefore illegal, because it has been abolished. Under C. P. 210 *et seq.*, the arrest of a debtor is permitted while suit is pending, or until he shall give security for his appearance after judgment. By the terms of Code Prac. art. 726 *et seq.*, his imprisonment is permitted, after judgment, under certain circumstances; and one of them is to compel him to make a surrender under the insolvent law. These statutes have been held not to conflict with the act of March, 1840, which abolishes the writ of *ca. sa*. *Anderson v. Brinkley*, 1 La. Ann. 126; *Thornhill v. Christmas*, 10 Rob. (La.) 543. For a like reason, we cannot perceive in what way Rev. St. § 1807, conflicts therewith; for it merely provides that when an accusation of fraud is brought against an insolvent debtor, who has made a surrender, and is found guilty, he shall be deprived of the benefit of the insolvent law, and sentenced to imprisonment. In *Bank v. Squires*, 8 La. Ann. 337, it was said that "it seems to be conceded everywhere to be well settled that state insolvent laws, as to contracts posterior thereto, are valid and binding between citizens of the state where such laws exist, with respect to contracts made and to be performed in another state." It does not lie in the mouth of plaintiff, who is in court on his own petition, seeking the benefit of the insolvent law, to complain of its enforcement against him. There is no question here as to whether the contract between him and opponents was to be performed in New York or Louisiana, for the reason that the latter have taken judicial cognizance of plaintiff's surrender, and joined issue with him in the courts of this state, and seek therein the enforcement of the insolvent law against him. We do not regard such an imprisonment as being an imprisonment for debt. This law has stood the test of half a century, and, in our opinion, does not conflict with the law abolishing the writ of *ca. sa*.

7. It is next strenuously urged by plaintiff's counsel that, if fraud was perpetrated at all by the insolvent, it was in New York, and that same is not cognizable by the courts of this state. It is no doubt true, in principle, that one state cannot, in virtue of its criminal laws, punish acts committed

against the laws of another state; but in the case of *Montequien v. Hall*, 4 La. 52, above cited, one of the questions presented was whether proof of a theft committed in France would support a charge of fraud made in the courts of this state against an insolvent debtor who had made a surrender under our insolvent law. On this question the court said: "As this evidence relates solely to a civil action, we are unable to perceive the force of the objection made to it, on account of proving a fraud committed in France. It is true that our state and government will not punish crimes committed in another, by public prosecution; but it does not follow, as a necessary consequence, that an offender who flees from the state wherein he committed the crime, shall be screened against pursuit by individuals whom he may have injured in the country where he has taken refuge. In relation to the civil suit, he must be subjected to the laws of the latter place." That decision is particularly applicable to the instant case, because the fraud complained of was begun in one state, and consummated in another.

8. Objection was urged on behalf of plaintiff to the judge's charge to the jury; but they were not particularly specified, nor set out in a bill of exceptions, and cannot, therefore, receive any consideration. The request made of the judge to prepare and submit his charge to the jury came too late; but he did subsequently reduce it to writing, and file it in the record, and the demand was substantially complied with.

9. The application for a new trial substantially embraces the various issues presented in the argument, and it was overruled by the judge *a quo*, after careful consideration, and our study of the case has impressed us with the correctness of his ruling. On the trial thereof, plaintiff's counsel offered in evidence quite a number of letters and papers in support of his contention; but same were rejected and disallowed, mainly for the reason that they were not introduced in evidence on the trial of the case; and there is no averment to the effect that these papers constituted newly-discovered evidence. There is no warrant for such a practice, and we approve of the rejection of this evidence.

We do not approve of that part of the judgment of the court *a quo* which taxes the costs against the insolvent personally. It should have been taxed against his estate. In all other respects we think the judgment is correct. It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to tax all cost against the insolvent's estate, and that it be in all other respects affirmed.

Rehearing refused, March 26, 1888.

(40 La. Ann. 238)

**WIRT *et al.* v. PINTARD.**

(*Supreme Court of Louisiana. March 5, 1888.*)

**EXECUTORS AND ADMINISTRATORS—APPOINTMENT—ORDER.**

There can be no valid appointment of an administrator unless such appointment is under authority of an order therefor signed either by the judge or the clerk. Letters of administration issued in the absence of such an order are null and void.

(*Syllabus by the Court.*)

Appeal from district court, parish of West Feliciana; JOHN YOIST, Judge. Alleging themselves to be heirs of John Marsden Pintard, Mrs. Julia A. Wirt and others institute this action against Claude Pintard, seeking the annulment of letters of administration issued to defendant. From a judgment favorable to defendant, plaintiffs appeal.

*Wickliffe & Fisher*, for appellants. *W. W. Leaks*, for appellee.

TODD, J. The plaintiffs, as collateral heirs of John Marsden Pintard, seek by this action to annul the letters of administration issued to Claude Pintard.

the defendant, as administrator of the succession of the deceased. Among other grounds of nullity urged, is this, (quoting:) "That there was no order of the judge or clerk authorizing the issuance of the letters of administration." We find in the record no such order, and this omission was fatal. The appointment was an absolute nullity. It was so held by the present court in the case of *Succession of Picard*, 33 La. Ann. 1196, a case presenting the precise issue now before us. It is unnecessary for us to repeat here the reasons which led us to the conclusion stated. They can be found at length in the opinion then delivered, which we reaffirm. The application for the appointment in question by the defendant was regular, and notice of the application published in the manner and for the time prescribed by law. The conclusion reached by us does not involve the dismissal of the entire proceeding, but only affects the alleged appointment by reason of the omission referred to and which the remanding of the case may enable the parties to supply. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; and it is now ordered and decreed that the said letters of administration issued to Claude Pintard, as administrator of the succession of John Marsden Pintard, by the clerk of the district court of the parish of West Feliciana, be annulled and set aside, and the case remanded to the lower court to be proceeded with according to law; defendant to pay costs of both courts.

GOSSIGI *et al.* v. CITY OF NEW ORLEANS.

(*Supreme Court of Louisiana. March 26, 1888.*)

MUNICIPAL CORPORATIONS—MARKETS—CONSTITUTIONAL LAW.

The constitutionality and legality of the private market ordinance of the city of New Orleans have been too frequently passed upon to be open to further discussion. (*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

This is an attack by Anna Gossigi and another against an ordinance of the city of New Orleans, prohibiting the keeping of private markets within a radius of six squares from a public market. Plaintiffs appeal from an adverse judgment.

*Belden & Armbruster*, for appellants. *Walter H. Rogers*, City Atty., and *Frank N. Butler*, for appellee.

FENNER, J. This is one of the stereotyped suits assailing the legality and constitutionality of the private market ordinance of the city of New Orleans. The questions have been so often decided that appellants have not seen fit to make any appearance in support of their appeal. *State v. Gisch*, 31 La. Ann. 544; *Stafford v. Harper*, 32 La. Ann. 1077; *New Orleans v. Wolf*, 36 La. Ann. 986; *State v. Natal*, 38 La. Ann. 967. Judgment affirmed.

Rehearing refused, April 16, 1888.

(40 La. Ann. 256)

WOOD v. DABOVAL.

(*Supreme Court of Louisiana. March 26, 1888.*)

1. PARTNERSHIP—ACTION FOR LIQUIDATION.

In an action for the liquidation of a partnership, in which issue has been joined between the parties as to the sufficiency and correctness of an account furnished to the suing partner by the managing partner, in which a trial has taken place on evidence introduced on the merits of the controversy, and in which the defendant had not filed an exception or even prayed for a dismissal of the suit, a judgment maintaining an exception, and for that reason dismissing the suit, is not responsive to the issues tendered by the pleadings, and such a judgment cannot be reviewed on the merits of the appellate tribunal.

## 2. SAME.

In such a case the judgment will be set aside, and the cause remanded for trial on the issues involved in the controversy.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

Action by James Wood against Emile Daboval, in which plaintiff seeks to compel defendant to furnish him with a complete account of a partnership previously existing between the parties. Plaintiff appeals from a judgment sustaining an exception.

W. B. Lancaster, for appellant. Sambola & Dueros, for appellee.

POCHE, J. This is a suit for the liquidation of a partnership, of which plaintiff was a dormant partner, and which was under the exclusive control and management of the defendant. The partnership had been formed for one year, to begin on the 1st of June, 1882. The relief asked by plaintiff was a detailed and exact account from the defendant of the affairs of said partnership, and for a judgment against defendant for such amount that might be found to be due to plaintiff after a final and judicial investigation of the accounts of the firm. After a general denial, and after denying specially that he had the exclusive control of said partnership, defendant avers that he has furnished plaintiff with a full and final account of the transactions of said partnership, and also with a statement of plaintiff's personal account with the firm, both of which went to show a balance of \$42.88 in favor of plaintiff, who received said statements without ever questioning the correctness of either. Alleging that he has frequently offered to pay said balance to plaintiff, defendant embodies in his answer a succinct statement of the account of the partnership, and he concludes with a prayer "for such judgment as the nature of the case may require and the law will permit."

The issue having thus been joined between the parties, as to the correctness of the account rendered by the defendant, with a prayer by both parties for a judgment liquidating the partnership, followed by the introduction of a mass of testimony and some documentary evidence bearing on the merits of the controversy, the judicial mind is served with quite a surprise on finding in the record the following judgment from which plaintiff prosecutes this appeal: "In this exception submitted for adjudication and for the reasons orally assigned by the court, the law and the evidence being in favor of plaintiff in exception, it is ordered that the exception filed herein be maintained, and accordingly the plaintiff's suit dismissed with costs." And the surprise thus experienced grows into amazement at the perusal of the briefs filed here by both parties, who join in a discussion of the entire controversy on its merits, in an appeal from a judgment sustaining an exception, and in a record which contains no exception. In their brief, defendant's counsel make the statement: "The judgment of the lower court, which called and treated the defense embodied in the said answer as an exception, dismissed said suit with costs." But the statement is not borne out by the record, from which it appears that the defendant acknowledged an indebtedness to plaintiff in the sum of \$42.88, without averring a legal tender thereof, and that in his prayer he had not asked for a dismissal of the suit. Hence it is clear that the judgment on appeal is not responsive to any issue tendered by the pleadings. The statement furnished to his copartner by the defendant was either an accounting or it was not; and, if a sufficient account, it was either correct or it was not. If it was a sufficient account, and if correct, the judgment should have been in favor of plaintiff for the balance in his favor acknowledged by the defendant. If the conclusion was that the statement was not a sufficient accounting, or that it was not correct, then a proper judgment, based upon the partnership books and other testimony in the case, should have liquidated the partnership, by determining the rights and liabilities of the partners *inter sese*. But under

no event and under no law or judicial precedent was there any room or reason for the judgment rendered in this case. Under those circumstances, we are powerless to review the merits of that judgment, and to decide whether it is intrinsically right or wrong, as the record does not set forth the issues on which it seems to be predicated. We are left but one alternative, and that is to set it aside, and to remand the cause for further proceedings according to law. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is ordered that this cause be remanded to the lower court to be there tried under the issues contained in the pleadings and according to law; the costs of this appeal to be taxed against the defendant, other costs to abide the final determination of the case.

(24 Fla. 152)

TOWN OF ENTERPRISE *et al.* v. STATE *ex rel.* ATTORNEY GENERAL.

(Supreme Court of Florida. March 30, 1898.)

APPEAL—MOTION TO DISMISS—NOTICE—RULE 17, SUP. CT. FLA.

Under rule 17, Sup. Ct. Fla., a motion to dismiss an appeal for failure of appellant to file with the clerk of the supreme court a copy of the record and proceedings in the court below cannot be granted unless notice of such motion has been served on appellant or his attorney.

Appeal from superior court, Volusia county; JOHN D. BROOME, Judge.

Motion to dismiss an appeal for failure of appellant, the town of Enterprise, to file with the clerk of the supreme court a copy of the record of proceedings in the lower court.

Thomp. Dig. p. 448, § 1, provides: "It shall be the duty of the party appellant to demand from the clerk a true copy of all proceedings in such cause in the circuit court, and to file said copy with the clerk of the supreme court on or before the first day of the next succeeding term thereof, unless the said succeeding term shall commence within 30 days after the obtaining of such appeal; and then the said appeal shall be entered as soon after the first day of the next succeeding term thereafter of said supreme court as will admit of 20 days' notice thereof being given. If the party appellant fail to file the proceedings as aforesaid, it shall be the duty of the said court, unless good cause be shown, to dismiss said appeal, on the adverse party producing a certificate from the clerk of the court below that an appeal has been obtained, and a bond given as aforesaid; and upon the receipt of the order dismissing such appeal, certified by the clerk of the said supreme court, the clerk of the court below shall proceed to issue execution, as well for the costs and damages which may have been adjudged by said supreme court, as for the debt, damages, or condemnation and costs for which the judgment, sentence, or decree was originally pronounced." Rule 17 of the supreme court of Florida is as follows: "In case the plaintiff in error or appellant shall fail to file with the clerk of this court a true copy of the record and proceedings as required by law, (Thomp. Dig. p. 448, § 1,) the defendant in error or appellee may procure and file such copy, and thereupon the cause may proceed in like manner as if the same had been filed by the plaintiff in error or appellant; and no motion to dismiss at the first term after the appeal or writ of error, on account of the neglect of the plaintiff in error or appellant to file a certified copy of the record and proceedings, will be heard, unless notice of such motion shall have been served on the opposite party, or his attorney or solicitor."

Frank W. Pope, for the motion.

RANEY, J. (*after stating the facts.*) This is a motion to dismiss the appeal on account of the failure of appellants to file the transcript of the record on or before "the first day of the next succeeding term." As the present term is the first term "after the appeal," and no notice of this motion appears

to have been served on the opposite parties or their attorney, as required by supreme court rule 17, the motion cannot be granted, but will be denied, without prejudice to a motion on proper notice. It will be so ordered.

(84 Ala. 65)

THOMPSON v. HARTLINE.

(*Supreme Court of Alabama*. March 22, 1888.)

1. GUARDIAN AND WARD—ORDER FOR REMOVAL OF GUARDIAN—UNION OF, WITH ORDER FOR SETTLEMENT.

It is not error to make together and embrace in one entry, orders removing a guardian, and requiring his settlement.

2. EVIDENCE—OPINION—VALUE OF SERVICES.

Where in a guardian's settlement, to offset an account for her board, the ward counter-claimed for services performed, testimony that her services were "worth as much as her board" was not admissible, especially as the witnesses did not profess complete knowledge of the services.

3. APPEAL—REVIEW—OBJECTION NOT TAKEN BELOW.

Where a guardian's only objection to an order removing him, and requiring settlement, is that the court cannot do both in one order, he cannot afterwards, on appeal from the settlement, object further that the order was made out of term-time.

Appeal from probate court, Cherokee county; R. R. SAVAGE, Judge.

On application for settlement by guardian. F. M. Thompson, the appellant, was the duly-appointed guardian of Anna Hartline, the appellee, who was before her marriage Anna Hall. One of the sureties on the guardian bond filed his petition to be taken off of the bond of F. M. Thompson, as guardian of the said Anna Hall, and the probate court hearing the petition granted that the said petitioner's name should be stricken from the bond, and required the said Thompson to make his bond good. This order was made, and he was allowed 30 days from June 14, 1886, within which he could give this new bond, as required by the order of the court. He failed to give the said bond, and on the 14th July, at a special term of the probate court, the said Thompson was removed from the guardianship, and ordered to file his account with the estate of the ward, together with the vouchers, and make a final settlement of his guardianship. On the day on which he was ordered to file his account and vouchers, and make final settlement, he appeared, and objected to being brought to a settlement, solely on the ground that the court could not remove him as guardian, and require settlement, in one and the same order. This action of the court constitutes the first assignment of error. The guardian claimed in his account several separate items for the board of the ward for each year from the time of his appointment up to the time when the settlement was sought to be made. The ward tried to make, as a set-off to this item of charge against her, her services to the guardian during the whole time of his guardianship. The rulings by the court on the evidence constitute the second assignment of error.

*J. L. Burnett*, for appellant. *Matthews & Daniel*, for appellee.

STONE, C. J. One of the questions urged in this case is that the order removing Thompson from the guardianship, being made out of term-time, and at a time to which there had been no adjournment from a regular term, is invalid. *Boynton v. Nelson*, 46 Ala. 501, and *Childress v. Childress*, 49 Ala. 237, are relied on in support of this view. The order in this case was not appealed from, and hence the question comes up collaterally in the present proceeding. To avail anything, presented as it is, it must be on the ground that the order was void, that Thompson is still guardian, and hence he could not be brought to a settlement. On the day on which the citation required Thompson to appear, and file his account current and vouchers for a settlement, he appeared by himself and counsel. He objected to being brought to a settlement, but not on the ground that he had not been legally removed from the

guardianship. His exact objection is in the following language: "Comes the movent, F. M. Thompson, and moves to strike the citation issued by the court 20th July, 1886, and demurs to the same, because court cannot, on an order removing guardian, also order guardian to file acct. [account] and vouchers for final settlement." The motion and demurrer being overruled, the guardian thereupon filed his account current, on which the settlement was had. Objecting on one ground—the joinder of two orders in one—was a waiver of all others. *Floyd v. State*, 82 Ala. 16, 2 South. Rep. 683; *Garrett v. Trabue*, 82 Ala. 227, 3 South. Rep. 149; *County Com'rs v. Iron Co.*, 82 Ala. 151, 2 South. Rep. 132; *Jacques v. Horton*, 76 Ala. 238; 3 Brick. Dig. p. 444, § 574. There was no error in making both orders at one and the same time, nor in embracing them in one and the same entry. The motion and demurrer as made were properly overruled.

In one respect, however, the probate court erred. The witnesses J. A. Leath and Mrs. Leath were permitted, against objection, to testify that the services rendered by the ward to the guardian "were worth as much as her board." This was not the proper mode of arriving at the facts, even if the witnesses had complete knowledge of all the services she rendered. This they did not profess to have. It was permissible to prove what services they had seen her render, and for what length of time, according to their best recollection, and the value of her services by the day, week or month, as the case may be; and they could also give their judgment of the customary price of board in the neighborhood, if they had sufficient knowledge to speak of it. All else, however, it was the duty of the court to determine; and in arriving at his conclusions, he should ascertain, as accurately as the testimony enables him to do, in favor of the guardian, what, according to the custom of the country, was a reasonable price for such board as he furnished, including her washing to the extent it was furnished to her, if at all, and of all other services necessary or useful that were done for her. Against this comes up the counterclaim of the ward for services rendered. The burden of proving this rests on the ward, precisely as if she were suing to recover for such services. She is entitled to a proper allowance for all services she makes reasonable proof she has rendered, at customary rates, and she is entitled to no more. If, at any time, she was absent from service to the guardian for any reason, or for no reason, or if there is failure of proof of service for any particular time or times, she should have no allowance for such time or times. *Minniece v. Jeter*, 65 Ala. 222; *Rap. Witn.* § 287; *Hathaway v. Brown*, 22 Minn. 214; *Railroad Co. v. Campbell*, 64 Amer. Dec. 607; *Harwood v. Pearson*, 60 Ala. 410.

There is nothing in the other questions. Reversed and remanded.

(84 Ala. 80)

#### MOONEY v. HOUGH.

(*Supreme Court of Alabama. March 22, 1888.*)

##### 1. TENANCY IN COMMON—CROPS—LIEN OF CO-TENANT—CODE ALA.

A petition under Code Ala. 1886, § 8268 *et seq.*, for partition of crops alleged that cotton, corn, and cotton seed, grown and cultivated on petitioner's land in 1887, was in the actual possession of, and owned jointly by, petitioner and defendant; that part of the crops had been gathered, and that petitioner had a lien, by law or contract, on defendant's share. *Held*, that a demurrer to the petition should be sustained, the facts showing that the crop was raised under a contract constituting the parties tenants in common not being stated.

##### 2. SAME.

In proceedings under Code Ala. § 8056, to enforce a landlord's lien for advances where the record fails to show any article advanced for which the statute does not give the landlord a lien, an error by the court in referring to the jury the question whether the landlord had a lien for any particular article advanced is without prejudice.

##### 3. SET-OFF AND COUNTER-CLAIM—LIEN OF CO-TENANT ON CROPS—ADVANCES.

The defendant, in an action to enforce a landlord's lien for advances in cultivating and growing crops, may under Code Ala. 1886, § 2678, plead as a set-off a debt due from the landlord before they undertook to cultivate the crops together.

4. TRIAL—JURY—TAKING PAPERS INTO JURY-ROOM.

Where witnesses, in giving their testimony, use copies of accounts, the jury may take these copies with them on their retirement.

Appeal from probate court, Bullock county; S. T. FRAZER, Judge.

The appellee, Peter Hough, filed his petition to the probate judge in words as follows, (after alleging his and the said Mooney's citizenship in the county of Bullock and state of Alabama:) "and petitioner and said Mooney are of full age, over twenty-one years of age: and petitioner alleges that he and the said Mooney are joint owners of the following crops, to-wit: The crops of a four-mule farm, cultivated and grown during the year 1887, consisting of cotton, corn, cotton seed, said farm being near Post Oak, in this county (Bullock), and of the value of about eighteen hundred dollars; that the said petitioner and the said Mooney have each a half interest in the crops aforesaid; and that the said petitioner and the said Mooney are both now in the actual possession of said crops, that is to say, that they both live on the same lands upon which said crops were grown, which belong to petitioner. Petitioner further shows unto your honor that some of the said crop has been gathered, and the remainder is still ungathered. And petitioner further shows unto your honor that he has a lien, by law or contract, on the share of said Mooney in the said crops. Wherefore petitioner prays that said crops of cotton, corn, cotton seed, and other produce be partitioned into two parts or shares; and one of the two shares be allotted to your petitioner, and the other share be allotted to the said Mooney, according to the statute made and provided. [Signed,]" The said Mooney demurred to the petition on the grounds that the said petition did not allege and set forth such a state of facts as to show that the probate court had jurisdiction of the matters therein complained of; that said petition did not show that said crops were raised in such a way as to make the petitioner and the said Mooney tenants in common; that the said petition did not contain a sufficient description of the crops; that the said petition did not show that the crop had not been divided; that the said petition did not show who was in the actual possession of the crop sought to be divided; that the said petition did not state any facts which show that the petitioner had any lien on the crops; and that the petition did not state the facts upon which the petitioner based his claim. The court overruled all of these demurrers separately, and the said Mooney duly excepted to each of the rulings of the court. The defendant then pleaded the general issue, alleging that the facts stated in the petition were true, and sought to interpose a plea of set-off to the claim of the petitioner for advances he made to him, by setting off a debt the petitioner owed him before they undertook to cultivate the crops together. On motion of the petitioner, the court struck the plea of set-off from the plea of the defendant; and to this ruling of the court the defendant duly excepted. There were facts, as shown by the bill of exceptions, substantiating the allegations of the petition, and showing that the petitioner had made advances to the said Mooney. Upon those facts the court charged the jury, among other things, that "they must, from all the evidence in the case, ascertain what articles the plaintiff furnished during the month of December, 1886, and during the year 1887, to aid him in cultivating and gathering the crops grown on said premises, under said contract, in estimating the amount due from defendant to plaintiff, and for which the plaintiff had a lien upon defendant's share of said crops; and that their verdict, in ascertaining the extent of plaintiff's lien on such share, must be for the amount so ascertained." The defendant excepted to the giving of this charge, and now assigns the several rulings of the court upon the pleadings, and the evidence, and the giving of this charge, as error.

*Norman & Son*, for appellant.

STONE, C. J. The argument for reversal of this case takes too narrow a view of the statute by which the rights of the litigants must be determined,

—Code of 1876, § 3467; Code of 1886, § 3056. The terms of the statute are very comprehensive, including “advances made in money, or other thing of value, either by him directly, or by another at his instance or request, or for which he became legally bound or liable at or before the time such advances were made for the sustenance or well-being of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market.” Interpreting this statute, we, in *Cockburn v. Watkins*, 76 Ala. 486, said: “These are comprehensive words, and would embrace everything useful for the purpose enumerated, or tending to the substantial comfort and well-being of the tenant, his family, or employes about the service.” See, also, *Hamilton v. Maas*, 77 Ala. 283; *Thompson v. Powell*, Id. 391. We do not find anything in the account which does not fall within some one of the classes specified in the statute. *Marcus v. Robinson*, 76 Ala. 550, and other similar cases, were controlled by an entirely different statute,—Code of 1876, § 3286 *et seq.*,—and shed no light on the question we have in hand. *Tison v. Association*, 57 Ala. 323; *Watson v. Auerbach*, Id. 353; *McLester v. Somerville*, 54 Ala. 670. The present proceeding was instituted under the statute, Code of 1876, § 3521 *et seq.*; Code of 1886, § 3263 *et seq.* That statute, while it confers both a right and a remedy for its enforcement, is nevertheless so beneficial in its policy and tendency, so promotive of speedy and inexpensive justice, that we are not inclined to give it a severe or technical construction. Still, as the statute confers both the right and the remedy, a remedy summary in its nature, the petition must set forth enough to show that the probate court has jurisdiction of the suit. It is not every case of tenancy in common of matured crops that the statute is intended or framed to reach. It must be “corn, cotton, or other produce, raised and made by persons in such manner as to make them joint owners or tenants in common therein;” and it must be matured, and either gathered, or ready for gathering. The statute provides for every case where the matured crop was raised and made in such manner as to make the persons raising it tenants in common, and it reaches no other case. The facts which show this state of case must be set forth in the petition. And, if there be a claim for advances, the amount should be stated, with a general description, so as to bring the articles advanced within one or more of the classes enumerated in section 3056, Code 1886. Section 3064 describes one of the relations of landlord and tenant to which the remedy in this case is adapted, equally for partition and for the recovery of advances. We would not require much technicality in the frame of the petition. Still, enough must be averred to show that there had been a contract under which the crop was grown, which contract constituted the parties tenants in common; and the facts out of which the relation springs must be averred. This is done by stating the substance of the contract, and that the crop was raised and made under it. It is, perhaps, to be lamented that, in providing this very salutary remedy, a brief form of petition was not furnished, and declared to be sufficient. We feel forced to hold that the demurrer to the petition ought to have been sustained.

In charging the jury the court should not refer to them the ascertainment of any principle of law; for instance, whether the landlord had a lien for a particular article advanced. The legal feature of the inquiry he should have decided himself, leaving to them only the ascertainment of the facts. But, as the present record fails to show any article advanced for which the statute does not give the advancing landlord a lien, no error was committed of which appellant can complain. The legal question involved in the charges the court should have decided in favor of the landlord, Hough, and no injury could result to Mooney from the simple error of submitting them to the jury. 1 Brick. Dig. § 337, § 26; *Jones v. Pullen*, 66 Ala. 306.

There was no error in allowing the jury to have with them, in their retire-

ment, the copy of accounts used by witnesses in giving their testimony. *Hirschfelder v. Levy*, 69 Ala. 351. The same object could have been accomplished, however, by having the jury make *memoranda* of the accounts, or of the items composing them, as deposed to by the witnesses. In the absence of one or the other of these methods, it would be very difficult for the jury to reach anything approximating correct conclusions.

We think defendant's plea of set-off ought to have been allowed as partial defense to the claim for advances. Code 1886, § 2678, and note.

There is nothing in the other assignments of error.

When the case returns to the probate court, it will be necessary to amend the petition, unless the parties agree to try on the pleadings as they now appear. It would seem that only the question of set-off need be further litigated, unless new and varying facts are brought out. Reversed and remanded.

(84 Ala. 208)

JONES v. PELHAM et al.

(Supreme Court of Alabama. March 23, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—DECLARATIONS.

In an action for possession, the declarations of ownership by the defendant, while in possession of the land, as plaintiff's tenant, or with his permission, made in the absence of the plaintiff, and without showing that such declarations were brought to plaintiff's knowledge, are not admissible to show adverse possession for the purpose of putting in operation the statute of limitation.<sup>1</sup>

2. SAME—ADVERSE POSSESSION—PAYMENT OF TAXES—DESCRIPTION OF PROPERTY.

In an action for possession defendants offered in evidence a tax deed, tax receipts, and the tax assessor's book, to show that the property had been assessed to one of the defendants. The assessment showed that "a house and lot on B. street" had been assessed to him, and the lot was so described in the assessment. This defendant owned another house and lot on the same street. The assessment was made under Acts Ala. 1868, § 297, requiring a description of real property, taxed by numbers, or in some way by which it may be known. *Held*, that the assessment was void for uncertainty, and neither the assessment, nor the auditor's certificate, nor the tax deed were admissible as evidence of title or color of title.<sup>2</sup>

3. WITNESS—IMPEACHING TESTIMONY—RECEPTION AS ORIGINAL EVIDENCE.

Where, for the purpose of impeaching a witness, he is allowed to testify as to a conversation with another party, it is error for the court to treat the statements made to the witness in this conversation as original evidence of the facts.

Appeal from circuit court, Talladega county; LEROY F. BOX, Judge.

This was an action brought by Charles S. Jones, as administrator of the estate of Charles H. Jones, deceased, for the recovery of certain lands described in the complaint, against Harry R. Boswell and Charles Pelham. Charles Pelham put in his special plea of disclaimer, and the other defendant pleaded the general issue and the statute of limitations, and issue was joined thereon. The evidence on the part of the plaintiff, as shown by the bill of exceptions, showed that in 1869 the plaintiff's intestate bought the land in controversy from J. W. & R. A. McMillan, and introduced in evidence the deed from J. W. & R. A. McMillan and their wives to the said land. There was evidence that the said Charles Pelham became the tenant of the plaintiff's intestate shortly after he purchased the said land, and so continued. During the examination of the said Charles Pelham as a witness for the defendants, he was asked if, during the time he was in possession of the lot in controversy, he ever stated to any one that he claimed the same as his own property. The plaintiff objected to this question, but the court overruled the objection, and allowed the witness to answer the question, and the plaintiff excepted. In his answer the witness stated that he had said that he claimed

<sup>1</sup>As to what constitutes adverse possession, see *McLaughlin v. Del Re*, (Cal.) 16 Pac. Rep. 881, and note.

<sup>2</sup>As to what constitutes color of title, see *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12, and note.

the lot in controversy, while standing on the said lot, but that the plaintiff's intestate was not present, nor did he ever say so in his presence. The plaintiff objected to this answer, but the court overruled his objection, and allowed the answer to go to the jury; and the plaintiff duly excepted. The defendant offered to introduce the tax deed from the auditor, and tax receipts from the tax collector, and the tax assessor's book, to show that the said property was assessed to the defendant Boswell, had been purchased from the state by him, and that he had paid the taxes on it for years. The assessment only showed that "a house and lot, the property of Charles Pelham, on Battle street," had been assessed, and the taxes paid by the said defendant Boswell. It was shown that the said Pelham had two lots on the said Battle street, whereupon the plaintiff objected to the introduction of the deed, receipts, and assessment book. The court overruled the objection, and the plaintiff thereupon duly excepted. One Hayden, a lawyer, was introduced as a witness, and was asked concerning a conversation he had said that he had had with the plaintiff's intestate, and had repeated the said conversation to one of the defendant's lawyers. This was done for the purpose of impeaching witness. The plaintiff objected to the question on the ground that as the alleged conversation was to the effect that the plaintiff's intestate had said that he had thrown the deed to the property away as worthless, it had a tendency to disparage the plaintiff's titles, and could not, therefore, be brought before the jury, it being at most but hearsay evidence. The court overruled the objection, allowed the witness to testify, and the plaintiff excepted. The defendants introduced evidence tending to show that the said Pelham had been in possession of the adjoining lot since 1869, although he first went into possession of it as tenant of the plaintiff's intestate, and that the said Boswell had been in uninterrupted possession since 1878, and the present suit was commenced in October, 1881. The several rulings of the court are here assigned as error.

*Know & Bowie*, for appellant.

CLOPTON, J. As a general rule, a party's own declarations, made in the absence of his adversary, cannot be admitted as evidence for him. An exception to the general rule is that the declarations of one in possession of property, explanatory of the possession, may be received in evidence as constituting a part of the *res gesta*. His declarations, however, respecting the source of his title, and not explanatory of the possession, are inadmissible. The defense of the statute of limitations having been set up to the present suit, it was necessary for the defendants to show adverse possession under claim of right during the statutory period. For this purpose the declarations of Pelham, while in possession of the property, that he owned it, were admissible, in a proper case, as explanatory of his possession, and as showing an adverse claim. But there is evidence tending to show that he went into possession as the tenant of George, plaintiff's intestate, or by his permission. If such be the fact, his assertion of an independent hostile claim must be brought to the knowledge of Jones, by whose permission he entered into possession, in order to put the statute of limitations in operation. *Wells v. Sheerer*, 78 Ala. 142. His declarations of ownership, made in the absence of George, are not admissible evidence of such fact, and in order that they may be received as evidence of the assertion of an adverse claim for the purpose of putting the statute of limitations in operation against George, if Pelham went into possession by his permission, they should have been connected with proof offered, or proposed to be offered, that such assertion was brought home to him. In the absence of such evidence, or of an assurance that such evidence would be subsequently introduced, they should not have been admitted for the purpose of the defense of the statute of limitations. The testimony of Parsons, if admissible for the purpose of impeaching the witness Hayden, which we do not decide, could not be received for any other purpose. The court, however,

seems to have considered and treated his testimony of the statements of Hayden as original evidence of the facts which Parsons testified Hayden had stated to him; for such facts constitute a part of the hypothesis of one of the charges, in which the jury were instructed they might look to them in connection with all the evidence in deciding whether Pelham had paid George for the lot. In assessing lands for taxation, the statute in force at the time the lot in controversy was assessed provided that they should be described as follows: If an entire section, by the number of such section; if a subdivision of a section, by a designation of such subdivision; if less, or other, than a subdivision, by the number of the lot, or other lands by which it is bounded; and in cases of lands surveyed, and laid out as a town, a plat of which is recorded in the office of the judge of probate, if the tract be a whole lot or block, by the designation of the number thereof, and if it be a part of a lot or block, by its boundaries, or some other way by which it may be known. Acts 1868, § 297. The purpose of the statute is that the description in the assessment should be sufficiently definite and certain to inform the owner that his property is assessed for taxation, and the purchaser at the tax sale what property he is buying. In the assessment of the lot in controversy it is described as "a house and lot on Battle street, in the town of Talladega," as the property of Pelham. The evidence shows that Pelham owned another house and lot on the same street, in which he resided, and adjoining the lot in question. The description affords no data by which to ascertain what house and lot on Battle street is intended. The assessment is void for uncertainty. *Wilkinson v. Roper*, 74 Ala. 140; *Hannel v. Smith*, 15 Ohio St. 134; Blackw. Tax Titles, 423; Burrows, Tax'n, 203. In a conveyance between individuals, where the purpose is to explain and give operation to the intention of the parties, certainty may be imparted to the deed by parol evidence that the particular land was designated, and that the grantee was put into possession. But this rule does not apply to tax titles, with which the owner has nothing to do, and there being no intention to which operation can be given. The assessment is the foundation of all subsequent proceedings, and, in order to impart certainty and validity to them, the description of the land in the assessment must be sufficiently definite and certain, as not to require resort to extrinsic proof of the character above mentioned. *Keane v. Cannovan*, 21 Cal. 291; *Driggers v. Cassidy*, 71 Ala. 529. While actual occupancy of a part of a tract of land, into the possession of which a party has entered under claim and color of title, draws constructive possession of the entire tract described in the conveyance, if the color of title is inoperative as a conveyance, by reason of uncertainty in the description of the lands, the possession is limited to the part actually occupied. *Railroad Co. v. Boykin*, 76 Ala. 560. Neither the assessment, nor the certificate of the auditor, nor the tax deed, was admissible in evidence, either as operating a conveyance of the title, or as color of title. Reversed and remanded.

(84 Ala. 70)

**BALLARD v. JOHNS.**

(Supreme Court of Alabama. March 23, 1886.)

**PARTITION—ASSESSMENT OF TITLE—BY ADVERSE POSSESSION—JURISDICTION OF PROBATE COURT.**

Where it appears, in an action for the partition of land, that there has been a conveyance of the land by a party believing he has the right to convey, and the grantee has been in the open and adverse possession of the same for 14 years, it raises such a question of title by adverse possession as to take the case out of the jurisdiction of the probate court under Code Ala. § 8512, providing that no division of property claimed by joint owners can be made where an adverse claim is asserted by any one, or brought to the knowledge of the judge of probate,

Appeal from probate court, Montgomery county; F. C. RANDOLPH, Judge. Suit by Z. T. Ballard, plaintiff and appellee, against Barney Johns, defend-

ant and appellant, to obtain a partition and sale of certain lands claimed to be held by them as tenants in common. Judgment for plaintiff, and defendant appeals.

*Moore and Pindley, for appellant. Watts & Son, for appellee.*

CLOPTON, J. Section 3512 of the Code, being a section of the chapter relating to the partition of property held by joint owners, declares: "No division or allotment can be made under this chapter where an adverse claim or title is asserted by any one, or brought to the knowledge of the commissioners or judge of probate." Under the statute as construed when this case was before us on a former appeal, the assertion of an adverse claim or possession must be *bona fide*, and a false or unsupported assertion is not sufficient to oust the jurisdiction of the probate court. It was held that the probate court did not err in holding that there had been no sufficient adverse possession by Ballard, who set up a claim to a part of the land. *Ballard v. Johns*, 80 Ala. 32. On the remandment of the cause, the adverse possession of Ballard was not set up in the answer to the petition as amended, but the adverse claim and possession of Ellen Johns was duly pleaded. The petition, as amended, seeks the sale for partition of the E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 17, township 13, range 18, and five acres adjoining on the west. The record discloses that the land set forth in the amended petition was sold by the sheriff in September, 1848, under a *venditioni exponas*, as the property of Zephaniah Johns and E. M. Bassey, and was purchased by John W. Hughes. In 1851, Hughes conveyed to W. A. Johns the N. W.  $\frac{1}{4}$  of the quarter section mentioned in the petition; and in December, 1870, W. A. Johns conveyed to Ellen Johns the land described in the amended petition, except the five acres, who continued in possession, claiming the land as her own, and exercising acts of ownership, until her death, which occurred in September, 1884. The petition alleges that the petitioner and the defendants therein, the estate of Ellen Johns being one of them, are tenants in common by inheritance from Zephaniah Johns and his other children who died without issue since his death. The statute, in terms, denies to the probate court the power and jurisdiction to adjudicate, on a petition for the partition of lands, adverse claims and titles. It is immaterial by whom the adverse claim or title is asserted, so it is brought to the knowledge of the judge of probate. If, during the pendency or trial of the petition, it is made known to him that there is a substantial adverse claim asserted by any one, the statute makes it obligatory upon him to decline further jurisdiction of the matter. In order to ascertain whether the assertion is substantial and *bona fide*, he must necessarily investigate, not the validity of either of the opposing claims or titles, but the grounds on which they are based; and, as was said on the former appeal, "if it is clear that there has been, in reality, no such adverse possession as to have constituted a disseizin or ouster of the petitioner, destroying the holding together of the joint owners, and that the complainant's title is good, or that the court can entertain, on the facts presented, no serious doubts as to such title, it may proceed to hear the application." But when it does not clearly appear that there has been no such adverse possession, or if the court entertains serious doubt as to the title, it can proceed no further. If there was, in fact, a sale of the land in 1848, under a valid order of the circuit court, as the property of Zephaniah Johns, the title to the land passed out of him, and was vested in the purchaser. It is true, no order of the court is shown by the record on which the *venditioni exponas* was issued; but, after the lapse of 20 years, such order may be presumed for the purpose of determining whether there is a *bona fide* assertion of a hostile title. The conveyance of Hughes describes other lands, which, as may be reasonably inferred, is a misdescription, such as a court of equity would correct. Whether this be so or not, Ellen Johns was in possession of the land continuously for nearly 14 years, claiming it, openly and no-

toriously, adversely, during all of which time the petitioner was out of possession. She was in possession under color of title made by W. A. Johns, who evidently believed he had a right to convey the land. Such adverse possession, under claim of title, for such period of time, is sufficient to vest in her an indefeasible estate. On these facts presented by the record, it cannot be said that there are no serious doubts as to the title of the petitioner, as claimed and set forth in the petition. The order of sale for partition is the equivalent of an adjudication that she had only a one-third interest. The probate court should have declined to entertain jurisdiction of the petition. Reversed and remanded.

(84 Ala. 197)

LYONS v. HAMNER.

(*Supreme Court of Alabama*. March 22, 1888.)

DESCENT AND DISTRIBUTION—SALE FOR DISTRIBUTION—COLLATERAL ATTACK.

A decree of sale of land by an administrator for distribution among the heirs can not be attacked collaterally, in an action of ejectment, by an heir, because her name was omitted from the petition for sale.<sup>1</sup>

Appeal from circuit court, Chambers county; JOHN MOORE, Judge.

Action of ejectment by plaintiff, Emelia Lyons, against defendant, L. P. Hamner. Upon the facts stated in the opinion, the court charged the jury to find for the defendant if they believed the evidence. Verdict and judgment for defendant, and plaintiff appeals.

*E. G. Richardson*, for appellant. *J. R. Dowdell*, for appellee.

SOMERVILLE, J. The plaintiff, as one of the admitted heirs of Harrison Austin, deceased, shows herself to be entitled *prima facie*, to a one-seventh undivided interest in the lands sued for in this action, which is one of ejectment under the statute. The defendant sets up a title acquired by him under a sale made in November, 1885, by one Moore, as administrator of Austin's estate, on application to sell the lands for division or distribution among the heirs of the estate. The petition was in every respect regular, and in due form, except that it failed to designate the plaintiff among those named as heirs of the decedent.

It is contended by appellant's counsel that, inasmuch as she was not named in the proceedings in the probate court as a party or distributee, she cannot be concluded by the sale made under that order of that court. The precise point has many times been raised before this court, and has been adjudged against the view contended for by the appellant's counsel. In *Duval's Heirs v. McLoskey*, 1 Ala. 708, (decided in 1840,) the administrator of Duval had filed his petition, under the act of 1822, praying the county court to sell the lands in controversy for the payment of debts. The petition under which the sale took place properly described the lands, and averred the jurisdictional grounds of sale, as required by the statute; but it failed to conform to the statute in defectively omitting to mention the names of any of the heirs. The proceeding was held to be one "*in rem* against the estate of the intestate, and not *in personam*;" and the omission of the names of the heirs was held to be an irregularity which would authorize a reversal on a direct appeal, but one that did not affect the jurisdiction of the court to make the sale, and could not be taken advantage of collaterally in an action of ejectment by the heirs for the land. The conclusion reached was based on the case of *Wyman v. Campbell*, 6 Port. (Ala.) 219, where it was decided in 1838, and again reiterated in 1840 in *Lightfoot v. Lewis*, 1 Ala. 475, and other cases, that proceedings in

<sup>1</sup> Respecting the grounds upon which a judgment may be collaterally attacked, see *McCarter v. Neil*, (Ark.) 6 S. W. Rep. 781, and note; *Decker v. Decker*, (N. Y.) 15 N. E. Rep. 807; *Nicholson v. Nicholson*, (Ind.) Id. 223; *Comer v. Bray*, (Ala.) 8 South. Rep. 554; *In re Newman's Estate*, (Cal.) 16 Pac. Rep. 387.

the orphans' court to sell realty were "*in rem* against the estate of the intestate, and not *in personam*," and that plenary jurisdiction was vested in the court over the *thing*, in the nature of an admiralty proceeding, although the owner or party in interest was not notified of the pendency of the proceeding; and that jurisdiction attached *quoad* the thing when the petition was regularly filed by a proper party, and was recognized by the action of the court, without notice to parties concerned; and that, where jurisdiction had attached, the order of sale, although reversible for error on direct appeal, could not be assailed collaterally for such failure to give notice, which was an irregularity of the procedure, merely, in the exercise of such jurisdiction. *Lee v. Campbell*, 6 Port. (Ala.) 249; *Couch v. Campbell*, Id. 262. The same question arose again in *Duval's Heirs v. Bank*, 10 Ala. 686, (decided in 1846,) and the principle was again announced that the decree of the county court, ordering a sale of the decedent's realty, under the act of 1822, could not be collaterally impeached by showing that there was an entire failure to designate the heirs by name in the petition, or elsewhere in the record, this not being a jurisdictional allegation, and that such omission did not render such sale void. In each of the foregoing cases the parties assailing the validity of the sales were the heirs themselves, whose names had been omitted from the petition of the administrator, and other subsequent proceedings, they being, in the first case, plaintiffs in action of ejectment, as in the present action, and, in the second, parties complainant to a bill in equity instituted against the purchaser. The sale was held to be as binding against them on collateral attack as if they had been made parties, and served with regular notice of the pendency of the proceeding. In *Field's Heirs v. Goldsby*, 23 Ala. 218, (decided in 1856,) the doctrine of these cases was again reviewed. The objection there urged to the petition of the administrator, which was filed, praying a division among heirs, was that it failed to set forth the heirs who were of full age, which it was insisted was a jurisdictional allegation, inasmuch as it was expressly required by the statute. The principle to which we have above adverted, as settled in *Duval's Heirs v. McLoskey*, 1 Ala. 708, and *Duval v. Bank*, 10 Ala. 686, was reiterated by GOLDTHWAITE, C. J., and adhered to by the court, with the following observation: "Could we regard the question as an open one, we might arrive at a different conclusion from that which was attained in *Duval's Heirs v. McLoskey*, *supra*; but after it has been recognized by a subsequent decision, and has probably been acted upon as a practicable rule of property, we do not feel at liberty to depart from it." That was about 16 years after the first announcement of the principle by the court, in 1840. Since then more than 30 additional years have elapsed; making, in all, 47 years since the case of *Duval's Heirs v. McLoskey* was decided. In *Matheson's Heirs v. Hearin*, 29 Ala. 210, (1856,) this court, speaking through RICE, C. J., in discussing *Wyman v. Campbell*, *supra*, and the case above cited, declared the presumption to be a fair one that "the opinions delivered in those cases had been acted upon as a rule of property," and, therefore, that "the reasons which impel courts to uphold every settled rule of property require us to reaffirm and maintain those cases, not only as to the points necessarily involved, but as to the principles which are declared in *Lightfoot v. Lewis*, and the subsequent cases above cited, to have been established by them." The case of *King v. Kent's Heirs*, 29 Ala. 542, was decided the following year, 1857, and, upon the strength of the foregoing authorities it was said: "In determining upon the validity of the decree of the orphans' court when collaterally assailed, it is only necessary to inquire whether the court had jurisdiction of the subject-matter; for the proceeding is *in rem*, and no mere irregularity can render it void." These cases again came under judicial review in *Satcher v. Satcher*, 41 Ala. 26, (decided in 1867,) where the following language was used by WALKER, C. J.: "The proceeding in the probate court for the sale of the decedent's land is held by a long chain of decisions, not now to be questioned, to be *in rem*; and

therefore the validity of the order can never depend upon the fact that the court has acquired jurisdiction of the person of the parties. The requisition of notice is just as plainly and as positively made in the act of 1822 as under any subsequent law. Clay, Dig. p. 224, § 17. Under the act of 1822, the order of sale was not void on account of the want of notice. It was so settled by the decisions of this court. We cannot," he added, "decide to the contrary, unless we disregard the doctrine of *stare decisis*, and overturn decisions which constitute a rule of property under which millions of dollars' worth of land are probably held. No person who will examine the act of 1822 can say that there is a reason for regarding the proceeding to sell land under the present law as *in personam*, which did not apply to the old law; under which, as every intelligent lawyer knows, the proceeding was regarded as *in rem*." In discussing elsewhere in the same case, and declining to assent to the proposition that the sale is made void by a failure to comply with every statutory requirement, it is suggested that such a rule would lead to consequences alike absurd and injurious. Among these is enumerated "an inaccuracy in the list or description of the heirs or their residences" as one of the omissions which, under the operation of the rule, would render the sale void. "One desiring to purchase at the sale," it was observed, "would be unable to ascertain, by an examination of the records and papers, whether the title would be valid. After making the most careful inquiry, and finding no defect in the proceedings, and therefore venturing on a purchase, his title (if such were the law) might be defeated by evidence that there was some heir whose name was overlooked, or forgotten by the administrator, or not known by him, and therefore not inserted in his petition." The inevitable effect of holding that omissions of this kind would render the sale in any respect invalid, it was thought by the court, "would be to destroy confidence in such sales, and cause great injury to heirs by sales at greatly depreciated prices."

There has been no departure from the principles of these cases at any time during the past 50 years, but, on the contrary, they have been constantly reaffirmed. 3 Brick. Dig. p. 465, § 162 *et seq.* In *McCorkle v. Rhea*, 75 Ala. 218, (decided as late as 1883,) while declining to extend the rule announced in *Duval's Heirs v. McLoskey*, *supra*, to proceedings for the partition or division of property owned by tenants in common, we observed as follows: "Perhaps these cases [citing *Whitman v. Reese*, 59 Ala. 532, and *Johnson v. Ray*, 67 Ala. 608] are not in strict analogy to the line of decisions, so long prevailing in this state, in which it is held that, upon application by an administrator to sell the lands of a decedent, the failure of the petition to state the names of the heirs, although expressly required to be done by the statute, is not the omission of a jurisdictional averment, which would render the sale void, but a mere irregularity, rendering the judgment reversible on error. *Duval's Heirs v. McLoskey*, 1 Ala. 708; *Matheson v. Hearin*, 29 Ala. 210. This principle has become a rule of property in this state, in this particular class of cases, and under its influence, no doubt, many titles have been acquired. However unsound we might be disposed to regard it, we do not feel at liberty to depart from it at this time." We regard it, therefore, we repeat, as established by a long line of decisions in Alabama, extending through half a century, that on an application by an administrator to the probate court to sell the lands of a decedent, whether for the payment of debts, or for distribution among heirs, the failure to name one or more of such heirs in the petition or subsequent proceedings is not the omission of a jurisdictional allegation, and does not affect the validity of the title acquired at such sale, so as to subject it to collateral attack; and if the court has jurisdiction of the thing sold, although it has acquired none over the person of the parties owning it, the sale is binding on the world, including the heirs whose names are omitted from the petition and the proceedings. In such cases, the parties interested, whether parties to the record or not, may be made so by application to the

court so as to sue out an appeal. *McConloo v. Cannon*, 23 Ala. 462; *Light-foot v. Lewis*, 1 Ala. 475, 479; *Clemens v. Patterson*, 38 Ala. 721; 1 Brick. Dig. P. 92, § 129. And, with this ready mode of redress open to all whose rights may be prejudiced, it cannot be said that any person has been deprived of his property, in cases of this peculiar kind, without due process of law, or that he has been deprived of his day in court. *Dickey v. Vann*, 81 Ala. 425; *Clemens v. Patterson*, 38 Ala. 721, *supra*.

The circuit court did not err in giving the general affirmative charge in favor of the defendant, or in refusing to give the charge requested by the plaintiff, and the judgment must be affirmed.

(34 Ala. 178)

#### LOUISVILLE & N. R. CO. v. SHERROD.

(*Supreme Court of Alabama*. March 22, 1888.)

##### CARRIERS—LIMITATION OF LIABILITY—AMOUNT OF RECOVERY.

Where a railroad bill of lading contains a stipulation fixing the carrier's liability in case of total loss of the goods, such limitation being in consideration of a reduced rate of transportation, the higher rate being reasonable, and there being no imposition or undue advantage, such stipulation will be upheld, although the goods may have been destroyed in an accident caused by the carelessness of the carrier's servants.<sup>1</sup>

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. *Jones & Falkner*, for appellant. *Williamson & Holtzclaw*, for appellee.

CLOPTON, J. The suit is brought by appellee to recover damages for the failure of appellant to deliver furniture and other goods shipped from Birmingham to Cherokee, Ala. The goods were destroyed by a collision between two of defendant's trains on a bridge, which was "unsafe for the passage of trains in case of collision thereon, and was being repaired." The bill of lading contains a stipulation limiting the value of the goods, and the extent of the defendant's liability in case of total loss. The agreed statement of facts shows that without such agreement as to the value a much greater rate of freight was charged on such shipments than was charged in this case, which rate was reasonable; and that the limitations as to value was in consideration of a reduced rate of freight, and was inserted in the bill of lading as a part of the contract of shipment. The plaintiff contends that a carrier cannot stipulate so as to limit the common law measure of his liability for loss caused by his own negligence. The contestation is founded on the general proposition that a common carrier cannot relieve himself by special contract from liability for loss or injury resulting from his negligent conduct.

Whether a carrier may limit the extent of his liability by an agreed valuation has heretofore been considered in several cases by this court. In *Railroad Co. v. Henlein*, 52 Ala. 606, where the action was on a contract for the transportation of live stock, such stipulation was, under the circumstances of the case, sustained as just and reasonable. It was said: "If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal, and the amount of freight received, we should not hesitate to declare it unjust and unreasonable; but, as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier from exaggerated or fanciful valuations. We cannot, therefore, pronounce it unjust and unreasonable, and it is the measure of the appellant's liability." The principle of the decision is that the carrier and shipper may lawfully contract as to valuation in case of loss, when the contract is supported by an adequate consideration, and there is no imposition, coercion, or unfair dealing. This ruling was adhered to in a subsequent case between the same parties. 56 Ala. 368. In *Railroad*

<sup>1</sup> Respecting the right of common carriers to limit their liability by contract, see *Railroad Co. v. Thomas*, (Ala.) 2 South. Rep. 802, and note.

*Co. v. Little*; 71 Ala. 611, expressions are found in the opinion to the effect that the law will not tolerate that a carrier shall stipulate, by special contract, for exemption from liability for the value of the goods carried, when the loss or injury occurs from the want of ordinary care, skill and diligence. The main question in the case related to the construction and effect of a special term in the bill of lading limiting the extent of the company's liability. The contract was construed as not exempting the company from liability for the value of the goods if lost by the want of ordinary care, skill, and diligence. The rule established by the preceding cases was recognized; which is that the limitation of the carrier's common-law liability may extend "to the amount of damages for which he will be liable in the event of loss or injury, when the purpose appears to secure a just and reasonable proportion between the amount for which he is liable and the freight which he is to receive." The first of the cases above referred to is cited as sustaining this rule. It was not intended to overrule the former cases. The decision is in terms confined to the case before the court, which was a non-delivery, without excuse or explanation; and the effect of the decision is that, in such case, the special term of the contract does not exempt the carrier from liability for the value of the goods. And in the subsequent case of *Railroad Co. v. Oden*, 80 Ala. 38, a stipulation limiting the liability to the value of the cotton at the time and place of shipment was sustained as just and reasonable, where the cotton was destroyed by fire, though the loss may have been the result of negligence. Limitations as to value do not come under the operation of the rule that a carrier cannot, by special contract, exempt himself from liability for the consequences of his own negligences, and, ordinarily, are not calculated to induce negligence. To the amount of the agreed valuation, the carrier is responsible for loss occasioned by his neglect, or by any of the risks or accidents for which he is answerable. No public good will be subserved by denying to the parties the right to make such contracts. The shipper and the carrier may lawfully contract as to the valuation of the articles to be transported. Such special contract is in the nature of an agreement to liquidate the damages proportionately to the compensation received for the carriage, and the responsibility of safely carrying and delivering. In many cases, the carrier does not know, and has not the means to ascertain, the real value of articles offered for shipment. An agreement as to the valuation may be a reasonable and proper mode of adjusting the measure of liability to the amount of freight paid by the shipper, who thereby receives the benefit of a reduced rate. When the value has been thus fairly agreed on, the carrier cannot recover a greater rate, and the shipper should not be allowed to take benefit of the reduced rate if there is no loss, and to repudiate the contract if there is a loss.

This question has undergone much consideration and discussion by the courts of this country, and the decisions are not in accord; but the tendency of the late decisions is to sustain such contracts, when made in good faith, and both parties have freedom of contracting. In a case similar to this in many of its features, MORTON, C. J., says: "We cannot see that any sound public policy requires that such contracts should be held invalid, or that a person who, in such contract, fixes a value upon the goods which he intrusts to the carrier, should not be bound to his valuation." And BLATCHFORD, J., in a late case, holding such limitations just and reasonable, says: "The distinct ground of our decision in the case at bar is, that when a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Graves v. Railroad Co.*, 187 Mass. 83; *Hart v. Railroad Co.*, 112 U. S. 831, 5 Sup. Ct. Rep.

151. Many other authorities might be cited, but it is unnecessary. There is, however, a qualification of the rule. A common carrier exercises a public employment, and is bound to receive and carry, at reasonable rates, any goods offered, and the means of transportation are greatly monopolized. Under these circumstances, a carrier will not be permitted to take advantage of his position to coerce the shipper to agree to a limited value by a threatened charge of a high and unreasonable rate, if such agreement is not made. There must be no imposition, coercion, or undue advantage. Neither can the carrier stipulate for immunity from liability for fraud, or for intentional or reckless negligence. Such special contracts may be avoided by willful or wanton negligence, in disregard of the rights of the shipper. The agreed statement of facts shows that in this case the higher rate which the defendant charged, in the absence of an agreed valuation, was reasonable, and that the agreed valuation was in consideration of a reduced rate. The shipper had the option to pay the high rate, and hold the carrier responsible for the full value of the goods, or obtain a reduced rate, based on the agreed valuation. Having freedom to contract, he chose the latter, and received the benefit; and will not be permitted, under such circumstances, in the absence of imposition or unfair advantage, to repudiate the value to which he agreed. "It would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of a loss." *Hart v. Railroad Co.*, *supra* Reversed and remanded.

(84 Ala. 216)

DOWDELL *et al.* v. EMPIRE FURNITURE & LUMBER CO.

(Supreme Court of Alabama. March 22, 1888.)

CHattel Mortgages—WHAT CONSTITUTES—SALE WITH RESERVATION OF TITLE—VALIDITY.

Plaintiff delivered to a party certain goods, taking in return three promissory notes, with an oral agreement that the title to the goods should remain in plaintiff till the notes were paid. The vendee was empowered to sell the goods, and, if sold on credit, to take notes and turn them over to plaintiff as security. If any of the original notes remained unpaid 10 days after due, plaintiff could take the goods; and the invoice price of the goods taken back was to be a credit on the notes unpaid. Held, that the contract was a mortgage; and under Code Ala. 1886, § 1731, providing that mortgages of personal property are not valid unless in writing, etc., plaintiff cannot recover in an action of trover against a purchaser from the mortgagor.

Appeal from city court, Montgomery county; THOMAS M. ARRINGTON, Judge.

Action of trover, brought by the Empire Furniture & Lumber Company against James S. Dowdell *et al.*, for the conversion of certain goods, the title to which is alleged to have been and remained in plaintiff. Judgment for plaintiff, and defendants appeal.

*Troy, Tompkins & London*, for appellants.

CLOPTON, J. Appellee brings an action of trover to recover of defendant damages for the conversion of furniture which they purchased from George B. Brown & Co. The agreement under which the furniture was delivered to Brown & Co. by plaintiff was not in writing, but the evidence shows that it was delivered upon the same terms and conditions of a previous written contract, made by the parties in July, 1885. The rights of the parties depend upon the construction of this contract, whether it is a conditional sale or a mortgage; for there can be no pretense that it is a consignment. If the instrument executed by the parties is a mortgage, the plaintiff is not entitled to recover, by reason of the statute, which declares: "A mortgage of personal property is not valid, unless made in writing and subscribed by the mort-

gagor." Code 1886, § 1731. In determining the nature and legal effect of the instrument, the name giver to it by the parties, and its mere form, are inferior and unimportant considerations. However inartificially drafted, the controlling intention of the parties must be collected from its nature, their situation, and the objects intended. All the provisions of the instrument should be considered in connection, whatever may be their relative order one to the other. If the relation of debtor and creditor is created, and if it appears that security for the debt was intended, the general rule is that it shall operate as a mortgage, though there may be no words of conveyance and no power to sell on default. The written agreement recites that the Empire Furniture & Lumber Company has delivered to Brown & Co. a lot of furniture, and that, in consideration of the delivery, they executed to the plaintiff their three several notes, payable, respectively, on the 1st day of October, November, and December, 1885, at Montgomery, Ala., and the title to the furniture was retained by the company until payment of the notes according to their face. If this were all, if there were no other opposing and controlling provisions, the transaction would be a conditional sale, and the ownership of the property would not pass out of the company until performance of the condition. In a conditional sale the vendor has the right to rescind the contract of sale upon failure of the vendee to perform the condition; but in such case the debt contracted for the purchase price of the property is extinguished; and, ordinarily, the vendee has no right or power to dispose of the property in the mean time. By the terms of the instrument an unconditional debt for the purchase price of the furniture was contracted. The notes given by the vendee were to secure the prompt and faithful remittance of the invoice price of the furniture to the place and on the dates stated in the notes. The vendees were authorized to sell the goods, and for all goods sold on a credit they were to take well-secured notes, and transfer them to the company as collateral security for the payment of their notes, and the company was to credit thereon all collections from such collaterals, and return to Brown & Co., on payment of their notes, any collaterals uncollected. If any or either of the notes of Brown & Co. should remain unpaid for 10 days after maturity, the company was empowered, at any time, and without previous demand, to take possession of the furniture, and all the notes were to be considered then due, and the invoice price of the furniture taken possession of was to be considered as a credit on the notes of Brown & Co. then unpaid. From this analysis of the provisions of the instrument it clearly appears that the furniture was delivered into the possession of Brown & Co. with the power of disposition added; that they became absolutely liable for the purchase price, and that the debt continued binding on them, notwithstanding the company should take possession of the furniture in case of default in paying the notes. The instrument possesses the essential elements and characteristic features of a mortgage. A continuing liability for the purchase price after the failure to perform the condition, and the vendor has acquired possession of the property, is wholly inconsistent with the character of a conditional sale. The notes of Brown & Co. belonged to the plaintiff, which they had a right, by the terms of the contract, to retain, though they might take possession of the goods. Claiming both the furniture and the notes as their property, under the agreement, is a claim of antagonistic rights, unless the instrument operates as a mortgage. *Heryford v. Davis*, 102 U. S. 235; *Hart v. Barney*, 7 Fed. Rep. 543. The construction and legal effect of the instrument is that the retention of the title was intended as a security for an absolute debt contracted for the price of the furniture. It operates as a chattel mortgage. It follows that the agreement under which the furniture in controversy was delivered, containing the same terms and conditions, is also a mortgage, and not being in writing, is invalid under the statute. The court should have given the affirmative charge in favor of the defendants. Reversed and remanded.

(33 Ala. 408)

SNEDIKER *et al.* v. BOYLSTON.

(Supreme Court of Alabama. February 28, 1888.)

## 1. HUSBAND AND WIFE—SEPARATE ESTATE OF WIFE—PROTECTION IN EQUITY.

When an execution against a husband is levied on personal property, the legal title of which is in the husband, as trustee, but which belongs to the wife's statutory estate, he is not estopped from joining her in a suit in equity to protect it against sale, because he has unsuccessfully interposed a claim at law to the property, as her trustee, and has given a claim-bond to have it forthcoming, if it be liable to sale.

## 2. EXECUTION—LEVY—RIGHT OF TRIAL TO PROPERTY—ACTS ALA. FEB. 27, 1887.

Act Leg. Ala. Feb. 28, 1887, providing that any person having a lien upon or equitable title to property, shall have a statutory right of trial to property when levied upon, is not retroactive, and does not affect a suit in equity to enforce an equitable title to property levied on, brought prior to the passage of the act.

Appeal from chancery court, Barbour county; JOHN A. FOSTER, Judge.

The bill in this case was filed by Victoria Boylston and her husband, J. O. Boylston, against the appellants, Snediker & Boynton. The defendants in this case had previously commenced an attachment suit against the said J. O. Boylston, and the sheriff had levied on the certain goods set out in the bill, for which a claim suit had been instituted by the husband, as trustee for the said Victoria Boylston, whose property the goods levied upon were alleged to be as a part of her statutory separate estate.

G. L. Comer, for appellants. H. D. Clayton, Jr., for appellee.

CLOPTON, J. The bill is filed by appellees, who are husband and wife, and its purpose is to enjoin a statutory trial of the right to property, and to establish the right of the wife to the property in controversy, which was levied on by an attachment sued out by the appellants against the estate of the husband, and claimed by him as husband and trustee of his wife. The affidavit made by the husband preliminary to putting in the claim states that the goods levied on are the property of his wife, held and owned by her under a conveyance from him. It is insisted that the husband, by executing a bond requisite to obtain a trial of the right of property, and possession of the property, fixed a liability upon himself from which a court of equity will not relieve him, on the ground that complainants were ignorant of and mistook their legal rights.

A conveyance by the husband directly to the wife creates in her an equitable estate, but is inoperative to pass the legal title. Under the law, at the time the claim was interposed, only the legal title was in issue in a statutory trial of the right of property. Equitable rights would not be regarded or enforced. If the legal title was found to be in the defendant in the attachment, the property would be held, in a court of law, to be his, and subject thereto. In such case, in order to uphold the equitable estate, and protect it against the creditors of the defendant in attachment, resort to a court of equity was necessary. *Loeb v. Manasses*, 78 Ala. 555. It is well established that, when personal property of a married woman is levied on under executions against the husband, who is her trustee, by operation of law, she may come at once into a court of equity to protect it from levy and sale, or, after it has been sold under the executions, to recover the property. *Cole v. Varner*, 31 Ala. 244, *Gerald v. McKenzie*, 27 Ala. 166. There can be no sufficient reason, when her equitable estate has been seized under an attachment against her husband, who, having the legal title, interposes a claim, why the wife may not invoke the intervention of a court of equity, before the trial of the claim suit, for the protection of the trust-estate, by preventing a trial and condemnation at law. If the equitable estate is in the wife, as alleged in the bill, and at the trial at law it was found subject, and sold to satisfy the judgment rendered on the attachment, the purchaser only would acquire the legal title to hold in trust for the wife, against whom she could file her bill to recover the property. The

ends of justice would be more fully subserved, the trust-estate more surely protected, and a multiplicity of suits prevented, by the intervention of equity before a trial and condemnation at law, whereby the trust property might be subjected to waste or destruction.

It is insisted that, though the wife may come into equity for the purpose of protecting her equitable estate, the husband having interposed a claim under the statute, and having given the claim-bond, cannot unite with her in the bill. Notwithstanding a party may have failed in the assertion of a legal defense, and judgment be rendered against him, he will not be precluded from relief on independent grounds exclusively equitable; and an unsuccessful attempt to assert in a court of law a purely equitable defense will not prevent relief in equity. *Greenlee v. Gaines*, 13 Ala. 198; *Howell v. Motes*, 54 Ala. 1. The affidavit of claim made by the defendant in attachment shows that the right to the property asserted and intended to be put in issue is the equitable title of the wife; and the recitals of the claim-bond are that he made affidavit that, as husband and trustee, he has a just claim to the property, and that it is the property of his wife. The condition of the bond is that "J. C. Boylston, as husband and trustee aforesaid, shall have the said property above described forthcoming for the satisfaction of the judgment, if it be liable therefor, and pay such costs and damages as may be recovered for putting the said claim in for delay." Neither the bond nor affidavit, nor both, estop the husband from uniting with the wife to obtain protection of the trust property by a court of equity. It is no more than an attempt to assert in a court of law a claim purely equitable. The liability imposed by the bond is contingent on the property being found subject. The purpose of the bill is, not to relieve the claimant from this contingent liability, but to stay the trial at law, and obtain an adjudication as to the liability of the property to the demands of the creditors, by a court having exclusive jurisdiction of purely equitable rights; and, if adjudged not to be subject, the effect of the bill will be to prevent the happening of the contingency on which the liability on the bond becomes absolute.

The case does not come under the operation of the act of February 28, 1887, amending section 3341, Code 1876, by which it is provided that the statutory right of trial to property shall include any person who holds a lien upon, or equitable title to, the property levied on. The claim was interposed before the passage of the act, and the statute is not retroactive. *Wetzler v. Kelly*, 3 South. Rep. 747; Code 1886, § 3004. Affirmed.

(83 Ala. 260)

**STANLEY et al. v. SHEFFIELD L., I. & COAL CO.**

(*Supreme Court of Alabama. February 28, 1888.*)

**1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED.**

Under Code Ala. § 2765, providing that a party shall not testify as to any transaction with or statement by any deceased person who acted in a fiduciary relation to the party against whom such testimony is sought to be introduced, it is incompetent for one of the plaintiffs to testify that he made a certain agreement with his co-plaintiff in behalf of the defendant company, under the instructions of the president of the company, who is shown to be deceased at time of trial.

**2. PRINCIPAL AND AGENT—AUTHORITY—INFERENCE FROM FORMER AUTHORITY.**

In an action to recover the amount paid the holders of certain "labor tickets" of the defendant company, which the plaintiffs alleged were taken up under an agreement with one of the plaintiffs, who was, at the time, the agent of the company with authority to make such agreement, evidence that on a former occasion it had been arranged between the defendant company and another firm, through the same agent, that the firm should take up these labor tickets, and the company would redeem them, is inadmissible as a ground for inferring an implied authority to make other contracts generally, of the same kind, with other persons not specified by the principal.

**3. SAME—AUTHORITY—PRESIDENT OF CORPORATION.**

The mere fact of being president of a company implies no authority to direct an agent to make an agreement with a firm to take up the labor tickets of the company.

**4. SAME—AUTHORITY OF CORPORATE AGENT—ASSENT OF STOCKHOLDER.**

The assent of a civil engineer, stockholder, and director of a company, and the consent of one of the company's committee to sell lots, cannot be shown to strengthen the authority of an agent of the company who made an agreement that a certain person should take up the labor tickets of the company, and the company would redeem them, such persons having no more authority than the agent.

Appeal from circuit court, Colbert county; H. C. SPEAKE, Judge.

This action of *assumpsit* was brought by the appellants, A. S. Stanley & Co., against the appellees, the Sheffield Land, Iron & Coal Company, to recover a certain amount alleged to be due them as transferees of a large number of "labor tickets" issued by the defendant corporation. The suit is defended on the plea that the defendant never gave any authority to any one to make an arrangement with the plaintiff, or with any one else, by which these labor tickets were to be transferred, or to pass as money. The plaintiff sought to introduce the evidence brought out in the opinion, and, on account of the ruling of the lower court in not allowing him to introduce the said evidence, the plaintiff was compelled to take a nonsuit, with leave to have a bill of exceptions. The plaintiff in the court below, the appellant here, now assigns the ruling of the court upon the evidence, as shown in the opinion, as error.

J. T. Kirk, for appellant. Emmett O'Neal, for appellee.

SOMERVILLE, J. If the action were brought by the plaintiffs as transferees of the labor tickets described in the bill of exceptions, it is clear that, under the authority of *Tabler v. Coal Co.*, 79 Ala. 377, no recovery on them could be sustained. The count based on this phase of the case was abandoned, however, in the court below by being stricken from the complaint, and the present action is on the common counts. The suit can be sustained only on the theory that the amount paid by the plaintiffs to the holders of these labor tickets was paid to them by the request or acquiescence of the defendant corporation, acting through some officer or agent possessing such authority. Much evidence was offered with the view of proving this fact; but all of it was excluded as inadmissible, on the ground that it did not tend to prove this disputed fact, the *onus* of which was on the plaintiffs. The witness Miller, himself one of the plaintiffs in this action, testifies that, before he became interested as a member of the firm, he was in the employment of the defendant company as commissary, having authority to hire and pay laborers for grading the streets of Sheffield, and that he made an arrangement with the plaintiff Stanley by which it was agreed that if he would purchase the company's commissary supplies, and sell goods there, he could take those tickets by paying merchandise for them; that the company would redeem them; and that the trade was made on the basis of this agreement. It appears that, at the time this agreement was made, the witness was negotiating to become a partner with Stanley in the business. It is not shown that the company knew that this stipulation entered into the trade as a term or condition of it, nor was any fact in evidence which tended to show any authority on Miller's part to make such a contract. His employment certainly did not carry with it the incidental authority to borrow money, or obtain a loan in this manner, from the plaintiffs, especially in view of the contracting agent's contingent interest in the business.

The testimony of the same witness to the effect that he was acting under the instruction of Gordon, the president of the company; who, at the time of the trial, was shown to be deceased, was properly excluded by the court, for two reasons: *First*. Gordon was, at the time of this transaction, acting in a fiduciary relation to the defendant against whom this evidence is sought to be introduced, and the plaintiff, being both a party and interested, was incompetent, under the statute, to testify to such fact. Code 1886, § 2765; *Warten v. Strane*, 82 Ala. 311. *Second*. There is no evidence tending to

show that Gordon had the authority from the company, either expressly or impliedly, to give the instructions in question. The mere fact of being president of the company would imply no such authority, either in itself, or in connection with other evidence offered.

It was equally unavailing for Miller to show that in making this agreement he had the assent of one Beck, who was employed as civil engineer by the defendant company on their works at Sheffield; or of Adair, who was a stockholder and director of the company; or of McCracken, who was on a committee appointed to make necessary arrangements for the sale of lots in Sheffield held in May, 1884. There is nothing to show that these employes had any more authority in this matter than the witness Miller himself, and possessing none themselves, they could confer none,—admitting that the agency was one of a nature capable of being delegated.

It is further assigned for error that the court refused to allow the plaintiff to prove that, on a former occasion, it had been arranged between the defendant company and another firm, through the agency of the same witness, Miller, that they should take up these labor tickets, and that the company would redeem them on their regular pay-day. A special authority of this nature to make a particular, or single, contract, is, standing alone, no ground for inferring an implied authority to make other contracts generally, of the same kind, with other persons not specified by the principal. It is not anywhere intimated that this single exercise of agency was known to the plaintiffs, so that it was possible for their conduct to have been influenced or induced by it. And it certainly does not tend to prove such a habit and course of dealing between principal and agent as is ordinarily permitted to justify an inference of like authority in other cases. 1 Greenl. Ev. (14th Ed.) § 65.

We are of opinion that all of the evidence excluded by the court was either irrelevant, or incompetent to show any authorized agency on the part of Miller, express or implied, to bind the defendant corporation by the contract which he is shown to have made with the plaintiffs. The judgment is, accordingly, affirmed.

CLOPTON, J., not sitting.

(84 Ala. 106)

WILLIAMSON v. NEW ORLEANS INS. CO.

(*Supreme Court of Alabama. March 23, 1886.*)

1. INSURANCE—FARM PRODUCTS—CUSTOM TO GIN COTTON—TIME OF YEAR.

In an action on an insurance policy, evidence that the farmers in the neighborhood in which the insured property was situated usually gather, gin, and market their cotton before the time of year at which the fire occurred is irrelevant.

2. SAME—APPLICATION FOR—TRUTH OF ANSWERS—AGENCY.

Where the agent of the insured makes true statements of the condition of the title and ownership of the property insured, at the time the application for insurance and the answers were made, but the agent of the insurance company writes answers which are untrue, the company cannot take advantage of the misconstruction or mistake of its agent, and avoid payment on the policy of insurance.

3. SAME.

In an action on a policy of insurance, the defendant pleaded that the answers to certain questions as to the ownership of the property insured were untrue; and plaintiff undertook to rebut this by showing that the agent of the defendant had been correctly informed as to the ownership, and had written answers contrary to the representations of plaintiff's agent. The court charged the jury that "the fact that the questions were asked, and answered by plaintiff's agent, stating that plaintiff was the sole owner, is a proper matter to look to in determining whether the defendant's agent was correctly informed as to the ownership." *Held*, that this charge is erroneous in withdrawing from the consideration of the jury the evidence tending to show that the assured made a truthful statement, which was not put in the answers written by the defendant's agent.

## 4. SAME—APPLICATION FOR—ANSWERS—TRUTH.

Where an insurance company makes defense to an action on a policy of insurance by pleading that the answers to certain questions as to the condition of the title are untrue, the burden is upon the plaintiff to show that he made a full and true statement of the condition of the title.

Appeal from circuit court, Lee county; H. D. CLAYTON, Judge.

This was an action brought by the appellant, J. E. Williamson, against the appellee, the New Orleans Insurance Company, for the recovery of the amount of insurance due the plaintiff on two policies of insurance taken out in the defendant company. The complaint alleged that the property so insured had been completely destroyed by fire. The defendant pleaded that the plaintiff, through his agent, had misrepresented the true *status* of the property, had broken the warranty entered into with the company; and that therefore the company was not liable for the loss sustained by the plaintiff. Issue was joined on these pleas, and judgment was found in favor of the defendant. During the trial of the case, as shown by the bill of exceptions, the defendants asked one of their witnesses this question: "Did not farmers in that neighborhood usually gather, gin, and market their cotton before the time of year at which this fire occurred?" The plaintiff objected to this question, and also to its answer, and moved that the answer thereto be excluded from the jury. But the court overruled his objection and his motion, and allowed the witness to answer the question, and let the answer go to the jury for their consideration; whereupon the plaintiff duly excepted. The defendant introduced in evidence the application of the plaintiff to the defendant to have the property insured in their company, said application for insurance stating that all of the answers to the questions therein contained were warranted to be true and correct. To the questions as to whether or not the plaintiff, who was the applicant, was the sole and undisputed owner of the property herein sought to be insured, and whether the title thereto was free from incumbrance, the answers, as shown by the application, were "Yes." The defendant then offered evidence tending to show that this was not true; that the plaintiff was not the sole owner of the property, but that the agent who made out the said application was interested in the property, and that there was an incumbrance upon the property. The plaintiff undertook to rebut this by showing that, at the time the said application was made out, the said agent stated the true state of the affairs to the agent of the insurance company, who was writing the answers to the questions, and filling up the blank application; that the said agent said that was all right, and that would not make any difference; and that, after he was told just how the property stood, the agent of the insurance company wrote down the answer just as it was on the application, and contrary to the representations of the agent of the plaintiff. Upon the evidence, the court charged the jury, in writing, at the request of the defendant: "That the burden is on the plaintiff to satisfy the jury, by the evidence, that Carroll, the agent of the plaintiff, told Mr. Abrams, the agent of the defendant, that he (Carroll) had an interest in the said property; and, if the evidence is equally balanced on this subject, they should find for the defendant on that issue. \* \* \* The policies and the applications in this case constitute warranties, and are to be so construed by the jury: and if they find that Carroll had a half interest in the land on which the gin-house was situated,—and the court charges the jury that a deed from Shepard to Carroll and Williamson on the 1st day of December, 1880, made Carroll a half owner in the lands,—then that was a breach of the warranty, and will prevent a recovery, unless the jury can find, from the evidence, that the fact that Carroll had such half interest was made known to the agent of the defendant at the time of making the application for the policy; and the fact that the questions were asked, and answered by Carroll, stating that Williamson was the sole owner, is a proper matter to look to in determining whether such infor-

mation was given Mr. Abrams." The plaintiff objected to the giving of each of these charges, and duly excepted to such giving by the court. The rulings on the evidence, and the giving of these charges, are now assigned as error. *J. M. Chilton*, for appellant. *A. & R. B. Barnes*, for appellee.

**CLOPTON, J.** The evidence that the farmers in the neighborhood in which the insured property was situated usually gather, gin, and market their cotton before the time of year at which the fire occurred, was improperly admitted. There was no issue joined between the parties to which the evidence was relevant. The plaintiff was not under obligations to gin and market his cotton before any specified time. It was his privilege to let it remain in the gin-house until such time as suited his convenience to remove it. He was authorized to keep it in the gin-house during the entire time the policy was in force, and rely upon the insurance for his protection.

The answers to the questions contained in the application for insurance are made a part of the contract, and express warranties of their truth. Notwithstanding this, if the agent of the insured made true statements of the condition of the title and ownership of the property to the agent of the defendant, at the time the application for insurance and the answers were made, and the agent of the defendant nevertheless wrote the answer as appears in the application, thus substituting an answer which was untrue, the answer is the statement of the agent, and not of the assured. In such case the defendant will not be permitted to take advantage of the wrongful act, or misconstruction, or mistake, of its own agent, and avoid the policy, the insured being without fault. *Insurance Co. v. Garner*, 77 Ala. 210.

The charge of the court withdrew from the consideration of the jury the evidence tending to show that the assured made a full and truthful statement of the condition of the title to the property, at the time of making the answers, and that the answers, as written therein, were made by the agent of the defendant, at his own suggestion, and upon his own volition.

The burden is upon the plaintiff to show that he made a full and true statement of the condition of the title. The defense of a breach of the warranty is not technical, and should receive the same consideration as any other meritorious defense. Reversed and remanded.

(84 Ala. 72)

**LONG et al. v. WALKER.**

(*Supreme Court of Alabama*. March 22, 1888.)

**HUSBAND AND WIFE—SEPARATE ESTATE—LIABILITY.**

Under the statute law of Alabama prior to February 20, 1887, protecting the separate estate of a married woman, the money received by a married woman from her father's estate cannot be subjected to the payment of a debt decreed by the chancery court to be paid by her, as distributee of her grandfather's estate.

Appeal from chancery court, Barbour county; **JOHN A. FOSTER**, Chancellor.

This was a bill filed by D. L. Walker, as guardian, against Nancy J. Long, J. H. Long, and others, and sought to subject money in the hands of the said J. H. Long, belonging to his wife, the said Nancy J. Long, to the payment of a certain decree obtained out of the chancery court some time previous to this suit, to enforce this garnishment suit. The chancellor decreed that the complainant was entitled to relief, and ordered that the money shown to be in the hands of the said J. H. Long, belonging to the said Nancy J. Long, be held liable for the payment of the amount assessed against the said Nancy J. Long, and that it be subjected to such payment. From this decree the appellants appealed, and assign the same as error. The other facts are sufficiently stated in the opinion.

*G. L. Comer*, for appellants. *H. D. Clayton, Jr.*, for appellees.

STONE, J. This case was before us at a former term, reported as *Walker v. Crews*, 73 Ala. 412. After the case returned to the chancery court, an account was taken, and in April, 1883, it was ascertained and decreed that Nancy J. Long, a married woman, granddaughter of Arthur Crews, and one of the distributees of his estate, should pay to Ella Corinne Crews, of the debt due from Arthur Crews' estate, the sum of \$206.26. The decree not being paid, a garnishment was sued out against Mrs. Long's husband, J. H. Long, both as an individual and as administrator of Wesley Bishop, Mrs. Long's father, requiring him to answer as to indebtedness, effects, etc., to and property of Mrs. Long, his wife. This proceeding was under Code 1876, §§ 3218, 3854-3856, *et seq.*; Code 1886, § 3508 *et seq.*; § 2967 *et seq.* Mrs. Bishop, mother of Mrs. Nancy J. Long, was a daughter of Arthur Crews, but died before receiving anything of her father's estate. Her children, of whom Nancy J. was one, succeeded directly to the interest which would have fallen to her. Wesley Bishop also died in 1884, and J. H. Long became one of his administrators. The garnishee, J. H. Long, answered, disclosing nothing in his hands, as having come to his wife from the estate of her grandfather, Arthur Crews. He said: "The money she received from the Crews estate has been expended in clothing and vehicles." He made no further answer as to this. He further answered "that he received from the estate of her father, Wesley Bishop, the sum of seven thousand dollars," which "he has in money and notes; that at least one thousand dollars is now in money." He had stated, in a previous part of his answer, that individually he was not indebted to said Nancy J. Long. The foregoing are all the material facts of this case. A married woman's statutory separate estate, as it existed before our recent statute, was very peculiar. Except as the law made it chargeable for articles of comfort and support of the household, she had no power to bind it by any contract she could make, with the single further exception, that she and her husband could make sale of it by conforming to the statute. 3 Brick. Dig. 545, §§ 52, 53; *Wilburn v. McCalley*, 63 Ala. 436; *Pollok v. Graves*, 72 Ala. 347; *Lee v. Tannenbaum*, 62 Ala. 501; *Callen v. Rottenberry*, 76 Ala. 169. True, we have held that by bringing suit herself and bringing her property within the jurisdiction of the court, she so far places it within the power of the court as that it can be made liable for costs that may be incurred. *Haney v. Lundie*, 58 Ala. 100; *Lee v. Ryall*, 68 Ala. 354; *Askeo v. Renfro*, 81 Ala. 360, 1 South. Rep. 47; *Balkum v. Kellum*, (Ala.) 3 South. Rep. 696. The property sought to be subjected in this case accrued to Mrs. Long after the decree was rendered, ascertaining and declaring her liability. There is no connection between the liability, or its origin, and the fund out of which its payment is sought to be coerced. As no personal judgment can be rendered against a married woman, and as complainant has no lien on, and no connection with, the only estate of defendant which is brought to our view, the chancellor erred in decreeing its payment out of moneys which came to her from Bishop's estate. *Phipps v. Sedgwick*, 95 U. S. 3; 3 Brick. Dig. 557, § 218 *et seq.* We need not, and do not, say that if any of the distributive share which came to Mrs. Long from her grandfather Crews' estate remained it could not be made subject to her ascertained liability. It may be that a lien or liability would be declared in favor of Ella Corinne Crews, and fastened upon such remaining, existing inheritance or succession, for its payment. *Kieser v. Baldwin*, 62 Ala. 526; *Johnson v. Ward*, 82 Ala. 486, 2 South. Rep. 524. Should further effort be made to collect this decree, it would be well to inquire whether statutory garnishment will lie. *Jones v. Crews*, 64 Ala. 368; *Cauly v. Blue*, 62 Ala. 77; *Lee v. Ryall*, 68 Ala. 354; *McMullen v. Lockard*, 64 Ala. 56.

Reversed and remanded.

(24 Ala. 22)

STATE *ex rel.* McNEILL v. BIBB ST. CHURCH.

(Supreme Court of Alabama. March 22, 1888.)

## 1. RELIGIOUS SOCIETIES—RIGHTS OF PASTOR—MANDAMUS TO COMPEL ACCEPTANCE.

*Mandamus* will not lie to compel a local church to receive as its pastor one appointed by the ecclesiastical organization of which the local church is a member, where the church property is vested in and subject to the disposition of the local church, and no salary has been agreed on, nor rents of the church property directed to be applied to the payment of the pastor's salary, so as to vest in him a temporal right of which the civil courts can take jurisdiction.

## 2. SAME.

Where petitioner avers that he is deprived of his rights, emoluments, and franchises as pastor, in violation of the constitution and laws of the ecclesiastical body of which the local church depriving him is a member, the civil courts will not grant a *mandamus* to restore him before a decision has been had by the church authorities.

Appeal from city court, Montgomery county; THOMAS M. ARRINGTON, Judge.

*Rice & Wiley*, for appellant. *Shaver & Hutcheson*, for appellee.

CLOPTON, J. Appellant applied to the city court of Montgomery for a *mandamus* to compel the Bibb Street Church to rescind a resolution refusing to receive relator as their minister or pastor, and to restore him to his office of such minister or pastor, with all his rights and emoluments, and to compel the church and trustees to place him in charge of the church edifice and parsonage. The city court dismissed the petition of relator, and from the judgment this appeal is taken. The power of the civil courts to restore by *mandamus* a party who has been wrongfully removed from an ecclesiastical or spiritual office is well established, when the temporal rights, stipends, or emoluments are connected with or annexed to such office, which belongs to the incumbent. In *Rev v. Bloer*, 2 Burrows, 1043, the leading case, the exercise of the power was based on the ground that there was a temporal right. It is said: "A *mandamus* to restore is the true specific remedy, where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases where the established course of law has not provided a specific remedy by another form of proceeding, which is the case with regard to rectories and vicarages." But the courts are powerless to interfere where there are no fixed emoluments, stipends, or temporal rights connected with the office; where it is purely ecclesiastical. The foundation of the power to grant writs of *mandamus* is a clear, specific legal right, and the want of an adequate legal remedy to enforce it. The absence of such right is fatal to any application for the writ. Under our form and theory of government, every ecclesiastical system rests on the voluntary principle, and the support and maintenance of churches depend on voluntary contributions. No ecclesiastical organization in this country possesses legal capacity unless incorporated, or unless it is acquired by a conveyance of property in trust for the use and benefit of the church. The fourth section of the declaration of rights provides "that no one shall be compelled by law to attend any place of worship, nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry." In the absence of a valid legal contract, the courts are prohibited to compel the payment of a minister's salary, or contributions for the support of the ministry or the church. In accordance with the principles of our institutions and the organic law, the courts refrain from interfering when the office or functions are purely ecclesiastical or spiritual, disconnected from any fixed emoluments, salary, or other temporalities. In such case there is no legal temporal right of which the civil courts can take jurisdiction. *Church v. Sanders*, 1 Houst. 100. The Bibb Street Church is a member of a larger and more important ecclesiastical organization, known as the "Methodist Protestant Church," consisting of

quarterly, annual, and general conferences, to the government of which it is subject, by the discipline of the church. Assuming the truth of the averments of the petition, the relator was duly appointed to the church—a station in Montgomery—by the duly-constituted authorities. His office is purely ecclesiastical or spiritual, and, unless there are temporalities connected with the church which belong to the pastor in respect of his functions, the application for a *mandamus* must be denied. The petition alleges that there is considerable real property connected with the station at Montgomery, including the church edifice, parsonage, and other realty, which is held by trustees for the use and benefit of the Methodist Protestant Church, and which was conveyed in 1841 to trustees and their successors; that the trustees mentioned in the conveyance erected on the realty a church edifice for the preaching of the Gospel in conformity to the rules and discipline of the Methodist Protestant Church, and a parsonage as a dwelling-house for the minister and pastor during his pastorate, and other buildings under the direction and authority of the church, the annual rentals of which have been devoted and applied, by authority of the annual conference, for a number of years past, to paying the current expenses of the station and the compensation of the minister, and have been and are amply sufficient for these purposes.

In *Fetzel v. Trustees*, 9 Kan. 592, the local church was a member of the organization known as the "Methodist Episcopal Church." The church edifice was erected on the land conveyed upon the trust, among others, that the trustees should, at all times and forever, permit such ministers and preachers as should from time to time be duly authorized by the general or annual conference of the Methodist Episcopal Church to preach and expound "God's Holy Word" therein. The court held that, if the trustees hindered a duly-appointed minister "from preaching in the church, they are thwarting the expressed intention of the donor, and diverting the property from the channel of the trust in which he placed it. At this point the courts will interfere, and restrain the diversion of the property from the trust." A *mandamus* was issued to restore the removed minister. In that case the property was annexed to the local church, and belonged to the minister in respect of his office, under the rules and regulations of the church, and by the express terms of the conveyance. The deed to the realty connected with the Bibb Street Church is not set out in the petition, and we are not informed that it contained any specific uses and trusts. We must infer that the conveyance was in accordance with the regulations of the constitution of the church, which provides: "Each church shall have power, by the concurrent vote of two-thirds of the qualified members present at a meeting publicly called together for that purpose, to purchase, build, lease, sell, rent, or otherwise obtain or dispose of property for the benefit of the Methodist Protestant Church;" and the same power is conferred by the discipline on the trustees of the local church. Dis. 18, 110. It is further provided that if any station shall become extinct, in any manner, the church property shall vest in the quarterly conference, or, if there be none, in the annual conference, to be disposed of in erecting houses of worship for the church, after paying the debts of the local church. It is manifest from these provisions that the property vests in the local church until it becomes extinct, to be disposed of as authorized by two-thirds of the qualified members. The constitution of the church further provides that the annual conference shall be vested with power "to make such rules and regulations as may be necessary to defray the expenses of the itinerant ministers, preachers, and their families; to raise the amount of their salaries, and for all other purposes connected with the organization and continuance of said conferences." Dis. 22. So long as the property is vested in and subject to the disposition of the local station, the annual conference has no authority, without the consent of the local church, to direct any specific uses to which it shall be devoted; and, if the church becomes extinct, the constitution directs how the property

shall be appropriated. It is not averred that any fixed salary has been agreed on; or that the rents of the property have been directed, by the requisite vote, to be applied to the payment of the pastor's salary; or that there has been any diversion of the property from the use and benefit of the Methodist Protestant Church, as declared by the conveyance, or by the rules of the church; or that the use of the property is annexed to the pastorate, so as to vest in the pastor a temporal right of which the court can take jurisdiction. The allegations of the petition fail to sufficiently show any fixed emoluments, uses, or other temporal right, so as to authorize interference by the civil courts.

There is another objection fatal to granting a *mandamus* in this case. The petitioner avers that his deprivation of the possession of the church edifice and parsonage, and of his rights, emoluments, and franchises, have been conducted without due authority, and in positive and direct violation of the constitution, laws, and ordinances of the Methodist Protestant Church. The case made by the petition presents questions of ecclesiastical rule or law, and of church discipline; the pivotal question being whether, under the rules and regulations of the organization, the Bibb Street Church is bound to receive any minister who may be appointed thereto by the annual conference. When a local church is a member, and under the government, of a larger organization, and ecclesiastical tribunals are provided for the determination and adjudication of such questions, their decisions will be referred to such tribunals by the courts. The constitution of the Methodist Protestant Church provides for the trial of any church which shall, by any official act or declaration, evince a determination not to conform to the provisions of the constitution and discipline. It is made the duty of the pastor, in such case, to make every reasonable and proper effort to induce the church to conform; and, if such efforts prove unavailing, to nominate a committee of five male members, neither of whom shall be a member of the accused church, who shall constitute a competent court of trial, and shall decide the case. The accused church has the right of appeal to the quarterly conference, and if it be a station, to the following annual conference. The penalty prescribed is that if the church "be found guilty of a departure from the constitution, or the regulations of the discipline, it shall be declared no longer in connection with the Methodist Protestant Church." Dis. 59. Such tribunals having been provided for the trial and decision of such cases, the civil courts, in the exercise of their discretion, will not grant a writ of *mandamus* to restore a rejected minister to his office and functions, before a final decision has been had by the church authorities. *Church v. Seibert*, 3 Pa. St. 282; High, Ext. Rem. § 298. It is more promotive of the peace and good order of the church at large, and of the advancement of the principles of Christianity, that resort should be had to the church judicatories, when they are provided by the constitution of the organization, for the decision of such questions, than to the civil courts. The relator should be left to resort to the remedies provided and furnished by the constitution and discipline of the church. Affirmed.

(84 Ala. 36)

GAY et al. v. GAY.

(Supreme Court of Alabama. March 22, 1888.)

1. WILLS—REVOCATION—MARRIAGE OF TESTATOR.

Under Code Ala. § 2282, providing that "if, after making of any will, disposing of his whole estate, the testator marry, and have issue of such marriage born, either in his life-time or after his death, and the wife or such issue is living at the death of the testator, such will must be deemed revoked, unless provision has been made for such issue by some gift or settlement," an antenuptial contract made by a testator, conveying to his intended wife real and personal property in trust, to enjoy the same during her life or widowhood, with remainder to any issue of the marriage living at testator's death, or at the time of her remarriage; and should such issue die unmarried, then to the heirs at law of the testator,—will prevent the will being revoked by the subsequent marriage of testator, with issue of the marriage living at his death.

## 2. SAME.

The provision for the issue of a testator's marriage, referred to in Code Ala. § 2282, as necessary to prevent the revocation of a prior will, may be made after such issue is born.

Appeal from probate court, Montgomery county; F. C. RANDOLPH, Judge. *Graves & Blakey* and *Thos. H. Watts*, for appellants. *Shaver & Hutcheson*, for appellee.

CLOPTON, J. Section 2282, Code 1876, (being section 1953, Code 1886,) provides: "If, after making of any will, disposing of his whole estate, the testator marry, and have issue of such marriage born, either in his life-time or after his death, and the wife or such issue is living at the death of the testator, such will must be deemed revoked, unless provision has been made for such issue by some gift or settlement; or unless such issue has been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence can be received for the purpose of rebutting the presumption of such revocation." Julius B. Gay, being then a widower, made his will August 3, 1884, devising and bequeathing his real and personal property to his six children born of a deceased wife. In February, 1885, he married a second time, and a few days prior to this marriage he and his intended wife made an antenuptial contract, the nature and provisions of which will be considered hereafter. The testator died December 31, 1887, leaving his wife and one child born of this second marriage surviving him. The question presented is whether, on these facts, the will shall be deemed revoked. The case brings before the court for the first time the construction and effect of the statute. It should be construed in reference to the state of the law as it existed at the time of the formation and adoption of the statute. The established doctrine, which was borrowed by the English courts from the civil law, was that marriage and the birth of a child revoked a prior will, whether of real or personal estate, or both, where the entire estate was disposed of and no provision made for the wife and child by the will, or otherwise. As to the theory of the doctrine and the principle on which it rested, discrepant views were entertained, the result being conflicting inferences and conclusions in respect to the time the provision for the wife and child should be made in order to prevent a revocation. The temporal courts generally sustained the view that the revocation was the consequence of a rule of law, grounded on a tacit condition annexed to the execution of the will that an entire alteration of the state of circumstance under which the will was made, produced by subsequent marriage and birth of a child, should operate a revocation. On the other hand, the ecclesiastical courts maintained the view that the implied revocation was founded on the presumed intention of the testator to revoke his will, arising from the change of the state of circumstances under which it was made, and from the new social and moral duties resulting therefrom. Lord MANSFIELD sustained the rule upheld by the ecclesiastical courts,—a presumed alteration of intention,—which Chancellor KENT considered "the higher and firmer ground." 1 Kent, Comm. (12th Ed.) 524; *Brady v. Cubitt*, 1 Doug. 31. The present statutory provisions were first introduced into the Code of 1852, being section 1957. It is not a legislative affirmation *in toto* of the doctrine as it existed prior to and independent of the statute. By the statute the wife or the child must be living at the death of the testator, while by the common law the death of the child before the death of the testator did not revive a will revoked by marriage and the birth of the child. By the English law provision must be made for both wife and child, while the statute requires provision shall be made only for the child. In these respects the Alabama statute modifies the doctrine as established by both the temporal and ecclesiastical courts in England. It was framed and enacted in the light of the conflicting opinions held by these courts in regard to the principle on which the doctrine was grounded, and of the inconsistent and antagonistic

onistic results produced thereby. After having provided that marriage and birth of a child must be deemed a revocation of a prior will, if the wife or child is living at the death of the testator, unless provision has been made for the issue by gift or settlement, or in the will, or such issue is mentioned therein in such a way as to show an intention not to make such provision, the statute declares: "No other evidence can be received for the purpose of rebutting the presumption of such revocation." The effect is to declare the particular kind and character of evidence which shall be requisite to rebut the presumption of revocation, and to abrogate the rule sustained by some of the courts, that any evidence was admissible which showed a contrary intention. In respect to the statute of New York, of which our statute is a substantial copy, Chancellor KENT says: "This provision is a declaration of the law of New York as declared in *Brush v. Wilkins*, with the additional provision of prescribing the exact extent of the proof which is to rebut the presumption of revocation, and thereby relieving the courts from all difficulty on that embarrassing point." The law, as declared in the case referred to, was that the presumptive revocation may be rebutted by circumstances. *Brush v. Wilkins*, 4 Johns. Ch. 506; 1 Kent, Comm. 52. By clear implication the statute declares, as the law of this state, the rule maintained by the ecclesiastical courts, and approved by Lord MANSFIELD, which placed the doctrine of implied revocation on a presumed alteration of intention, arising from a change of circumstances, and from new relations and duties, with the modification that the presumption of revocation shall be conclusive, unless provision is made for the after-born child, or an intention not to make such provision is shown, as required by the statute. From the doctrine that the revocation was a consequence of a tacit condition annexed to the execution of the will, it followed that a provision for the wife and child, by a settlement made after the will, did not prevent a revocation. 1 Jarm. Wills, (Rand. & T. Ed.) 276. The statute having impliedly abrogated this rule, or having declared that it shall not be regarded in this state, the conclusion following from the rule falls with it, and, under the statute, a settlement providing for the child, made after the execution of the will, is sufficient to rebut the presumption of revocation. We can conceive no adequate reason on which to base an inference that the legislature intended that provision, by gift or settlement, should be made before the child was born, and when a second marriage may not, and probably could not, have been reasonably contemplated.

The remaining question is whether the antenuptial settlement is a provision for the child in the meaning of the statute. A construction should not be placed on the statute which will impair or interfere with the right of the testator to absolutely dispose of his property as he may deem proper, further than its terms, expressly or by clear implication, require to accomplish the intended ends. It does not operate to deprive the testator of the right and power to determine the nature and extent of the provision which he will make for those having claims on his natural affections. It does not undertake to declare the measure and extent of the provision which the testator must make for the after-born child. He may make no provision whatever, provided the child is mentioned in the will in such a way as to show an intention not to make any provision. The requirements of the statute are satisfied, if it be shown by a provision, made by gift or settlement, or by mention of the issue in the will, that such issue was fully in his mind and contemplation, and that he acted deliberately on the matter of making provision for such issue. In *Kennebel v. Scrafton*, 2 East, 580, Lord ELLENBOROUGH said that the doctrine of implied revocation only applies where there is an entire disposition of the whole estate, and the wife and children are wholly unprovided for. Under the statute the testator has discretion and capacity to determine the nature and extent of the provision, when made by gift or settlement, the same as when made in the will, with the qualification that the gift or settlement is insufficient if,

by reason of gross inadequacy, it shall be an equivalent of no provision. He may make no provision whatever; but in such case, the intention must be shown by mention of the issue in the will. It was deemed that the issue had sufficient security, resting on parental affection, that the father's power of disposition would not be abused. By the antenuptial settlement the testator, in consideration of the intended marriage, and of the relinquishment by his intended wife of all claim which she may or might become entitled to, by reason of the marriage, upon his real and personal property, conveyed to her real and personal property upon trust that she should hold the same during her natural life or widowhood, with remainder to any issue of the marriage living at the time of the testator's death, or at the time of her remarriage; and should such issue die unmarried, then to the heirs at law of the testator. In *Ex parte Earl Ilchester*, 7 Ves. 348, on the marriage of the testator subsequently to making his will, a settlement was made in favor of his wife, by which provision was also made for the children of the intended marriage. Lord Chancellor ELDON held that, the wife and children being provided for, and there being children of the former marriage, the will was not revoked by the second marriage and the birth of children. It has also been held that a marriage settlement, by which an estate is secured to the wife during her life, with remainder to the children of the intended marriage, is a sufficient provision for wife and children to rebut a presumptive revocation. *Talbot v. Talbot*, 1 Hagg. 299. A provision creating a trust for the child, which a court of equity would enforce, is a provision for the benefit of the child, such as falls within the words as well as the spirit of the statute. *Walker v. Hall*, 34 Pa. St. 483. Clearly, provision is made by the antenuptial settlement for the child, the issue of the second marriage. The testator, at the time he made the antenuptial settlement, had fully in mind and contemplation the probability of issue by his intended marriage, acted deliberately on the matter, and determined the nature and extent of the provision which he would make for such issue. If the will were revoked, the antenuptial settlement would remain in force, and the child born of the second marriage would receive the property conveyed by the settlement, the provision made by the testator, in addition to an equal distribution in his estate with the children of the first marriage. A construction should not be placed on the statute which would result in such inequality and injustice, contrary to the intentions of the testator. We regard the antenuptial settlement, which *prima facie* makes a substantial provision, a sufficient provision for the after-born child, in the meaning of the statute, to prevent a revocation of the will.

Reversed and remanded.

SOMERVILLE, J. The construction of section 1958 of the present Code (Code 1876, § 2282) does not seem to me to be involved in any doubt or embarrassment, by reason of the language in which it is expressed. My analysis of the section is, briefly, this: The revocation of a testator's will, which is declared to be effected by his marriage and subsequent birth of issue, can take place only in the following concurring contingencies: (1) The making of a will disposing of substantially his whole estate; (2) the testator's subsequent marriage; (3) birth of issue from such marriage at any time, whether before or after the testator's death; (4) the survival of either the wife or such issue after the testator's death. If these four incidents concur, the will is totally revoked, except in the following cases, which operate to prevent revocation: (1) Where the testator, in his will, provides for such issue, or makes mention therein of such issue so as to show an intention, express or implied, not to make such provision; (2) unless before death he makes provision for such issue by some gift or settlement, whether before, contemporaneous with, or after the making of his will. The only mode of rebutting the presumption of revocation raised by the statute is by evidence of a provision having been

made in one of the two modes last mentioned. No oral declarations of the testator are admissible in evidence for the purpose of raising a contrary intention. Section 1955 of the Code (1886) has reference to a partial revocation of the will, so far as to allow a child born after the making of the will to take as in case of intestacy, and does not affect the question before us. These conclusions seem to me to clearly follow from the obvious meaning of the words employed in the statute, which leave but little room for construction. I concur in the view of Judge CLOPTON, that the antenuptial settlement made in this case, by the testator, for the child afterwards born, was a sufficient provision to prevent the revocation of the will, which would otherwise have followed under the operation of the statute.

(86 Ala. 230)

**STEELE v. SAVAGE.***(Supreme Court of Alabama. February 23, 1893.)***EXCEPTIONS, BILL OF—SUBJECT OF—RULINGS ON DEMURRER.**

Rulings on demurrer are not the subject of exceptions, but must be set out in the judgment entry, and, when they appear only in the recitals of the bill of exceptions, they cannot be revised by this court. Following *Kfurd v. Loeb*, 3 South. Rep. 3.

Appeal from circuit court, Calhoun county; LEROY F. BOX, Judge.

This was originally an action of trespass for false imprisonment, commenced in January, 1886, by the appellant, Robert S. Steele, against the appellee, Thomas P. Savage. By leave of the court the plaintiff amended his complaint in August, 1887, by adding a second count in case for damages arising from a malicious prosecution. The defendant pleaded, specially, the statute of limitation of one year to said amended complaint, the same being for a new cause of action. The plaintiff demurred to this plea of the statute of limitation by the defendant, but the court overruled the demurrer, and the plaintiff thereupon took a nonsuit, with leave from the court to file his bill of exceptions. And the appellant now assigns this ruling of the court upon his demurrer to the defendant's plea as error.

*Caldwell, Humes & Caldwell*, for appellant. *Brothers, Willett & Willett* and *J. H. Savage*, for appellee.

SOMERVILLE, J. The only question raised is the correctness of the court's ruling on the demurrer of the plaintiff filed to the defendant's plea of the statute of limitation of one year. This plea was interposed to the second count of the amended complaint, which was an action on the case for malicious prosecution, the amendment being made more than a year after the commencement of the original suit. The judgment must be affirmed on the authority of *Perry v. Danner*, 74 Ala. 485, and *Kfurd v. Loeb*, 82 Ala. 429, 3 South. Rep. 3, and the line of cases there cited. The ruling of the court on the demurrer appeared only by recital of the bill of exceptions, and is not set out in the judgment entry. It cannot, therefore, be revised in this court on a voluntary nonsuit taken by the plaintiff in consequence of an adverse ruling on demurrer shown only by the bill of exceptions.

(40 La. Ann. 224)

**STATE v. POWELL et al.***(Supreme Court of Louisiana. March 26, 1893.)***1. PRINCIPAL AND SURETY—OFFICIAL BONDS—DISCHARGE OF SURETY.**

Sureties on the bond of an officer cannot avail themselves of laches or omissions of other officers of the state, in the performance of duties imposed by law, as a ground of discharge for their own liability.

**2. SAME—DISQUALIFICATION OF PRINCIPAL—RELEASE OF SURETY.**

They cannot plead the ineligibility or disqualification of their principal as a defense.

## 2. SAME—ACTION AGAINST—EVIDENCE.

In a suit against a defaulting tax collector and his sureties, certified extracts from the books of the auditor of public accounts, showing the condition of his account with the state, are competent evidence, and afford *prima facie* proof.

## 4. SAME—RELEASE OF SURETY.

Sureties are not released because the collections covered by their bond have been paid into the treasury on his account for preceding years. Such a disposition was itself as much a misappropriation as if he had devoted it to his private debts.

## 5. TAXATION—TAX COLLECTORS—WITH WHAT CHARGEABLE.

A tax collector is properly charged with the full amount of the tax-rolls and licenses, the whole of which he is presumed to have collected, until rebutted by legal vouchers for legal payments or offsets.

## 6. SAME—TAX COLLECTORS—SETTLEMENTS.

The tax collector and his sureties are required by law to make their settlements with the auditor, and to see that any offsets are duly entered on his books; and, if they neglect this duty, they cannot, by parol evidence, contradict the accounts of the auditor, and claim credits not entered therein.

## 7. POWERS—TO EXECUTE BOND—SPECIAL POWER—CIVIL CODE LA. ART. 2997.

A power of attorney, to bind the constituent "upon any bond whatsoever, either as principal or surety, and to sign the same for her and in her name, either as principal or surety," is such express and special power as is required by article 2997, Civil Code. The term "special," as therein used, does not require a designation of the particular act to be done.

(Syllabus by the Court.)

Appeal from district court, parish of East Carroll; E. J. DELONEY, Judge.

Action by the state of Louisiana against M. S. Powell, a defaulting state tax collector, and the sureties on his official bond, in which plaintiff seeks to recover \$30,000, amount alleged to have been peculated by defendant. From a judgment favorable to the sureties, the state appeals.

J. E. Ransdell, Dist. Atty., W. G. Wyly, and C. S. Wyly, for appellant. J. M. Kennedy, F. F. Montgomery, J. M. Montgomery, and White & Saunders, for appellees.

FENNER, J. M. S. Powell was elected as sheriff and *ex officio* tax collector in 1884, and was commissioned and qualified as such on June 16, 1884, for the full term of four years. In June, 1885, he absconded, and was declared a defaulter to the state and parish for a large amount of taxes not accounted for. The present action is brought against him and sureties on his official bond. A separate judgment was rendered against his succession, he having died after suit was instituted, for the amount claimed, without prejudice to the rights and defenses of the sureties, as to whom the case was subsequently tried, resulting in a judgment in their favor. The sureties, admitting their signatures to the bond, filed a general denial as to all other matters, and also certain special defenses. We will first consider the special defenses, which go to the root of the action, viz.: (1) They show that Powell has held the same office during several previous years, having been elected as his own successor; that he had been a defaulter to the state in each of said years; that the law of the state required the auditor of public accounts to publish annually the names of all defaulters; that the auditor failed to make such publication; that by reason thereof the fact of his previous defalcation was concealed from them; and that they signed the bond through error and in ignorance of this fact, which, if they had known, would have prevented them from signing the same. (2) That, under article 171 of the constitution, the said Powell, by reason of his aforesaid defalcation, was ineligible to the office of sheriff, and, having been elected and commissioned in violation of a constitutional prohibition, the bond is invalid and void. These defenses are utterly unavailing. It has been so often held that sureties on the bond of an officer cannot avail themselves of laches or omissions of other officers in the performance of duties imposed by law as a ground of discharge of their own liability, and that the ineligibility or disqualification of their principal is no defense, that a mere quotation of the precedents is an all-sufficient disposition of these defenses: *Board*

v. *Judice*, 39 La. Ann. 896, 2 South. Rep. 792; *St. Helena v. Burton*, 35 La. Ann. 521; *Board v. Brown*, 33 La. Ann. 383; *State v. Blohm*, 26 La. Ann. 538; *Mayor v. Merritt*, 27 La. Ann. 568; *State v. Breed*, 10 La. Ann. 491; *State v. Dunn*, 11 La. Ann. 549; *State v. Hayes*, 7 La. Ann. 118; *Dunsmuir v. State*, Id. 377; *Mayor v. Blache*, 6 La. 500. The case last cited learnedly and scientifically disposes of the defense of error based on concealment or failure to give notice of prior defalcations.

The state's case is based upon and sustained by certified extracts from the books of the auditor of public accounts. The admissibility and sufficiency of such evidence are disputed by defendants; but it is well settled that they are official records, kept under requirements of law, and as such are admissible, and furnish full *prima facie* proof. *State v. Masters*, 26 La. Ann. 268; *State v. McDonnell*, 12 La. Ann. 741. It is even expressly provided by law that such certified statements shall be held sufficient evidence for the finding of an indictment against a delinquent tax collector, and "shall be read in evidence against the accused on the trial of the case." Act No. 107 of 1884, § 11. As to the nature and effect of these statements, this court has said: "The process of computing debts and credits on a tax collector's account is very simple. He is charged with the sum total of the rolls and of the licenses, and it is for him to offset them by legal vouchers for legal payments and by a delinquent list in due form. The tax collector is presumed to have collected all that is on his roll and his number of licenses; and, if he does not settle by a given day, he is a defaulter *ipso facto*. Everything is presumed against him. He is *prima facie* liable for the whole amount of the assessment roll, and the onus of proof is upon him to show discharge, payment," etc. *Police Jury v. Brookshire*, 31 La. Ann. 736; *State v. Guilbeau*, 37 La. Ann. 718; *Vermillion v. Comeau*, 10 La. Ann. 695; *Seaborough v. Stevens*, 3 Rob. (La.) 147. The defendants have failed to furnish any legal vouchers whatever to show any offsets. They set up that in February, 1885, Powell made large payments to the state treasurer, which they claim were made out of moneys collected from the taxes and licenses of 1884, and they produce the treasurer's receipts. These receipts show a certain amount paid on account of taxes and licenses of 1884, which credits are duly entered and allowed in the auditor's certified accounts herein sued on. The balance of the payments are expressly imputed, by the receipts themselves, to taxes and dues of previous years. How can defendants contradict the receipts offered in evidence by themselves, and of what avail would such contradiction be? The payments, so imputed, operated a discharge of the dues to which they are imputed; and how can they have the double effect of discharging others to an equal amount? This court has expressly held that sureties are not released because the collections covered by their bond have been paid by the sheriff into the treasury on his account for the preceding year. "The disposition of it alleged by the defendants," says the court, "was as much a misappropriation as if he had used it in the payment of his private debts." *State v. Hayes*, 7 La. Ann. 121.

The defendants further allege that the blank licenses with which Powell was charged, to the amount of \$5,592.50, were never used by him, but were turned over by his deputy to his successor in office, J. C. Bass, for which sum they claim credit. The only word of evidence in the record with regard to this important allegation is this statement by Bass as a witness: "T. J. Powell was in charge as a deputy when I took possession. He turned over to me in blank state licenses for the year 1885, \$5,592." There is nothing to show that the turning over was ever reported to the auditor; that Bass was ever charged with them; what he did with them; whether he disposed of or accounted for them. If they had been returned to the auditor, or charged to Bass, or otherwise accounted for to the state in any manner, the auditor's books would show it, and that was the source to which defendants should have looked for proof that this valid charge against their principal had been legally ac-

counted for. Not only have they failed to bring such proof, but they have not even produced the blank licenses, which, for aught that appears, may have been used, and never accounted for to the state. It was to the state that Powell was bound to account, and he failed to do so. When he absconded, the law provided that "his sureties shall be authorized to take into their hands the list of taxes remaining unpaid, and hold the same until his successor is appointed and qualified, when the sureties shall immediately make a final settlement with the auditor, as provided by law." Act 96 of 1882, § 78. They have failed to make this settlement, and cannot dispute the indebtedness, as charged on the auditor's books, upon such utterly insufficient evidence.

The same reasons apply to reject their claims to credits on account of taxes collected and property adjudicated to the state for taxes of 1884, by the successor, Bass. There is no proof that the state received any account of these collections from any source, and it is to the state that the account is due. If it be true that the state recovers by our judgment more than she is entitled to, she is the fountain of justice, and defendants may find relief by application to other departments of her government; but we must hold that they have failed to establish these offsets by any competent evidence. We find in the record an admission that defendants are entitled to credits on the amount claimed, in the sums of \$78 and \$65, and shall allow them.

One of the sureties, Mrs. Steinhart, interposes a denial of her liability on the bond, because her name, as surety thereon, was signed by an agent without legal authority. The power of attorney under which the agent acted, is the broadest and most complete that could be imagined. It seems to have been framed to confer upon the agent, not only every possible general power, but to confer expressly and specially every power for the exercise of which the Code requires that the authority shall be express and special. One has only to read it with the articles of the Code before him to discover that it was drawn with direct reference thereto, and with the plain intention of conferring upon the agent every possible power in manner and form as the Code provides. We make the following extract from the powers granted: "To draw, indorse, or accept bills of exchange, promissory notes, or bank checks; to bind the said appearer upon or to any bond, obligation, contract, or agreement whatsoever, either as principal or surety thereto or thereon; and to sign the same for her in her name, either as such principal or surety, as the case may be." Her counsel quotes *Copley v. Flint*, 6 Rob. (La.) 56. In that case the power granted was to make and indorse notes, drafts, etc., and the court held that such a power did not include authority to bind the principal as surety to a contract, saying: "An authority to indorse notes and drafts is different from one to bind the constituent as surety *in solido*." Considering that the power to bind as surety is not mentioned among the acts specially noted in Civil Code, art. 2997, but is only included under the general final clause thereof, it seems clear that this mandate was drawn especially to meet the ruling in *Copley v. Flint*, by adding the special power to bind as surety. We have considered all the other authorities quoted, but none of them meet the exigencies of this case. An express and special power to bind the constituent as surety on "any bond whatsoever" is an express and special authority to bind her on this particular bond. The contention that the term "special," as used in the Code, requires a special authority for each particular act, is unreasonable, and unsupported by any authority, and would defeat the purposes of mandates; since, if the constituents were required to grant a new authority for each particular act, he might, with less inconvenience, perform the act himself. If her agent has abused the trust confided in him, she, being *sui juris*, deliberately invested him with the power, and it is just that she should bear the loss, rather than the state, which accepted his action under her express and special mandate. In framing the decree we shall follow the precedent in *Bank v. Wagner*, 38 La. Ann. 732.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the state of Louisiana have and recover judgment against the defendants severally, to-wit, Fred G. Bernard, William D. Bell, Nathaniel Houghton, Jason Hamilton, Frank D. Rago, Victor M. Purdy, Oliver M. Cherry, Zachariah Goldenburg, Alfred Lewis, John W. Montgomery, and Mrs. Henrietta Steinhardt, in the sum of \$15,818.92, with 5 per cent. interest thereon from September 25, 1885, less any amount that may have been collected under the judgment against the succession of M. S. Powell; the said judgment to be operative against said defendants Bernard, Bell, and Houghton up to the sum of \$1,000 each, and no more; against Hamilton and Rago up to the sum of \$500 each, and no more; against Purdy, Cherry, Goldenburg, and Lewis up to the sum of \$2,000 each, and no more; against the said Montgomery up to the sum of \$3,000, and no more; against the said Mrs. Henrietta Steinhardt up to the sum of \$5,000, and not more,—with the stipulation that there shall be but one satisfaction of the entire amount due plaintiff; defendants and appellees to pay costs in both courts.

(40 La. Ann. 398)

STATE *ex rel.* PATTON *v.* HOUSTON, Judge.

(Supreme Court of Louisiana. April 16, 1888.)

1. PROHIBITION—CERTIORARI—WHEN GRANTED.

In order to invoke the exercise of the supervisory jurisdiction of this court under the writs of *certiorari* and prohibition, relator must establish one of three things, viz.: (1) That the proceedings are infected with some fatal irregularity; or (2) that the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or (3) that the cause is of a nature, jurisdiction of which is denied to any court, because not within the limits of judicial power.

2. SAME.

Constitutional executive officers are not exempt from judicial authority to compel them to perform specific duties imposed upon them by law.

3. MANDAMUS—TO ELECTION OFFICERS.

Officers charged with the conduct of elections and with the ascertainment and promulgation of the results thereof, may be compelled, by *mandamus* proceedings, to perform specific ministerial duties imposed on them by law.

4. SAME.

Where the statute requires the registrar to appoint commissioners 10 days, and to publish them 6 days, before the election, if he has violated his legal duty in the selection of such commissioners, parties interested are not precluded from judicial remedy because he has so acted. They could not proceed before he had acted, and, if denied the right to proceed afterwards, this would be a complete denial of right. The object of the laws in requiring action a certain time before the election was to afford an opportunity to correct any violation of duty which he might commit.

5. SAME.

The questions as to whether the law imposed the duty alleged, whether the duty was ministerial or discretionary in its character, and whether the defendant had violated his duty, are mixed questions of law and fact, belonging exclusively to the merits of the cause, and constituting, indeed, the entire merits thereof; and the court, being seized with jurisdiction of the case, was necessarily invested with full power to consider and determine them. Mere error in the judgment, even if it exists, could only be corrected by us in the exercise of a jurisdiction purely appellate, and can form no foundation for invoking our supervisory jurisdiction.

(Syllabus by the Court.)

Application for writs of prohibition and *certiorari*.

Application by Isaac W. Patton, registrar of voters for the parish of Orleans, against W. T. Houston, judge division B, civil district court, in which relator seeks to prohibit the execution of a judgment of said judge compelling him to appoint a representative of the republican party for each polling precinct of the city of New Orleans.

*E. D. White, Walter H. Rogers, and E. H. McCaleb*, for relator. *J. D. Rouse and W. S. Benedict*, for respondent.

FENNER, J. Relator invokes the exercise of our supervisory jurisdiction, by means of the extraordinary writs of prohibition and *certiorari*, to declare the nullity of a certain judgment rendered by the respondent judge, and to prohibit him from further proceeding in execution thereof. The judgment complained of was rendered in a *mandamus* proceeding brought before the civil district court by Henry C. Warmoth and other republican candidates for offices of the state which are to be filled by an election to be held on April 17th, wherein they allege that by virtue of sections 13 and 15 of act No. 58 of 1877, it was made the duty of the registrar of voters for the parish of Orleans to appoint for each voting precinct three commissioners of election, to be assisted by a clerk of election, said commissioners and clerk to be selected from opposing political parties, such appointments to be made 10 days before the election, and to be published at least 6 days before the election; that more than 10 days before the election representatives of said republican party had requested said registrar to comply with his said duty by appointing a commissioner or commissioners selected from the republican party, and had furnished him with names of qualified republicans from which to make such selections; but that the said registrar had failed to perform the duty imposed upon him by law, and had violated said duty by appointing all the commissioners at said election from members of the democratic party. On the appropriate averment of the absence of all other appropriate remedy, they asked for a writ of *mandamus* commanding and compelling him to appoint a commissioner at each election precinct from the republican party. In answer to an order to show cause why the peremptory *mandamus* should not issue the registrar filed the following defenses: (1) An exception to the jurisdiction of the court; (2) an exception of no cause of action; (3) that in the appointment of commissioners he exercised a discretion legally vested in him by the statute, and not subject to judicial control; (4) that in his said appointments he had actually complied with all the requirements of the law. The case went to trial on these issues, evidence was heard, and the court, in an elaborate opinion, overruled all the defenses, and rendered a judgment making the *mandamus* peremptory.

It is to be borne in mind that the proceeding now before us is not an appeal, and vests us with no appellate jurisdiction over the case, under which we may review questions merely affecting the correctness of the judgment. The application invokes the exercise of our supervisory jurisdiction exclusively, and in considering it, we must be guided and controlled by those rules and limitations which have been formulated and fixed by the laws of the state and the jurisprudence of this court. To obtain the relief sought herein under the writs of *certiorari* and prohibition, these rules imperatively require that relator shall establish one of three things, viz., either (1) that the proceedings are infected with some fatal irregularities, rendering them absolutely void, such as want of citation or refusal of a hearing and the like; or (2) that the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or (3) that the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judiciary power. It is not pretended that either of the first two grounds of relief is presented in this case. The perfect regularity of the proceedings in the court below is not questioned. There is no complaint that the court has assumed a jurisdiction which is vested by law in some other court. On the contrary, it will be admitted that if any court is vested with jurisdiction over the persons and the subject-matter of the controversy, it is, and must be, the civil district court. It follows therefore that the whole contention of relator is narrowed down to the proposition that the proceedings concern a subject-matter, the power to consider and determine which lies outside of the functions and powers of the judiciary. Analyzing as completely as we can the positions of relator, we find this contention to be based on the following grounds, viz.:

1. That relator is a constitutional officer, belonging to the executive department of the government, and not subject to judicial control in the execution of the functions of his office. This is answered by the very language of the Code of Practice touching the writ of *mandamus*, article 884 of which declares: "It may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them." There is no exception of constitutional executive officers, and our reports are full of cases in which such jurisdiction has been exercised over the auditor, the treasurer, the secretary of state, and other executive officers.

2. That as the subject-matter of the case is one touching the conduct of elections, such matter does not lie within judicial cognizance. There is no authority and no reason to support this broad proposition. It is true that it has been held by this court that in the absence of special statutory authorization, courts are without jurisdiction, *ratione materiae*, to entertain cases of contested elections. *State v. Judge*, 13 La. Ann. 89. This is a rule widely recognized and generally prevalent and resting on peculiar principles, but it has never been extended so far as to exempt officers charged with the conduct of elections, and with the ascertainment and promulgation of the results thereof, from judicial control to require them to perform the specific duties imposed on them by law. Thus, says Mr. High, under the full sanction of authority: "Notwithstanding the rule denying the relief by *mandamus* to compel admission to a disputed office or to determine the title thereto, there are certain incidents connected with the question of title and election to public offices, which, from their nature, involve the exercise of merely ministerial powers, and are hence properly subject to control by *mandamus*. Among these incidents are the canvassing of election returns, the issuing of certificates of election to the persons entitled thereto, and the issuing of a commission to a claimant duly elected." High, Extr. Rem. § 55; *State v. Secretary*, 32 La. Ann. 579. So, says High: "*Mandamus* has also been held an appropriate remedy to protect the right of a voter to registration of his name upon the poll-list; and a registering officer, appointed under the laws of the state for this purpose, may be compelled by the writ to register the names of voters applying for registration, and properly entitled to vote." High, Extr. Rem. § 66. Of course, in all such cases the propriety of the writ will depend upon the distinction between duties of a purely ministerial nature involving the exercise of no official discretion, and those which are quasi-judicial and involve the exercise of such discretion. It would indeed be monstrous if officers, charged by the legislative will with specific duties intended for the protection of the electoral right of the citizen and for the security of fair elections, could disregard and violate them with impunity. No authority is or can be cited exempting public officers charged by law with specific ministerial duties in election matters from the same judicial control which is exercised over all other officers of the state with reference to similar duties.

3. It is claimed that the statute required that the appointment of commissioners should be made 10 days before the election, and published at least 6 days before the election; that, having so made and published his appointments, his power was exhausted, and courts had no power to compel him to undo or to correct what had been done. We are strongly doubtful whether this ground does not go exclusively to the merits of the case, and is not therefore beyond our review in this case. But, at all events, it is entirely without merit. The right to invoke the aid of courts to compel the performance of this alleged duty could not arise until the relator was actually in default. This is elementary, and is strongly announced by Mr. High as follows: "*Mandamus* is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duties when the proper time arrives. It is therefore incumbent on the relator to show an actual omission on the part of

the respondent to perform the required act, and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time." High, Extr. Rem. § 12. Relators in the case below were not in the position to exercise their right until, by the action of the registrar, he placed himself in default by violating his alleged duty. A legal right cannot be paralyzed by such a paradox, which says to the person injured: "You cannot proceed before the registrar acts, because it is too soon; and you cannot proceed after he has acted, because it is too late." On the contrary, we are satisfied that the very object of the law, in requiring the registrar to act in a certain period preceding the election, was to afford parties an opportunity to correct any violation of his duty which he might commit.

4. The final grounds are that the law relied on did not impose on the registrar the specific duty performance of which was sought to be enforced by *mandamus*, and that the duty imposed with reference to the appointment of commissioners was of a character involving the exercise of official discretion, and that having exercised such discretion, and discharged his duty in accordance therewith, his action is not subject to judicial control by *mandamus*.

It is obvious that these questions belong exclusively to the merits of the cause. In every *mandamus* proceeding brought against public officers, in the language of the Code of Practice, "to compel them to fulfill the duties attached to their office or which may be legally required of them," the questions necessarily arise: Is the duty alleged imposed by the law? Has the officer violated his duty? Is the duty of a character authorizing the court to enforce it by *mandamus*? The solution of these questions constitutes the entire merits of every such proceeding and the sole judicial function involved therein. The court seized with jurisdiction of such a controversy is necessarily invested with full power to examine and determine those questions of mixed law and fact, the determination of which is a necessary condition precedent to the rendition of any judgment whatever. The claim that error in such determination entails the nullity of the proceeding and judgment has no more foundation than a claim that like error would strike any other judgment with nullity. We are clearly precluded from considering such questions in this proceeding. As we said in a former case, and have often reiterated, "the constitution intended that our supervisory jurisdiction should be distinct, in nature as well as in name, from our appellate jurisdiction. The former was intended simply to enable us to compel inferior courts to perform their functions, to prevent them from exceeding the bounds of their jurisdiction, and to enforce the observance of that regularity in their proceedings which is essential to fairness in the conduct of contradictory litigation. "More error in the decision of questions properly submitted to their determination, and regularly determined, can only be corrected in the exercise of a jurisdiction purely appellate." *State v. Judge*, 32 La. Ann. 1225. Finding in this case that the respondent judge had jurisdiction of the cause, that he was vested with judicial powers to hear and decide it, and that his proceedings have been, in all respects, regular, there is no occasion or room for the exercise of our supervisory jurisdiction.

It is therefore ordered that the application for writs of *certiorari* and prohibition be denied at relator's cost.

(40 La. Ann. 312)

#### Succession of LAMM.

(*Supreme Court of Louisiana*. March 5, 1883.)

#### 1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT—CONTEST—ACQUISITION IN JUDGMENT.

Judgment having been contradictorily rendered in a contest between two applicants for the appointment of an administrator, and the unsuccessful party having thereafter joined issue on the merits with the successful party, in a suit instituted

by him as administrator of the succession; this cannot be considered and treated as such an acquiescence in said judgment as would prevent a subsequent appeal therefrom.

2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—DISTRIBUTION OF.**

When the husband and survivor of the community dies, without having administered the succession of his predeceased wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs in his succession alone.

3. **SAME—COMMUNITY PROPERTY—ADMINISTRATION.**

The administration of the succession of the deceased husband necessarily involves with it the administration of the community.

ON REHEARING.

1. **EXECUTORS AND ADMINISTRATORS—APPOINTMENT—ELECTION BY HEIRS.**

It is only after the heirs have been called on by the creditors of the succession to renounce or to take the inheritance and he asks time to deliberate, that an administrator can be appointed.

2. **SAME—ACCEPTING SUCCESSION BY HEIR—RIGHT TO ADMINISTER.**

The heir who accepts a succession, with the benefit of inventory, is placed nearly on the same footing with curators of vacant estates. His engagement is to administer as beneficiary heir.

3. **SAME—ACCEPTING SUCCESSION BY HEIR—LIABILITY FOR ANCESTOR'S DEBTS.**

The result of the whole legislation on the subject is that the heir who accepts with the benefit of inventory may institute suits touching the succession, without making himself unconditionally liable for his ancestor's debts.

4. **SAME.**

He may even institute suits that are conservatory in their character before he either accepts or rejects, provided he claim time for deliberation and make proper reservation, without assuming the capacity of a simple heir.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Baton Rouge; J. W. BURGESS, Judge.

Suit involving the administration of the successions of Adele Lamm and Leopold Dalsheimer, her husband. Mrs. Pauline Kaufman, third opponent. Opponent appeals.

*Cross & Buckner and Bernard Titcher*, for appellant. *Leonard, Marks & Bruenn and Kernan & Laycock*, for appellee.

ON MOTION TO DISMISS.

WATKINS, J. This case presents a controversy over the appointment of an administrator of the succession of Adele Lamm, deceased. She was the wife of Leopold Dalsheimer, deceased. There was a community existing between them, and neither owned any separate property. The wife died on the 26th of October, 1879; and the husband, in the spring of 1886. The latter left a will containing a bequest in favor of Mrs. Pauline Kaufman, one of his forced heirs, of all the disposable part of his fortune; and she was appointed executrix, with full seizin. She obtained the probate of the will, qualified as executrix, and had an inventory taken,—all on the 22d of June, 1886. On the 6th of July afterwards, Mrs. Sarah Rose and Henry Dalsheimer, co-heirs of Pauline Kaufman, joined in a petition for the appointment of J. W. Hubbs as administrator of the succession of the predeceased wife, Adele Lamm, and caused an inventory of her estate to be taken. This application was resisted by Pauline Kaufman on several grounds; but she, in the alternative, prayed to be appointed administratrix if an administration was deemed necessary. On the trial the court held that an administration was necessary, and that the opponent was entitled to be appointed on giving bond according to law; but it further decreed that, upon her failure to furnish a satisfactory bond, Hubbs should be appointed, upon his furnishing bond, in her stead. In January, 1888, Pauline Kaufman procured this appeal; and in this court, Hubbs having in the mean while obtained confirmation of his appointment, he seeks its dismissal, on the ground that she had acquiesced in the judgment appealed from by joining issue on the merits with him in the suit entitled *J. W. Hubbs*,

*Administrator vs. Mrs. Pauline Kaufman, Executrix*, the record of which is now before us on appeal, and which is annexed hereto for reference. It is clear to our minds that it is altogether insufficient for the purpose of proving acquiescence. The appearance of Mrs. Kaufman was at a date subsequent to the appointment and qualification of Hubbs, under the decree of court. That decree was valid on its face. This appeal was deemed necessary to obtain relief from it. Had she tendered, *in limine*, an exception to Hubbs' capacity to stand in judgment as administrator of Adele Lamm's succession, upon the introduction of the succession record in evidence, it would have been overruled. It is therefore obvious that she thereby abandoned no valuable right. Had she obtained her appeal prior to the filing of her answer, it could not have been considered as an abandonment of it; and obtaining it subsequently had no additional force. The motion to dismiss is denied.

#### ON THE MERITS.

On the inventory caused to be taken by Pauline Kaufman of the succession of Leopold Dalsheimer, there appear only two items of property, viz.: (1) Community real estate, \$5,000; (2) community personal estate, \$48.50; total, \$5,048.50. The inventory purports to represent the entire interest of the two deceased spouses in the community. On the one taken of the succession of Adele Lamm, in pursuance of Hubbs' application on the 6th of July, 1886, there appear the following items of property, viz.: (1) Community real estate, (one-half interest,) \$3,000; (2) community rights and credits, (one-half interest,) \$5,850,—\$8,850. The real estate that is embraced in each is the same; and, with the exception of \$48.50, the rights and credits appraised in the latter represent a valuation of certain articles of community property which Leopold Dalsheimer is alleged to have consumed and used during the continuation of his usufruct, and for which he is responsible to the heirs of Adele Lamm. Pauline Kaufman opposed the application made for the appointment of Hubbs, on the following grounds, viz.: (1) That the succession was already under administration as community property, it having been included in that of Leopold Dalsheimer, and that it is neither necessary nor expedient that the same estate should be subjected to another administration; (2) that the whole of said property was in the custody and under the control of Dalsheimer as usufructuary and owner, and that the affairs of the community cannot be liquidated and settled elsewhere than in his succession; (3) that the whole property is under her seizin, under the will, in pursuance of a judgment of the court, that cannot be attacked collaterally. In the alternative, she prays to be appointed administratrix, if an administration separate from that of the succession of Dalsheimer is deemed necessary or expedient. Judgment went in favor of opponent, as stated above; but she, being dissatisfied therewith, appealed.

In *Succession of McLean*, 12 La. Ann. 222 *et seq.*, it was held "that the administration of the deceased husband involves with it the administration of the community." The court said in *Flournoy v. Flournoy*, 29 La. Ann. 741, that "when the husband and survivor of the community dies without having administered the succession of the wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs in his succession alone," etc. *Pennisson v. Pennisson*, 22 La. Ann. 181. The instant case is exactly similar. The heirs of Adele Lamm are identically the same as those of Leopold Dalsheimer. The former died first, and the latter did not administer her succession at all. We gather from the record that her succession is solvent, and has a large claim against that of her husband for an interest in the personal effects of the community. We can perceive no reason why that claim, as well as all others, could not be adjusted and settled in the due course of administration of the Dalsheimer estate. A community is not a partnership, but even a closer and

more intimate union of interests. In case there should be an insufficiency of community property to pay community debts, the separate property of the husband may be called upon to contribute. Not only is it entirely proper and right that the succession of the husband should embrace that of the deceased partner in community, but two distinct and separate administrations are unnecessary, and would occasion increased expense and litigation.

We are of opinion that the judgment appealed from is erroneous, and should be set aside. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and proceeding to render such judgment as should have been rendered in the court below, it is ordered, adjudged, and decreed that the application for the administration of the succession of Adele Lamm be rejected, and that all costs of both courts be taxed against petitioner and appellee.

ON APPLICATION FOR REHEARING.

(March 26, 1888.)

WATKINS, J. Owing to the importance of the subject, we have thought proper to supplement our views, heretofore expressed, and against which error is urged. The application suggests, as a corollary of our opinion, that if the succession of the predeceased wife cannot be administered separately from that of her subsequently deceased partner in community, her heirs are denied the privilege of accepting her succession with the benefit of inventory; and, *ergo*, our opinion is wrong. The claimants for administration conclude their brief thus: "The heirs of Mrs. Lamm could sue the executrix of Dalsheimer for and force a settlement of the community; but the heirs of Mrs. Lamm do not wish her to accept her succession purely and simply; they do not wish to bind themselves personally for any debts with which her succession may be incumbered; but they are interested in having her succession administered in order that its debts may be paid, and that they may receive anything left after payment of debts. The matter cannot be settled until some one is authorized to act for the succession of Mrs. Lamm, and the court cannot, we think, properly refuse to appoint an administrator to her succession." The legal deduction from this argument is that an heir cannot accept a succession, with the benefit of an inventory, unless an administrator be appointed to take charge of the property and settle its affairs. In supporting this proposition, they cite and rely upon *Erwin v. Orillion*, 6 La. 212, in which the court expressed the opinion that "the articles which treat of the appointment of an administrator are from 1084 to 1040, inclusive, [Old Code,] and they seem to require the appointment of an administrator in every case where a succession is accepted with benefit of inventory."

We have been at the pains to make careful research into our jurisprudence on this question, and have found the following decisions which appear to favor the opinion quoted, viz.: *Poultney v. Barrett*, 6 La. 500; *State v. Judge*, 17 La. 500; *State v. Lekie*, 14 La. Ann. 641; *Succession of De Roffignac*, 21 La. Ann. 384; *Succession of Linton*, 27 La. Ann. 351. Opposed thereto we find, however, quite as many and quite as respectable authorities. Among the number is *O'Donald v. Lobdell*, 2 La. 299, from which we make the following pertinent extract, viz.: "If, indeed, on opening the succession, and before the heir has accepted or rejected the succession, it was a matter of course that an administrator be appointed, then any act of the heir previous to acceptance would be irregular, and the suit could not be maintained; but, by law, the appointment of such an officer is not a matter of course. It is only after the heir has been called on by the creditors to renounce or take the inheritance, and he asks time to deliberate, that an administrator can be appointed. The result of the whole legislation on the subject we take to be that the heir may institute suits before he accepts or rejects. It is true, if he be of the age of majority, and do so without qualification, this, in itself, will

be an acceptance. \* \* \* If the creditors apprehend any damages from the heir collecting funds of a succession, which he may thereafter reject, they have the power to call upon him to accept or renounce; and, in default of his immediate decision, an administrator can be placed in charge of the estate. Until they do so, however, the succession is not in abeyance and without a representative. The law has expressly said that the heir represents the succession, and is seized of it, from the moment it is opened. Code La., arts. 992, 1029, 1032, 1034, 1037."

A similar doctrine was maintained under the Old Code, antecedent to 1825, as the following quotation from *Cox v. Martin's Heirs*, 12 Mart. (La.) 363, will attest: "On referring to the Civil Code, where it treats of heirs with the benefit of inventory, it seems that they are placed nearly on the same footing with curators of vacant successions. In page 168, art. 104, we find it laid down that, although the heir who accepts with the benefit of inventory be really the lawful heir and true successor of the deceased, the effect, however, of the benefit of an inventory is to make him appear, in the eyes of the creditors and legatees of the succession, rather as the administrator of the estate, than as the true heir and proprietor of it. They may be required, under certain circumstances, to give security for the value of the property contained in the inventory," etc. *Dufour v. Camfranc*, 11 Mart. (La.) 712. In the still more recent case of *Flower v. O'Conner*, 7 La. 209, that view was strengthened and fortified by a clearly-expressed and well-reasoned opinion, from which we have made the following extracts, viz.: "The defendant, being the mother of S. Bell, who died without issue, became his heir-at-law, and was seized of his estate, at the moment of his decease, subject, however, to her right. \* \* \* either to renounce it, or to limit her liability to creditors, by accepting with the benefit of inventory. She went before the proper judge, \* \* \* and declared her intention to accept the succession, with the benefit of inventory. \* \* \* The acceptance of the estate \* \* \* was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts; that if she neglected to take an inventory, and other conservatory steps, if, by disposing of the property belonging to the estate as her own, she put it out of her power to make to the creditors a fair exhibit of the means of the estate to pay its debts, then the creditors should have the right to consider her as having forfeited the benefit of inventory, and made herself unconditional heir."

These views are in strict conformity with the provisions of the Code of Practice with regard to the method of making settlements of successions. Articles 990 and 991 provide the mode in which creditors may obtain the sale of property of vacant estates. Article 992 declares that "the principles contained in the preceding articles shall apply to all successions accepted with the benefit of inventory, whether the heirs are minors or of age, and to all successions administered by administrators." Article 993 indicates the mode of classifying and the order of paying debts of a vacant estate, and provides that, in default of proceeding accordingly, execution may issue against the property of the curator. Article 994 provides that like execution shall issue against a tutor or curator "in the same manner as is provided in said [preceding] article against the beneficiary heir and curator of vacant estate; and, on said execution, the property of said tutor or curator shall be sold in the same manner as that of a beneficiary heir or curator of vacant estate." It must be borne in mind that, in the cited cases, there was under consideration the rights and claims of beneficiary heirs who had accepted their ancestor's successions with the benefit of inventory; not those of heirs who had been called upon by the creditors of the deceased to accept or reject, and who had claimed time to deliberate; and not those of creditors demanding, on that account, the appointment of an administrator. And such is the apparent situation of the heirs of Addie Lamm. At least, they signify a willingness to

venture such an acceptance if they should not incur responsibility as simple heirs on the account.

In further illustration and enforcement of the principle announced in the above cases, we find in *Bryan v. Atchison*, 2 La. Ann. 465, a concise statement of it, as applicable to their exact attitude towards the succession of Lamm, viz.: "It is true that, under the dispositions of the Civil Code, when the heirs claim the term to deliberate, an administrator was to be appointed in all cases; and, when the succession was afterwards accepted under the benefit of inventory, the administrator was to continue in his functions, and settle and liquidate the succession. But the Code of Practice, subsequently adopted, provides that an administrator shall be appointed, in such cases, if any of the creditors of the succession require it; and this we take to be the rule now in force, as being the last expression of legislative will, and having, moreover, the advantage to be founded in reason, and to harmonize with other dispositions of the Code of Practice relating to the administration of successions." *Vide* Code Pr. art. 976; Rev. Civil Code, art. 1041, (1034.) That decision was expressly affirmed in *Succession of Story*, 3 La. Ann. 502. In this manner the decisions we have cited are made perfectly harmonious with the provisions of the Civil Code which have been interpreted as requiring, in such cases as the instant one, the appointment of an administrator. In this manner, subsequent jurisprudence permitting the appointment of an administrator or curator in no case, unless some emergency required it, may be reconciled with the Civil Code, and the adverse opinions referred to. Reference to such of those adverse cases as have been since decided will show that no mention is made of *Bryan v. Atchison*, nor of Code Pr. art. 976.

In our opinion, the views entertained by the court, as expressed in *Erwin v. Orillion*, have been so completely overborne by the opinions of their successors in *Flower v. O'Conner* and *Bryan v. Atchison*, as not to require that it should be any more specifically overruled. It is quite sufficient for us to say that we are in perfect accord with the latter, and are of opinion that it is a conservative doctrine, and one that tends to simplify and facilitate the settlement of successions, and to reduce the costs to a minimum, and at the same time to deprive the creditors of neither security nor safeguard.

Under the operation of this rule, there is no impediment in the way of the heirs of the succession of Adele Lamm. With the proper reservation being made, they may liquidate their demands against the succession of Dalsheimer, by suit or otherwise, without incurring the risk or responsibility they seem to apprehend. Having no interest in the succession of the latter except that of creditors, nor in that of the former except that of heirs, the way is easy to the accomplishment of the object they seem to have in view. Rehearing refused.

(40 La. Ann. 320)

HUBBS v. KAUFMAN.

(*Supreme Court of Louisiana*. March 5, 1883.)

APPEAL—DECISION—RELATED CASES.

This court is bound to take cognizance of its own decisions; and in cases so intimately associated that one is a necessary incident of the other, the decree in one should be so framed as to give effect to the decree in the other, and save litigants unnecessary cost and delay.

(*Syllabus by the Court*.)

Appeal from district court, parish of East Baton Rouge; J. W. BURGESS, Judge.

Suit by J. W. Hubbs, plaintiff, as administrator of the succession of Mrs. Adele Lamm, against defendant, Pauline Kaufman, as executrix of the will of Leopold Dalsheimer, for a settlement of the community between these two deceased spouses. From an adverse judgment, defendant appeals.

*Cross & Buckner* and *Bernard Titche*, for appellant. *Kernan & Laycock* and *Leonard, Marks & Bruenn*, for appellee.

WATKINS, J. The plaintiff institutes this suit as the administrator of the succession of Adele Lamm, deceased. It cannot be entertained because we have just decided that he was not entitled to administer her succession separate and apart from her deceased husband, Leopold Dalsheimer, and rejected his demand, with costs. *Vide Succession of Lamm*, (No. 10,135,) *ante*, 53. We feel bound to take notice of our own decisions in cases thus intimately associated,—one being an incident of the other,—and so frame our decree in one as to give full force and effect to the decree in the other, and thus save the parties unnecessary delay and cost.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed that plaintiff's suit be dismissed, at his costs in both courts, and that the rights of the heirs of Adele Lamm be reserved in the succession of Leopold Dalsheimer, deceased.

Rehearing refused March 26, 1888.

(65 Miss. 264)

#### McMASTER v. ILLINOIS CENT. RY. CO.

(*Supreme Court of Mississippi*. February 27, 1888.)

#### MASTER AND SERVANT—CO-EMPLOYEES—WHO ARE.

A brakeman on one train of a railroad company is the fellow-servant of the employees in charge of and operating another train of the same company, and cannot recover for injuries caused by the negligence of the employees operating such other train.<sup>1</sup>

Appeal from circuit court, Copiah county; T. J. WHARTON, Judge.

Kate McMaster sued the Illinois Central Railway Company to recover damages for the killing of her minor son, while employed as brakeman on defendant's freight train, through the alleged negligence of defendant's employees in charge of defendant's passenger train. Plaintiff appeals from a judgment sustaining a demurrer to the complaint.

*L. B. Harris*, for appellant. *W. P. & J. B. Harris*, for appellee.

ARNOLD, J. If a brakeman on one train of a railroad company is the fellow-servant of the employees in charge of and operating another train of the same company, on the same road, the declaration was demurrable. There is some diversity of authority as to who are fellow-servants, within the meaning of the rule which exempts the master or employer from liability to those engaged in his employment for injuries suffered by them as the result of the negligence or misconduct of other servants employed by him and engaged in the same common business; but subjection to control and direction by the same common master, in the same common pursuit, furnishes the true test of co-service. When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business; and, being subject to the control of the same master, they are fellow-servants, within the generally accepted meaning of the rule, no matter how different the grades of service or compensation may be, or how diverse or distinct their duties may be. 3 Wood, Ry. Law, 1494 *et seq.* And when the relation of fellow-servants is established, there can be no recovery from the common master or employer by one of them for an injury occasioned to him through the negligence or misconduct of his co-employee. In order to render the master liable in such case,

<sup>1</sup>As to who are fellow-servants, see *Wolcott v. Studebaker*, 84 Fed. Rep. 8, and note.

it would be necessary to show that the negligent servant was incompetent, and that he was selected without reasonable care and prudence, or that he was continued in the employment after notice to the master of his unfitness, or that the master had failed to furnish adequate means and materials for the work. Such is the law of this state, and such is the law as it has generally prevailed in America and England for many years. *Railroad Co. v. Hughes*, 49 Miss. 258; *Railroad Co. v. Doyle*, 60 Miss. 977; *Railroad Co. v. Conroy*, 68 Miss. 562; *Randall v. Railroad Co.*, 109 U. S. 478, 8 Sup. Ct. Rep. 823; *Murray v. Railroad Co.*, 86 Amer. Dec. 268, and note; 3 Wood, Ry. Law, 1494 *et seq.* For the purposes of this case, it is not necessary to collect more of the numerous decisions, English and American, on the subject. That is well done in the three authorities last above cited. The doctrine in question was first asserted by the supreme court of South Carolina in 1841, in *Murray v. Railroad Co.*, 1 McMul. 885. It may well be termed the South Carolina doctrine. *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Murray v. Railroad Co.*, 86 Amer. Dec. 268, and note.

The reason upon which it is based cannot be better stated than by quoting from the opinion of the supreme court of Massachusetts in *Farwell v. Railroad Co.*, 4 Metc. 49, which has long been considered a leading case, both in this country and England. Chief Justice SHAW, in delivering the judgment of the court, said: "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen, and provided for in the rate of compensation, as any others. To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. We are of opinion that there are such considerations which apply strongly to the case under discussion. Where several persons are employed in the conduct of a common enterprise or undertaking, and the safety of each depends, to a great extent, on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer. It was strongly pressed in the argument that, although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence on the conduct of the other, and thus, to some extent, provide for his security, yet that it could not apply where two or more are employed in different departments

of duty, at a distance from each other, and where one can in no degree control or influence the conduct of the other. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend on the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be the same or different departments? Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant."

But, the injury complained of in this case having occurred in Louisiana, the rights and liabilities of the parties in relation to it are governed by the laws of that state. *Railroad Co. v. Doyle*, 60 Miss. 977. We find that the law of Louisiana on the subject is different from that of Mississippi and most of the other states of our Union. In *Tewns v. Railroad Co.*, 87 La. Ann. 680, and in *Van Amberg v. Railroad Co.*, Id. 650, the supreme court of that state approves and adopts the doctrine announced by the supreme court of the United States in *Railroad Co. v. Ross*, 112 U. S. 877, 5 Sup. Ct. Rep. 184. But this does not change the legal aspects of the case at bar. Four of the judges of the supreme court of the United States dissented in the case referred to, and the decision of the majority is contrary to the general course of judicial opinion in this country and in England, and it does not go further than to hold that the conductor of a railway train, who commands its movements, and controls the employees upon it, is not the fellow-servant of the other employees on that train, but is the vice-principal, representing the company, and that the company would be liable for a negligent act of his, which resulted in injury to another employee on the train. On the authority of that case, the conductor, while not a fellow-servant of the other employees on the train, subject to his direction and authority, might well be, and under the law as it is generally understood and interpreted, would be, the fellow-servant of other employees of the company in the same common business, over whom he had no supervision or control.

It follows from what has been said that the brakeman on the freight train, and the employees in charge of the passenger train, were fellow-servants, and that the action of the court below in sustaining the demurrer to the declaration was free from error. Affirmed.

(65 Miss. 301)

## NEW ORLEANS INS. ASS'N v. MATTHEWS.

(Supreme Court of Mississippi. March 12, 1888.)

## 1. INSURANCE—CONDITION OF POLICY—WAIVER.

A provision in a policy that there can be no waiver of any of its terms and conditions, "unless such waiver shall be indorsed hereon in writing," applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract, and are essential to its binding force while running, and does not apply to those conditions which are to be performed after loss.

## 2. SAME—ACTIONS ON POLICIES—WAIVER OF CONDITION—WHEN A QUESTION FOR THE COURT.

When it clearly appears to the court that there has been a waiver of the conditions of a policy, the question should not be submitted to a jury; but, when the court is of opinion that such question should be submitted to a jury, his ruling will not be reviewed.

Appeal from circuit court, Copiah county; T. J. WHARTON, Judge.

Action on a policy of insurance, by Mrs. M. C. Matthews against the New Orleans Insurance Association. The policy contained the usual terms about waiver, proof of loss, etc. After loss an agent of the insurance association procured the services of a mechanic to make an estimate of the cost of a new building to replace the one burned. He then called on the agent of Mrs. Matthews, showing the estimate, and offered to pay a sum less than the amount of the policy. Such offer was refused. Other propositions of settlement were also made and refused. The agent of the insurance association then wrote several letters offering to settle at a less sum than the face of the policy, but no settlement was had. No proofs of loss were made. There was a judgment for plaintiff, and defendant appealed.

W. P. & J. B. Harris, for appellant. R. H. Thompson, for appellee.

CAMPBELL, J. It was decided by the supreme court of Michigan in *Insurance Co. v. Earle*, 83 Mich. 143, that "there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." If this is true, it would seem that the provision in the policy that there could be no waiver of any of its terms and conditions "unless such waiver shall be indorsed hereon in writing" was ineffectual. Be this as it may, it has been frequently decided that "such a stipulation applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue on his contract; such as giving notice and furnishing preliminary proof of loss." *Carson v. Insurance Co.*, 43 N. J. Law, 300; *O'Brien v. Insurance Co.*, 52 Mich. 131, 17 N. W. Rep. 726; *Insurance Co. v. Ice Co.*, 36 Md. 102; *Blake v. Insurance Co.*, 12 Gray, 265; *Insurance Co. v. Capehart*, 108 Ind. 270, 8 N. E. Rep. 285; *Rokes v. Insurance Co.*, 51 Md. 512. In view of this interpretation by the courts of such a condition in a policy, it must be supposed to have been inserted with the understanding that it did not apply to what was required of the insured after loss had occurred, and did not prevent the claim of a waiver of proof of loss by the acts of the agent of the company.

Was there in this case evidence of a waiver sufficient to be submitted to the jury, and to sustain its finding that there was? If the court can affirm confidently that the insured should not, as a reasonable person, have been misled, it should not be left to the jury, but should be decided by the court. If this cannot be affirmed, either because of dispute as to what occurred, or doubt as to its just influence on the insured, it should be submitted to the jury under proper instruction. Where it appears that the insured was not

misled, all idea of waiver is excluded. That the insured claims to have been misled, signifies little; and is not the criterion by which to determine the question, which is, was what occurred, and is relied on as a waiver, sufficient to mislead the "average man" into the belief that he was relieved from the obligation to do more than he did? *McPike v. Assurance Co.*, 61 Miss. 37. Doubtless, in every case of failure to make proof, or do anything required of him after a loss, the insured might truly claim to have been misled; but he may have misled himself, or have neglected to do what he should from considerations quite independent of anything done or said by the insurer or its agents. The question is, was the insured, as an ordinary person, reasonably justified in his course of inaction by what occurred between himself and the insurer? If this be a matter for fair disputation, about which men might reasonably differ, it should be left to the jury; otherwise not. We repudiate the proposition that it is always for the jury to say whether or not there has been a waiver. When there is evidence to be passed on by a jury, it is to find upon it, of course; but if the presiding judge can say that, upon the undisputed facts, there is no ground for dispute about a waiver, he should decide the controversy. We know no peculiarity about cases of this character to distinguish them from others. We reaffirm our announcement made in *Insurance Co. v. Sorsby*, 60 Miss. 302, that "the company is not to be prejudiced in its defense because its agent promptly went to the scene of the fire, and pursued every allowable method of investigation of the loss, and tried ineffectually to come to an understanding with the insured. This would be to punish for an effort to perform duty." Investigation into the circumstances of a loss, and an effort to agree with the insured as to the amount of his loss, and an offer to pay a sum less than the amount claimed, will not constitute a waiver. There must be more than this; and, where this alone appears, the jury should be told to find for the insurer. Waiver, which rests upon the idea of estoppel, cannot be predicated of mere performance of duty or exercise of right or offer of compromise by the insurer; and this view should be firmly maintained by the courts.

If the claim of a waiver in this case rested alone on what occurred when Gillaspie, the agent, was in Hazlehurst, soon after the fire, it would be manifest that the issue should be decided for the insurer; but the testimony of Gillaspie shows that he made several visits to Hazlehurst "to try to settle the matter with Mr. Matthews; he standing to the amount of his insurance, and would make no concessions." It thus appears that the controversy between Matthews and Gillaspie on his first visit after the fire was as to the value of the building, and the deduction that should be made because it was an old one, and this controversy was adjourned, and renewed on the repeated visits of Gillaspie for the purpose of "a settlement." It further appears that letters were passed between the parties which sustain the proposition that the only matter of difference was as to the value of the old building, and how much the insurer should pay. It may be that this protracted negotiation and discussion between the parties, during which the liability of the insurer for the loss was assumed and recognized, and the only difference was as to the sum to be paid, was well calculated to mislead the average man into the belief that he need not make any further proof of loss than was known to the insurer. The circuit judge was of opinion that it should be left to the jury, and we are unwilling to disturb the judgment, which is accordingly affirmed.

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GEOGHEGAN v. MARSHALL.

(Supreme Court of Mississippi. March 12, 1888.)

EVIDENCE—DECLARATIONS—OF HOLDER OF ADVERSE TITLE TO LAND—ADMISSIBILITY.  
Where defendant in an action for the possession of land claimed by adverse possession under a parol gift from plaintiff's father, from whom plaintiff also derived

title, statements made by the father before his death, tending to show that defendant's title was permissive only, are inadmissible as affecting defendant's claim by mere declarations of the holder of a hostile title.

Appeal from circuit court, Jefferson county; J. B. CHRISMAN, Judge.

This is a controversy over the possession of certain land. Appellant, Geoghegan, claims title by adverse possession; that he was put in possession in 1857 by the then owner of the land, S. C. Stampley. Appellee, Catherine Marshall, claims by descent from her father, S. C. Stampley, and also by purchase. The land was sold in 1866 under a deed of trust given by Stampley, bought by one Cassidy, who sold to Catherine Marshall. There were three verdicts rendered in this case. The first was in favor of defendant Geoghegan, which was set aside by the circuit judge. On this first trial, plaintiff, Mrs. Marshall, offered the deed of trust above mentioned in evidence, but it was excluded by the court. The second trial resulted in a verdict for the defendant, and on this trial the court admitted the deed of trust excluded on the first trial, and gave to the effect that the burden of proof was on the plaintiff. This verdict was also set aside, and a third trial granted by the circuit judge. On the third trial, plaintiff, Mrs. Marshall, was permitted to introduce witnesses to prove declarations made by Stampley to the effect that Geoghegan's possession was permissive, and there was a verdict in favor of plaintiff, on which judgment was entered, from which Geoghegan appealed.

*J. J. Whitney and Hooker & Hooker, for appellant. H. Cassidy, for appellee.*

COOPER, C. J. The first verdict was properly set aside, not because the court had erred against the plaintiff by excluding the deed of trust executed by S. C. Stampley to secure a debt due to Given, Watt & Co., for that instrument was properly excluded, but because it was against the clear preponderance of the evidence.

The second verdict was also properly set aside, for the reason that the court erred in giving the eighth instruction asked by the defendant. In that trial the plaintiff had incontrovertibly shown a right to recover in the action, unless the affirmative defense of title by adverse possession interposed by the defendant had been established. In this condition of things, it was error to instruct the jury that the burden of proof was on the plaintiff, and that, if the evidence in the case "is so evenly balanced that they cannot determine which has preponderance, then the plaintiff has not, as a matter of law, proved or made out her case, and the jury should find for the defendant." The real controversy was over the question of adverse possession by the defendant. The father of the plaintiff was the common source of title, and at his death at least one undivided third of the land passed to her by descent, unless it had been divested from her ancestor by the sale under the chancery decree. If it passed by that sale, she had shown herself to be the holder of the whole title by purchase; if it did not, she was the owner of an interest by descent sufficient to entitle her to recover a part, at least, of the land. The burden of proof on the real issue tried was upon the defendant, and not upon the plaintiff.

The judgment on the last verdict must be reversed, because of the error of the court in admitting, over the objections of the defendant, evidence of what S. C. Stampley had said in reference to his title to the land a short time before his death. The defendant claims that he went into possession of the land in the year 1857, under a parol gift from S. C. Stampley, and introduced evidence tending to show that fact. It is not competent to show, by the statements of S. C. Stampley, that the possession was permissive, and not hostile; nor that he (Stampley) believed that he had a right to direct what disposition should be made of the property after the death of the defendant's mother. This would be to affect the defendant by the mere declarations of the holder of the hostile title, and this it is not competent to do.

The judgment is reversed, and a new trial awarded.

(40 La. Ann. 187)

**McKENZIE et al. v. BACON et al.**

(Supreme Court of Louisiana. February 13, 1883.)

**1. JUDICIAL SALES—VALIDITY—EFFECT ON THE PARTIES.**

An authentic act of sale is full proof against all parties thereto.

**2. SAME—IMPEACHMENT—EVIDENCE.**

In the absence of a charge of fraud or error, it cannot be contradicted, by parol proof tending to show that the sale was not real, that the ostensible purchaser was but a person interposed, and that he had incurred no obligation to pay the price.

**3. SAME.**

Where immovable property of an interdict (a lunatic) has been sold under regular proceedings, preceded by a valid order of a competent court, and the process-verbal shows an observance of the required formalities, and a valid adjudication for an adequate consideration, parol evidence is inadmissible to prove that the proceedings and adjudications were not intended to convey the property to the adjudicatee, but that he was merely interposed to hold the naked title in order that he might convey it to another.

**4. SAME—FAILURE OF PURCHASER TO MAKE PAYMENT—RESCISSIION.**

The failure of the adjudicatee at a judicial sale to pay the price gives the vendor the right to demand the rescission of the sale, though the property may have passed from the possession of the adjudicatee.

**5. DESCENT AND DISTRIBUTION—SUCCESSION BY REPRESENTATION—RIGHT TO INHERIT—ESTOPPEL.**When a person dies, leaving no descendants or ascendants but a brother and children of a predeceased brother, the latter are called to the succession of their uncle by representation,—the children representing the predeceased father; but, though thus representing their father, they do not derive their right to inherit from him, but from the law. Such right is not impaired or affected by any act of their father. Therefore they are not estopped from prosecuting a right of action derived from the succession of their uncle, on account of acts or omissions of their father, although those acts or omissions might have estopped him, (the father,) had he survived the intestate, from maintaining the action. Reaffirming *Destrehan's Case*, 4 Mart. (N. S.) 657; *Succession of Morgan*, 28 La. Ann. 290; *Calhoun v. Crossgrove*, 38 La. Ann. 1001.**6. INSANITY—LIABILITY OF CURATOR TO ACCOUNT—CLAIMS AGAINST INSANE PERSON.**

A curator of an interdicted person cannot keep the funds of the interdict without accounting for the same to the probate court, under a claim that the interdict is indebted to him. He must account for the moneys received; and the indebtedness of the interdict, if it exists, must be settled and adjusted under the supervision of the court. Nor can such curator transfer his claim to another person, and authorize such person to collect the money of the interdict, and retain it in satisfaction of the debt so transferred, without proper judicial sanction.

**7. FRAUDS, STATUTE OF—PROOF OF AGENCY TO BUY LAND—PAROL EVIDENCE.**

Parol evidence cannot be received to create or destroy a title to immovable property, or to prove an agency to buy or sell such property.

**ON REHEARING.****PLEADING—AMENDING—PREVIOUS DECREE—CONSENT OF PARTIES.**

A previous decree may be amended, to allow what had not been granted; and this, without granting a rehearing, where the opposite parties consent that the relief sought be substantially allowed.

(Syllabus by the Court)

Appeal from district court, parish of Caddo.

Suit by Amelia C. McKenzie and others, heirs of Nicholas Gilmer, against Gabriella Bacon and others, in which plaintiffs seek to rescind a certain judicial sale of immovable property, for non-payment of the price of adjudication. From a judgment rejecting their demand, plaintiffs appeal.

W. A. Gunter, Young &amp; Thatcher, Henry C. Miller, and F. L. Richardson, for appellants. Alexander &amp; Blanchard, Wise &amp; Herndon, and D. T. Land, for appellees.

TODD, J. This is a suit by the heirs of Nicholas M. Gilmer to rescind the judicial sale of a plantation situated in the parish of Caddo, and known as the "Nick Gilmer Plantation," for the non-payment of the price. The suit is against the heirs of Pressly W. Donaldson, the adjudicatee at said sale, and those holding under him by mesne conveyances. The plantation named be-

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longed to Nicholas M. Gilmer, a resident of Alabama, and, at the time of the sale, and long previous thereto, an interdicted lunatic, under the guardianship of Merriweather L. Gilmer, a resident also of Alabama. The order for the sale of the property was made by the parish judge of Caddo parish on the 19th of April, 1871, by the recommendation of a family meeting previously convoked for the purpose of advising in regard to said sale; and, after the regular delays and advertisements, the sale was made at public auction on the 23d of May, 1871, and the property was adjudicated to P. W. Donaldson for \$32,000; \$5,000 cash, and the balance on a credit payable in equal installments of one and two years, and secured by special mortgage; and, on the 14th of June following, a formal conveyance was passed before a notary, conforming to the terms of the adjudication. This conveyance was duly recorded, and the inscription of the mortgage and vendor's privilege remained until the 8th of February, 1878, when it was canceled, by what authority it does not appear. Nutt & Leonard, attorneys for the guardian, received from the auctioneer the cash paid at the sale, and the notes of Donaldson for the credit part of the price, and sent the same to the curator or guardian of the interdict by Donaldson himself, and took his (Donaldson's) receipt for the same. M. L. Gilmer, the guardian, died in 1878, and the interdict in 1883, and in 1884 this suit was filed. In December, 1871, Donaldson sold the property to Reuben White for \$32,000; \$20,000 paid in cash, and the balance on a credit of one and two years. Donaldson never paid to Gilmer, guardian of the interdict, the cash portion of the price of adjudication, and never paid and never delivered him the notes he had executed for the credit portion of the price. The notes were found after the death of Donaldson among his effects, with his name torn off, and unindorsed by him. The defense to the action presented by the answers is substantially as follows: It is charged that the sale to Donaldson was not a real sale; that he was only a person interposed for the purpose of making subsequently to White a conveyance of the property, under a private agreement previously had with the guardian of the interdict; that White and another person were to buy the property jointly at the public sale, but that, this other party having failed to meet the engagement with White, it was agreed that Donaldson should have the property adjudicated to him at the judicial sale, and make the conveyance to White afterwards, and in the mean while Donaldson was to hold the naked title in his name until such time as White was ready or prepared to comply with the terms of the sale. It is urged that White was the real purchaser of the property, and that he paid to Donaldson, alleged to be the agent of the curator or guardian of the interdict, the entire price for the property; and, that the price being thus paid, that an action of rescission for its non-payment must fail. There were filed, also, pleas of estoppel, want of tender, and prescription. The plaintiffs are appellants from a judgment rejecting their demand.

1. The first legal question we are confronted with is the question of the admissibility of evidence. On the trial below the court admitted, against the objection of the plaintiffs, parol testimony in support of the defenses set up in the answer, and as above detailed, to-wit, that the judicial sale to Donaldson was not real; that Donaldson was a mere party interposed, and that White was the real purchaser; also of the private agreement under which the arrangement touching the judicial sale to Donaldson, and the conveyance from him to White, was to be consummated or carried out. The objections, substantially, to this evidence, as shown in the bill of exceptions, were—*First*, that the testimony was an attempt to destroy title to real estate under a judicial sale, by parol; *second*, to establish title in some other person than shown by the adjudication and notarial act, by the same character of evidence; *third*, that it was an attempt to prove by parol an agency to buy and sell real estate; *fourth*, to prove by parol agreements relating to real estate subsequent and antecedent to the execution of the authentic act of sale from the estate of the

insolvent to Donaldson; *5th*, that it was an attempt to prove by parol matters and things beyond what was contained in the authentic act. As stated, these objections were all overruled, and the testimony admitted. An examination of the record shows conclusively that all the proceedings relating to this sale were legal and regular; including the recommendation of the family meeting advising the sale, and fixing the terms thereof; the homologation of the proceedings, and the order of sale; the adjudication,—and everything else relating to the confection or completion of the sale. The record, in these respects, is perfect and complete. There is no pretense or allegation of fraud or error connected with these proceedings, but the proposition, in substance, is, in the absence of all cause of nullity in the proceedings, to destroy this complete and perfect record, and establish another sale, by parol; that is, to show that there was no judicial sale; that Donaldson, the declared adjudicatee, did not in fact purchase, but that he was merely interposed for some one else; that he did not pay the cash which the *proces-verbal* declares he did pay, and never obligated himself to pay the credit portion of the price, but that the notes given by him were but a pretense and empty formality. We cannot escape the conclusion that the attempt to contradict these essential, vital, and solemn declarations of the *proces-verbal* of the adjudication, and the stipulations of the notarial act confirming the same, was in direct contravention of the rule laid down in article 2276, Civil Code, as follows: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, or what may have been said before or at the time of making them, or since." And also of the provision of article 2233 of the Code, which reads: "The authentic act is full proof of the agreement contained in it against the contracting parties, and their heirs or assigns." Further, it is expressly provided that a power of attorney conferring authority to contract with reference to real estate must be in writing. Civil Code, art. 2992; *Muggah v. Greig*, 2 La. 596; *Badon v. Bahan*, 4 La. Ann. 467. This last reference applies to the proposition to prove by parol that Donaldson was authorized by the guardian of the interdict to make the arrangements and agreement respecting the disposition of the land, including the sale to White, mentioned in the foregoing statement of facts. The articles which control our conclusions on this point seem so clear as to require no reference to adjudications to strengthen them; but, if confirmation is sought, out of a multitude of decisions we refer to a number which bear a strong analogy to the instant case. *Badon v. Bahan*, 4 La. Ann. 467; *Liautaud v. Baptiste*, 3 Rob. (La.) 442; *Fuselier v. Fuselier*, 5 La. Ann. 132; *Barbin v. Gaspard*, 15 La. Ann. 539; *Smith v. Lambeth*, Id. 566; *D'Aquin v. Barbour*, 4 La. Ann. 441; *Kummengaiser v. Juncker*, 28 La. Ann. 678. It has been expressly held that, "when real property is adjudicated at public sale to one to whom the title is made, his agency in the purchase for the benefit of his co-heirs cannot be proved by parol." *Fuselier v. Fuselier*, 5 La. Ann. 132; *Heiss v. Cronan*, 12 La. Ann. 213; *Linton v. Wikoff*, Id. 878. To make the correctness of our views even plainer, if possible, suppose, for instance, that, after this judicial sale to Donaldson, the interdict had recovered his reason, and, ignoring the sale made during his interdiction, had sought to recover the property. The proceedings relating to said sale, being, as before stated, entirely legal and regular, of course he would be bound by the sale, and estopped thereby from a recovery. Suppose, on the other hand, that he should have brought suit against White for the price of the property, on the averment that he (Gilmer) was the real vendor of the property; that White was the purchaser from him, and not from Donaldson,—the latter being a mere person interposed; and that White, not Donaldson, was his debtor. It is evident that, in the absence of fraud or error charged, and with no transfer to himself of the evidences of the debt, that White, upon objecting to the competency of parol evidence to prove these averments, could have defeated his recovery. Rejecting the parol evidence to contradict the

record as to this sale to Donaldson, and, guided alone by this record, the case stands thus: We find a perfect sale of the property from the estate of the interdict to Donaldson by judicial process; further, about six months after the purchase by Donaldson a sale by him of this same property to White; and, as a further fact having an important bearing on the controversy, that the mortgage retained to secure the price from Donaldson was duly recorded, and was of record when White bought, and when those holding under him acquired the property. This is all that the record discloses, at least by written evidence. Finally, it is also shown by competent evidence that Donaldson never paid to the interdict or his guardian the notes given by him for the price of the property. White, however, paid Donaldson in full the price for which he purchased the property from him, but no part of the same he thus received from White did Donaldson pay over, at least in money, to the interdict or his guardian. It is, however, urged and attempted to be shown that the price paid by White to Donaldson for the plantation was virtually paid to the interdict, or inured to his benefit in this way: It was averred that the interdict was indebted to his guardian, and was proved on the trial that the guardian transferred this claim against the interdict to Donaldson, and that he (Donaldson) applied the money received from White for the property to the extinguishment of this indebtedness of the interdict to Gilmer, guardian, or himself, (Donaldson,) transferee. We cannot concede that M. L. Gilmer, guardian, could himself receive the price of land coming to his ward, and dispose of it by applying it to the extinguishment of his debt against his ward extrajudicially; but it seem to us that, when the money was thus received, it was a matter for settlement before the probate court of Alabama. The funds of the interdict, when they came into the hands of his guardian, were essentially trust funds, and were to be accounted for to the court, and settled and adjusted by proper proceedings before the court; and the guardian, if he could transfer his claim against the interdict to another person, and could authorize such person to receive or collect funds belonging to the interdict, could only do so under the restrictions and conditions to which he himself was legally subject. Be this, however, as it may, the record does not satisfy us that the interdict was indebted to his guardian. It is true that, from the proceedings before the probate court of Alabama in the matter of this interdiction and guardianship, it does appear that a provisional account was filed and homologated, by which a balance appears against the interdict in favor of the guardian of \$18,409.85. This was of date June 26, 1866. It further appears, however, that after the death of Gilmer, guardian, proceedings for an accounting were taken against his legal representatives by the heirs of the interdict, an account was filed, and judgment rendered against the guardian's estate for \$27,509. This judgment was rendered on the 30th of May, 1887, and is a final judgment, and conclusive of all matters pertaining to the guardianship. This judgment is bitterly assailed. It is charged with having been procured by consent or connivance. The record shows that it was regularly rendered, and properly certified, and that it was not appealed from nor annulled. We do not feel authorized, therefore, to disregard it; but, on the contrary, are bound to give it effect. This ground of resistance to the plaintiff's action, must therefore fall, and it is the very foundation of the defense.

There was a plea of want of tender, but the counsel of defendants in their brief expressly decline to urge it.

There is likewise a plea of estoppel. The defendants charge that M. L. Gilmer, guardian of the interdict, consented to the agreement or understanding by which Donaldson was interposed as the nominal purchaser at the judicial sale, and to the subsequent sale of the property by him to White, and that his children, who are among the plaintiffs in this suit, are bound by his acts, and are estopped from objecting to or attacking the proceeding covered by this agreement. It is unnecessary for us to determine whether, in fact,

M. L. Gilmer, the guardian, consented to said agreement, or was or not guilty of any unauthorized or illegal act of commission or omission respecting said proceeding. It is shown that said Gilmer, guardian, died before the interdict, and his children inherited the property in controversy, and their rights thereto, not from him, but from the interdict directly. The interdict was living at the time of M. L. Gilmer's death, and therefore Gilmer was not his heir, and could have no interest in his estate. *Nemo est hæres viventis*. It is true that his children inherited from the interdict by what the law terms representation, but none the less did they inherit directly from him, and in their own right. They were bound by no acts of their father, whom they represented, nor by obligations of his, if any, resulting from said acts as guardian or otherwise. In the language of the Code: "Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented." Civil Code, art. 894. Mourlon, after quoting the corresponding articles of the Code Napoleon, proceeds to comment as follows: "Il n'est pas exact de dire que le représentant entre dans les droits du représenté. On ne représente, en effet, que ceux qui sont morts, avant le *de cuius*; or aux termes de l'art. 725, les personnes qui avaient cessé d'exister du décès du *de cuius*, n'ont aucun droit à la succession: en cessant de vivre ils ont cessé d'être capable. Le représenté n'a donc eu aucun droit à la succession du *de cuius*." And again: Au reste il n'est pas nécessaire d'être héritier d'une personne pour la représenter; il suffit d'être son descendant. Mon père meurt et je renonce à sa succession. Je le représenterai néanmoins dans la succession de mon aïeul paternel, lorsqu'elle sera ouverte. Cela se conçoit: le droit de représentation ne faisant point partie de la succession de mon père; ce n'est pas de lui que je le tiens, je le tiens de la loi. C'est un droit qui est né dans ma personne: de lors, peu importe que je sois oui ou non l'héritier de mon père. Je suis toujours son descendant et c'est en cette qualité que j'ai le droit de le représenter. De là la règle qu'on peut représenter celui à la succession duquel on a renoncé. Mourlon, Examen du Code, vol. 2, p. 41, *et seq.* Touillier, on the same subject, says: "Il faut donc passer au principe que les enfants qui succèdent avec les parents les plus proches du défunt, comme aurait fait leur père, ne tiennent point ce droit de celui-ci, et ne représentent point sa personne. C'est un droit qui leur est propre et qu'ils ne tiennent que de lui. Barthet avait dit: Quod filius succedat in locum patris, quantum ad successionem avi, non a patre, sed ex dispositione legis." Touillier, vol. 2, p. 111. These views are supported by many other eminent French jurists. Piallet, Leg. et Gains des Suc., 2 600; Manuel de Droit Français, art. 744, note; Laurent, vol. 2, p. 188, No. 175, on art. 848, Court de Droit Civil. The same principle is substantially embraced in our own Code. Thus article 900, Civil Code, reads: "One who has renounced the succession of another may still enjoy the right of representation with respect to that other." And this principle has been substantially recognized by the decisions of this court. *Destrehan's Case*, 4 Mart. (N. S.) 557; *Succession of Morgan*, 28 La. Ann. 290; *Calhoun v. Crossgrove*, 33 La. Ann. 1001. There is, therefore, no force in the plea of estoppel, as respects the descendants of M. L. Gilmer.

The principle that excludes them from the operation of said plea does not, however, exist in favor of Francis M. Gilmer, another of the plaintiffs. He was a brother of the interdict, inheriting immediately from him; and there is no question of representation as to him involved. It is shown beyond a doubt that he was for many years the adviser of M. L. Gilmer, guardian. He was also cognizant of the entire proceeding relating to the judicial sale and subsequent disposition of the property. He agreed to the arrangement, and consulted with Donaldson, who was his son-in-law, the agent of M. L. Gilmer, and the adjudicatee of the property, and with the attorneys employed to effect the sale. He was fully committed to the plan of operations adopted

with respect to the alienation of the property. Moreover, after the sale was made by Donaldson to White, he ratified it, so far as relates to himself, by discounting one of the notes executed by White for part of the price, and received the payment of it. How could he consistently receive part of the price of this sale to White, knowing, as he did, all the facts relating to it, and that led to it, and afterwards seek to recover the land itself? It does not lie in his mouth now to say that this sale to White was illegal and void, and that the sale should be rescinded for non-payment of the price, when he has received a part of the price himself. He is estopped, under the equitable principles of the law, from doing so.

The plea of prescription is not urged or discussed before this court, and it might be considered as abandoned. But, however that may be, prescription was suspended as to the interdict during his life, and this action was instituted by his heirs in a year after his death, and the plea is therefore without force.

This completes the review of the facts relating to this case, and of the legal questions and issues pertaining to the controversy, and from the conclusions announced it is manifest the court *a quo* was in error in dismissing the action. There were questions raised by the pleadings touching the rents and revenues of the property, and the value of the improvements and reimbursement therefor. From the disposition of the case by the lower court, of course these questions were not considered. They will be left for future determination, and this will necessitate the remanding of the cause.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; and, proceeding to render such judgment as should have been rendered, it is further ordered, adjudged, and decreed that the suit, so far as relates to Francis M. Gilmer, one of the plaintiffs, be dismissed, and his demand rejected; and it is further ordered, adjudged, and decreed that there be judgment in favor of the other plaintiffs in the suit, and that the judicial sale of the property described in the pleadings, and attacked in this suit, be rescinded and annulled to the extent of four-fifths interests therein, and that the said undivided interests of said land be restored to the plaintiffs, (excluding Francis M. Gilmer,) to be held and owned by them according to and in proportion to their respective heritable rights therein. It is further ordered, adjudged, and decreed that the cause be remanded to the lower court for the sole purpose of determining the respective demands of the parties touching the rents and revenues of the property, and the reimbursement for improvements made thereon since the sale aforesaid, now rescinded. The costs of both courts to be paid by the defendants.

POOHE, J., being absent when this case was tried, takes no part in the decision. WATKINS, J., recuses himself, having been of counsel.

#### ON APPLICATION FOR REHEARING.

(April 16, 1888.)

BERMUDEZ, C. J. The court did not decree the return of the \$5,000 paid at the judicial sale, for the reason that it considered that a decision on that subject had been waived, and that one was desired on the merits of the case. As complaint is now made on the subject, and adverse parties have, in an answer to the petition for a rehearing, consented to relief being allowed, the matter can be easily settled without granting a rehearing. It is therefore ordered that the previous decree herein rendered be amended so as to allow defendants credit in the adjustment of amount for four-fifths, to-wit, \$4,000, of the amount, with legal interest from the acquisition of the property from the present owners thereof, the said sum to be credited on the rents and revenues of the property for which defendants are liable under the decree, and that, thus amended, said decree remain undisturbed. Rehearing refused.

(40 La. Ann. 423)

## SPOTORNO v. FOURICHON.

(Supreme Court of Louisiana. April 16, 1888.)

## 1. LIBEL AND SLANDER—ACTION FOR—WHEN LIES.

Under the law of Louisiana, slander is a *quasi* offense, actionable under the broad provision of the Code: "Every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it."

## 2. SAME—SLANDER—ACTIONABLE WORDS.

If the words are false, injurious, and uttered *malo animo*, they are actionable.

## 3. SAME—MALICE—PRESUMPTION.

Both malice and injury may be inferred from the nature and falsity of the words.

## 4. SAME—ACTIONABLE WORDS—CHARGING A WHITE MAN WITH BEING A NEGRO.

Under the existing social habits, customs, and prejudices, considered simply as facts, charging a white man with being a negro is calculated to inflict injury and damage, to the knowledge of all persons, and no one could make and circulate such a charge without knowing its injurious effect and intending to injure, if he knew that the charge was false. Such charge was recognized as actionable slander by the court, under the constitution of 1868. *Toys v. McMahon*, 21 La. Ann. 808.

## 5. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Evidence considered, and found sufficient.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; W. T. HOUSTON, Judge.  
Suit by Louis Spotorno against August Fourichon for \$5,000 damages for slander. From a judgment allowing plaintiff \$500 defendant prosecutes this appeal.

Branch K. Miller, for appellant. F. Michinard, for appellee.

FENNER, J. This is an action for slander, by falsely and maliciously asserting and circulating the report that plaintiff was a negro. Under our law, slander is a *quasi* offense, actionable under the broad provision of our Code, which declares: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Our courts are not bound by the technical distinctions of the common law as to words actionable *per se* and not actionable *per se*, and allowing, for the latter, only actual pecuniary damages specially proved. *Miller v. Holstein*, 16 La. 889; *Feray v. Foote*, 12 La. Ann. 894. If the charges are false, injurious, and made maliciously or *malo animo*, they combine all the elements essential to support the action. Both the damage and injury and the malice may be inferred from the nature and falsity of the words, and from the circumstances under which they were uttered, without the necessity of special proof. *Miller v. Holstein*, 16 La. 889; *Daly v. Van Benthuyssen*, 3 La. Ann. 69; *Tresca v. Maddow*, 11 La. Ann. 206; *Cass v. Times*, 27 La. Ann. 214.

Under the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage. We are concerned with these social conditions simply as facts. They exist and, for that reason, we deal with them. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious, and without intending to injure. This was treated as an actionable slander by the court, created under the constitution of 1868. *Toys v. McMahon*, 21 La. Ann. 808. Defendant admits that plaintiff is a white man, and defends only by denying that he ever made the charges alleged. We have considered and weighed the evidence and can find no reason to reverse the conclusion of the district judge that the proof is sufficient.

It is claimed that the evidence of one witness should not be considered because the facts testified to by him occurred more than a year before the suit, and were therefore within the prescription pleaded. This is doubtful; but, if

true, the evidence would be entitled to weight as corroborating the testimony of other witnesses, who prove like statements within the prescriptive term.

We think the record affords no ground for disturbing the moderate damages allowed. Judgment affirmed.

(40 La. Ann. 374)

DEARMOND v. ST. AMANT.

(*Supreme Court of Louisiana*. March 26, 1888.)

**MALICIOUS PROSECUTION—MALICE AND PROBABLE CAUSE—EVIDENCE—SUFFICIENCY.**

In this action for malicious prosecution, the evidence fails to establish the facts that the defendant acted with malice and without probable cause, which are essential to support such a suit.<sup>1</sup>

(*Syllabus by the Court*.)

Appeal from district court, parish of Ascension.

Action by Joseph Dearmond against Joseph St. Amant for \$3,500 damages, claimed for defamation of character and malicious prosecution. From a judgment condemning him to pay \$500 defendant appeals.

*White & Saunders, T. A. Flannagan, E. W. Robertson, and R. McCulloh*, for appellant. *R. N. Sims and E. N. Pugh*, for appellee.

FENNER, J. This is an action for defamation of character and malicious prosecution. The defamation of character alleged consists in merely making public statements that plaintiff was guilty of the crime for which he was arrested and prosecuted upon the affidavit of defendant. Manifestly the slander is merged in the prosecution, and, if the prosecution is not actionable, neither is the slander. The record shows that an attempt was made in the nighttime to burn down defendant's store. It was a palpable attempt at deliberate arson, only thwarted by a fortunate discovery, and alarm in time to extinguish the flames. Arson is one of the most dangerous and cowardly of all crimes, and none is calculated to impress its victim with a deeper sense of alarm and insecurity. It was natural that defendant should have been anxious to discover and punish the perpetrator of such a crime. He employed a professional detective in New Orleans, and brought him to the parish, to aid him in ferreting out the criminal. Evidence was obtained pointing to one Joseph Guedry as the guilty person, and he was arrested, and confined in the parish jail. While so confined, he made to the sheriff a most circumstantial confession to the effect, substantially, that he had been engaged by plaintiff to burn the store; that they had gone together and set fire to it; that Dearmond had told him that a mercantile rival of St. Amant had promised to give \$1,500 for the burning of defendant's store; that plaintiff had gone early next day to the rival's store to claim the reward, but that the merchant had refused to pay because the attempt had not succeeded. This confession, repeated several times, was communicated by the sheriff to defendant, and also to the district attorney, and, after consultation between the three, it was determined that plaintiff should be arrested. The district attorney prepared an unqualified affidavit charging plaintiff with the crime, but defendant declined to make it in that form, saying that he could only swear from information received, and not from his own knowledge; whereupon the affidavit was so changed, and defendant made oath to it before the judge, who issued his warrant for the arrest of plaintiff. Unwilling, however, to have the arrest made without further inquiry, the defendant asked time to make such, and it was determined that the warrant might be held, subject to his discretion, after further investigation. Defendant thereupon engaged another detective from New Orleans to assist him in further investigations. After several days thus employed, resulting in the discovery of various circumstances tend-

<sup>1</sup>See note at end of case.

ing to confirm the confession of Guedry, the arrest was made by defendant and the detective to whom the sheriff had given the warrant; and plaintiff was incarcerated. It turned out that Guedry's confession had been obtained by the sheriff under threats of the certainty of his conviction, and under promises that, if he would tell all, he would be set free. Of course such confession was inadmissible as evidence for any purpose; and upon the preliminary examination before the judge, Guedry was discharged. On the following day the district attorney entered a *nolle prosequi* as to the case of plaintiff, and he was discharged after a confinement of about a week. Neither the defendant nor district attorney was informed of the threats and promises by which the confession of Guedry was obtained. The sheriff admits that, after getting the confession, he suggested to defendant to make an affidavit against plaintiff. The district attorney states that, having no reason to doubt its truth, he "considered that confession alone sufficient for him to advise the affidavit and warrant." If plaintiff is innocent of this heinous charge, as the law presumes him to be, he has undoubtedly suffered a great wrong; and for him to be compelled to bear it without redress is indeed a hardship, but it is one of those sacrifices which the individual is required to make to the interests of society. It is not only the lawful right, but the civil duty, of every citizen to set on foot criminal proceedings whenever he believes honestly and on reasonable grounds that a crime has been committed. The social interests require, and the law invites, him thus to aid the state in the discovery and punishment of crime; and it would be equally unjust and impolitic to make him a guarantor of the success of the prosecution, or to make its failure an actionable wrong. Hence the law wisely holds the prosecutor harmless in such a case, notwithstanding the acquittal of the person accused, unless his conduct has been tainted by two concurrent vices: (1) Malicious motive; (2) want of probable cause, i. e., absence of reasonable grounds for believing in the truth of the charge made. From the huge volume of testimony in this case, we have selected and detailed a few of the pertinent and indisputable facts, the effect of which is not, in our judgment, destroyed by any other of the numerous facts and circumstances proved. It would serve no useful purpose to discuss the latter. Suffice it to say that the record fully satisfies us that the defendant acted throughout in good faith, from honest motives, on probable and reasonable grounds, and without malice, express or implied.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be now judgment in favor of defendant, rejecting the demand of plaintiff at the latter's cost in both courts.

Rehearing withdrawn.

#### NOTE.

**MALICIOUS PROSECUTION.** The existence of a probable cause is a mixed question of law and fact. It is for the jury to determine what facts are proved, and for the court to say whether or not they amount to probable cause. *Moore v. Railroad Co.*, (Minn.) 88 N. W. Rep. 834; *Burton v. Railway Co.*, (Minn.) 23 N. W. Rep. 800; *Johnson v. Miller*, (Iowa,) 29 N. W. Rep. 747, 17 N. W. Rep. 84, 19 N. W. Rep. 810; *Ross v. Langworthy*, (Neb.) 14 N. W. Rep. 515; *Castro v. De Uriarte*, 16 Fed. Rep. 98; *Gee v. Culver*, (Or.) 6 Pac. Rep. 775; *Sartwell v. Parker*, (Mass.) 5 N. E. Rep. 807; *McNulty v. Walker*, (Miss.) 1 South. Rep. 55; *Bell v. Keepers*, (Kan.) 14 Pac. Rep. 543; *Bell v. Matthews*, (Kan.) 16 Pac. Rep. 97; *Glasgow v. Owen*, (Tex.) 6 S. W. Rep. 527. But, when the facts are undisputed, the court should instruct the jury that there was or was not probable cause. *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Castro v. De Uriarte*, 16 Fed. Rep. 98; *Fulton v. Onesti*, (Cal.) 6 Pac. Rep. 491; *Sartwell v. Parker*, (Mass.) 5 N. E. Rep. 807; *McNulty v. Walker*, (Miss.) 1 South. Rep. 55.

It is a good defense to an action for malicious prosecution that the defendant before commencing the alleged malicious prosecution, it being a criminal prosecution, presented the matter to the county attorney, fairly stating to him all the facts, and then in good faith followed the advice of the county attorney. *Schippel v. Norton*, (Kan.) 16 Pac. Rep. 804. See, also, as to how far the defendant in an action for malicious prosecution may rely upon the advice of counsel, and as to the necessity of stating to counsel all

the facts in the case upon which advice is sought, *Railway Co. v. Hunt*, (Vt.) 7 Atl. Rep. 277, and note; *Walker v. Camp*, (Iowa,) 27 N. W. Rep. 809, and note; *Moore v. Railway Co.*, (Minn.) 83 N. W. Rep. 384; *Fire Ass'n v. Flemming*, (Ga.) 3 S. E. Rep. 420; *Mesher v. Iddings*, (Iowa,) 84 N. W. Rep. 328; *Donnelly v. Daggett*, (Mass.) 14 N. E. Rep. 161; *Glasgow v. Owen*, (Tex.) 6 S. W. Rep. 537.

Upon the question of what is evidence of want of probable cause, see *Taylor v. Rice*, 27 Fed. Rep. 264, and note; *Clements v. Excavating Apparatus Co.*, (Md.) 10 Atl. Rep. 442, and note; *Heap v. Parish*, (Ind.) 8 N. E. Rep. 549, and note; *Moore v. Railroad Co.*, (Minn.) 83 N. W. Rep. 384; *Bell v. Keepers*, (Kan.) 14 Pac. Rep. 542; *McNulty v. Walker*, (Miss.) 1 South. Rep. 85; *Wright v. Ascheim*, (Utah,) 17 Pac. Rep. 125.

(40 La. Ann. 327)

POCHELU v. CATONNET *et al.*

(*Supreme Court of Louisiana. March 26, 1883.*)

1. FRAUDULENT CONVEYANCES—PURCHASE BY CREDITOR—INADEQUACY OF PRICE.

A sale made to one not a creditor, for a price in cash, though inadequate to the value of the property conveyed, cannot be annulled at the instance of the creditors of the vendor, who was insolvent at the time, to the knowledge of the purchaser, on the charge of simulation.

2. SAME—CONVEYANCE IN PAYMENT OF DEBT—BONA FIDE PURCHASE.

A *dation en paiement*, made in consideration of a valid and subsisting indebtedness, cannot be revoked on the charge of simulation, if the conveyance was really intended to pass a title to the property to the creditor, and he really acknowledged full payment of the debt.

ON APPLICATION FOR REHEARING.

1. SAME—ACTION TO SET ASIDE—ALTERNATIVE RELIEF.

In an action *en declaration de simulation*, pure and simple, which is unaccompanied with an alternative prayer that, if the act complained of is not found to be a fraudulent simulation, it be declared to have been one in fraud of creditors, and, as such, annulled, it is not in our power to render judgment annulling it on the latter ground.

2. SAME—ACTION TO SET ASIDE—JURISDICTIONAL AMOUNT IN SUPREME COURT.

It is the settled jurisprudence that this court is without jurisdiction in revocatory actions, which seek to subject property that has been fraudulently conveyed to the payment of debts less than \$2,000 in amount.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

Plaintiff, Raymond Pochelu, demands in this action the annulment of a sale made by Manuel Navas to Henry Rougaignoc, on the allegation that same was a fraudulent simulation, also the revocation of a *dation en paiement* made to one Bernard Maylie. Maylie alone appeals.

T. M. Gill and T. J. Semmes, for appellant. Frank N. Butler, for appellee.

WATKINS, J. Plaintiff, being a creditor of Manuel Navas & Co., composed of Edmond Catonnet and Manuel Navas, for the sum of \$1,000, and of Manuel Navas individually for \$200, demands the annulment of a certain sale made by Manuel Navas to one Henry Rougaignoc of a certain coffee-house, fixtures, and paraphernalia, which is situated on the premises, bearing the municipal numbers 9 and 11 St. Charles street, in the city of New Orleans, on the allegation that it was a fraudulent simulation. He likewise demands the revocation of a *dation en paiement* of same property from Rougaignoc to Bernard Maylie, of subsequent date, on like averment of simulation. This property was acquired from Thomas Handy by Manuel Navas & Co.; and, while said firm owned it, a portion of said indebtedness was created in the purchase of materials, and the price of workmanship, employed in the construction of certain improvements and repairs on said premises; and on this property the plaintiff seeks to have his mechanic's lien and privilege enforced. He charges bad faith, insolvency, fraud, and conspiracy on the part of all the parties enumerated, and resulting injury therefrom. He specially charges that the notes

of \$1,000 and \$400, which Maylie surrendered to Rougaignoc in exchange for or in consideration of said property, represented no real and actual indebtedness of the latter, but that same were fictitious and simulated. He represents and claims that said defendants have, by their said wrongful and tortious acts, made themselves jointly and severally liable to plaintiff for the amount of his demands. He coupled with the foregoing averments an allegation of an apprehended transfer, during the pendency of the suit, and prayed for and obtained writs of injunction and sequestration. James Fahey and William Doll, whose united demands aggregate \$1,769.75, intervened, and joined the plaintiff in the prosecution of his demands, and upon similar averments. The defendants tendered, as an exception *in limine*, the plea of no cause of action; and, the same having been overruled, they plead the general issue. But Catonnet made an additional answer, to the effect that he was released from all liability by the dissolution of the firm of Manuel Navas & Co., by reason of his assignment to Navas of his three-fourths interest in the business of the partnership. The facts, as we glean them from the record, appear to be as follows: On the 5th of November, 1885, Manuel Navas conveyed the above-described property to Henry Rougaignoc, by authentic title, and for the expressed consideration of \$1,000 cash in hand paid, and the assumption of the October installment of the rent, \$229.16, then past due. On the 16th of same month Rougaignoc conveyed the same property to Bernard Maylie, for the expressed consideration of \$1,400, evidenced by two promissory notes of the vendor,—one for \$400, and another for \$1,000,—which were surrendered and canceled by the latter. It appears from the evidence that, finding himself in embarrassed if not insolvent circumstances, Navas felt it necessary to make some disposition of his property, and, possibly, with the view of satisfying some of his creditors. With this end in view, he proposed to make a sale to one or two different ones of his creditors, but they declined to purchase. He then advertised his property for sale in the newspapers, likewise without avail. He then made the conveyance to Rougaignoc. It appears that the latter obtained from Bernard Maylie a check of \$1,000, with which to make the payment of the purchase price, and it was used as cash in making that transaction with Navas. It further appears that, among others, Navas was indebted to Pierre Donnes in the sum of \$700, evidenced by his promissory note, and that he had promised Donnes to pay the note if he would secure him a purchaser for his property. Stimulated, perhaps, by this inducement, he interviewed Rougaignoc, and induced him to become the purchaser. Bernard Maylie was seen, and influenced to put up the necessary amount of money to consummate the trade. But, in order to insure the collection of his note, Donnes placed it in the hands of Maylie, with instructions to collect it out of the money to be paid to Navas for the property. So it transpired that, after the act of sale to Rougaignoc was executed and signed, the check of Maylie was handed back to him indorsed by Rougaignoc; and he sent it to bank, and had it cashed, and handed the cash to Navas, and from the same he withdrew \$700, and applied it to the payment of Donnes' note, and the balance of \$300 was retained by Navas. Immediately afterwards Rougaignoc went into possession of the saloon, and opened up a business. In addition to this \$1,000 cash advanced, Maylie loaned Rougaignoc \$400, in order to place him in funds with which to pay the arrearages of rent for the month of October, which he had assumed as a part of the purchase price, and the water and electric light bill. It was for these sums the two notes were executed in favor of Maylie; and they bear date November 6, 1885, the day after the sale to Rougaignoc is dated, but the day it was consummated. This transaction caused some comment and criticism among the creditors of Navas; Maylie became somewhat solicitous about the collection of the Rougaignoc notes; and the result was the execution of the *dation en paiement* of the 16th of November, 1885, and the surrender and cancellation of the notes. Soon afterwards Navas returned

to the saloon, and resumed control, to all appearances, as before the sale to Rougaignoc, but really for Maylie.

A vast amount of testimony was taken in support of plaintiff's and intervenor's charges against the purported conveyances, on the one hand, and in support of them on the other; and a comprehensive view of it all has left us under the conviction that the plaintiff has failed to make out his case. It is evident to our minds that neither Maylie nor Rougaignoc were bound, in any way, for the payments of the debts due to the plaintiff. There was no legal impediment existing to prevent Maylie loaning, or Rougaignoc borrowing, the \$1,000 with which he paid the purchase price to Navas. There was nothing to prevent Navas selling to Rougaignoc for cash, even though he were in insolvent circumstances, to the knowledge of the purchaser at the time. Rev. Civil Code, art. 1986; *Maurin v. Rouquer*, 19 La. 594. A sale to one not a creditor must be considered as one made in the ordinary course of business, if made for an adequate consideration paid in cash. The fact that a portion of the purchase money was applied to the discharge of the vendor's debts will not vitiate it as an onerous contract. Such was the view taken of a transaction of this kind in *Maurin v. Rouquer*. It may well be that the act of Navas, in applying \$700 of the purchase money to the payment of Donnes, was an unlawful preference given to him over other creditors; and his failure to apply the remaining \$300, that he received, to the satisfaction of other debts he owed, was a fraud on their rights. But neither can afford just ground for the resolution of the sale to Rougaignoc, on the charge of simulation, without the further proof that he was but a party interposed to take title only for the purpose of secreting it from the creditors of Navas. There is no proof in the record to show that Navas was not really indebted to Donnes in the sum of \$700, or that that sum was not paid him in satisfaction of his note. It is undenied that Maylie advanced to Rougaignoc \$1,000 with which to pay Navas, and \$400 to enable Rougaignoc to pay rent and other bills. The conveyance to Maylie squared the transaction all around. It may be true that this would have been a fraudulent transaction if Rougaignoc had been indebted to any one else. But, from the evidence, we are authorized to assume that Maylie was the only one; hence there was no impediment to the conveyance. It was perhaps the original purpose of Navas to make a simulated sale to Rougaignoc, but, for some reason, that purpose was altered, and the sale, as described, was entered into. There can be no reasonable doubt in regard to Maylie having expended \$1,400 in cash in these transactions, and that Navas was the recipient of \$1,000 thereof, the most of which was employed by him in discharge of debts. The prayer of the plaintiff's petition is that said acts "be decreed to be fictitious, false, simulated, and fraudulent, and that same may be set aside and held for naught." Under the state of facts above recited, his prayer cannot be granted. These transactions may have been made for an inadequate price; may have been intended on the part of Navas to defraud the plaintiff and other creditors; and may have affected them injuriously; but, in the total absence of any appropriate allegation or prayer, such relief was improperly awarded the plaintiff in the lower court. The judgment is erroneous in so far as it annuls the sale and *dation en paiement* complained of, recognizes a lien and privilege on the property therein described, and condemns Bernard Maylie for the payment of plaintiff's demands; and in these particulars it should be amended.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to reject and disallow the plaintiff's demand for the annulment of the sale from Manuel Navas to Henry Rougaignoc, and the *dation en paiement* from Henry Rougaignoc to Bernard Maylie; so as to disallow his demand for personal judgment against the latter for the debt of Navas; and so as to reject his demand for the recognition of his mechanic's lien on the property included in said acts, and disallow his injunction and

sequestration. It is further ordered, adjudged, and decreed that, in all other respects, said judgment be affirmed, and that the cost of appeal be taxed against the plaintiff and appellee.

ON APPLICATION FOR REHEARING.

(April 16, 1888.)

WATKINS, J. 1. The plaintiff and intervenors apply for a rehearing, on the ground, mainly, that, if they "have failed to prove the *simulation*," their suit should be maintained "under the prayer for the annulment of the contracts, and for general relief." Our opinion quotes the prayer relied on. We considered that their sole reliance was upon proof of the charge of simulation, as there was no alternative allegation or prayer that, if the conveyances were not simulated, they were fraudulent. Such demands have been considered as not inconsistent. In the absence of such alternative prayer, we thought it out of our power to grant such relief. But, indeed, if such demand and prayer had been specifically made, it could not have been determined by us, because of our want of jurisdiction; the plaintiff's moneyed demand being less than \$2,000, and that being the test in a purely revocatory action. Their application must therefore be refused.

2. The defendant Maylie complains that he was not relieved from the cost of the lower court, because the judgment of that court was, as to him, reversed entirely. In this we think he is clearly correct, and our judgment should be amended.

It is therefore ordered, adjudged, and decreed that our former judgment and decree be so amended as to tax the plaintiff and appellee with all the cost in the court *a quo* appertaining to the defendant and appellant Maylie, and that, as thus amended, it remains undisturbed. Rehearing refused.

(40 La. Ann. 264)

SCHWARTZ v. SAITER.

(*Supreme Court of Louisiana. March 26, 1888.*)

1. MECHANICS' LIENS—PROPERTY SUBJECT TO—BUILDINGS ON LANDS DEDICATED TO THE PUBLIC.

A contractor's privilege attaches to constructions and works erected on soil that is dedicated to public use.

2. SAME—ASSIGNMENT OF LEASE—RIGHTS OF ASSIGNEE.

Notwithstanding a purchaser, who buys, without qualification, an unexpired lease, assumes the obligations of the lessee, yet he is relieviable therefrom, if he should be deprived, by the lessor, of the enjoyment of the lease.

3. LANDLORD AND TENANT—LEASES—LIABILITY OF LESSEE FOR LOSS BY FIRE.

A lessee is not responsible for losses that are occasioned by fire, without his fault or negligence.

4. SAME—BUILDINGS ON LEASED PREMISES—CONTRACT WITH LESSEE.

The contractor's privilege attaches to constructions and works that have been erected on the leased premises, under a contract with a lessee, in the place of others that have been destroyed by fire, during the term of the lease, without his fault or neglect.

ON APPLICATION FOR REHEARING.

1. COSTS—ON APPEAL—WHO ENTITLED TO.

An appellant who succeeds in obtaining an amendment favorable to himself of the judgment appealed from is entitled to have the costs of appeal taxed against the appellee.

2. SAME.

In case the appellant, as plaintiff in the lower court, had a general judgment rendered against him, from which he obtains partial relief on appeal, he is entitled to have the costs of the court *a quo* taxed against the defendant and appellee in this court.

3. MECHANICS' LIENS—PROPERTY SUBJECT TO—RESTRICTION OF AMOUNT.

The judgment having limited the seizure and lien of a seizing creditor to particular property under seizure, against which he has a claim for material and workmanship, should be restricted to the amount thereof.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge. Action between Moses Schwartz and W. S. Saiter, involving the sale of certain personal property. Third opposition of the New Orleans, Spanish Fort & Lake Railroad Company. The railroad company appeals.

*Robert Mott and Harry H. Hall, for appellant. Bernard Titcher and T. M. Gill, for appellee.*

WATKINS, J. This is a third opposition, coupled with an injunction against the sale of certain personal property as that of the judgment debtor. Schwartz obtained judgment against W. S. Saiter individually, and as lessee of opponent's property, known as the "Spanish Fort," for an amount due on an open account, for material furnished and by him employed in the construction of certain buildings at or adjacent thereto, which inclosed the machinery for operating the electric light; in building certain cisterns; and laying the foundations for the machinery, etc., with recognition of his contractor's and vendor's lien thereon. A detailed bill is made a part of the petition, and is referred to in the judgment for particulars of description. This property was seized under execution, and also Saiter's rights under his lease from opponent, and advertised for sale. The railroad company makes opposition on the following grounds, substantially, viz.: That it had leased the Spanish Fort and railroad property for a term of years, expiring on the 31st of December, 1885; and that, at the execution of the lease contract, there were on the premises an electric light, boiler, dynamo, pipes, cisterns, and other appurtenances, and also a building in which the electric light machinery was contained. That there are now upon the premises similar, if not the same, items of property. That it has a judgment against Saiter for a large balance due on rent, and a lien and privilege on said plant, which primes that of Schwartz. Subsequently opponent amended its opposition, and in the alternative asserted ownership of the property, and averred Schwartz to be its vendor and warrantor, and that on that account he could not seize it as Saiter's. It avers that the said lessee had contracted to insure the premises and property leased for its benefit, and restore same in good condition at the expiration of the lease; that the building containing the dynamo and other machinery was destroyed by fire, and the dynamo and machinery injured thereby, and Saiter replaced the building, and repaired the machinery; and for the repairs, replacement, and materials furnished the seizing creditor claimed a first lien and privilege, and obtained a judgment therefor, when he was not entitled to it; that at the time he furnished materials and did the work he knew that it was opponent's property, and that Saiter was its lessee, and gave it no notice, and did not procure its assent thereto; that his claim is not valid on that account; and said services and materials furnished do not affect the property with a privilege. It avers that, notwithstanding the electric light machinery, building, etc., are not covered by the judgment, nor included in the sheriff's inventory of property seized, they were included in the seizure and advertisement of sale. The opponent's injunction forbade the sale of all the property that was seized, and advertised for sale, except Saiter's unexpired lease; and it was adjudicated to Schwartz for \$125. At a subsequent stage of the proceedings opponent filed, as a peremptory exception, founded on the law, and as a plea in bar of Schwartz's right to recover on his judgment at all, the following, viz.: That there remains unpaid on the judgment against Saiter for rent, a balance of \$8,000, in addition to taxes, repairs, licenses, and insurance premiums due, and Schwartz became bound for the payment thereof by virtue of his purchase of Saiter's unexpired lease, one of the obligations of which was the return of the property in like good condition as when received; hence his judgment became extinguished by confusion, he having taken the lessee's place in the contract, which imposed the duty on the latter of replacing the property in the condition it was when entered into. Schwartz, in his answer,

denies that the property replaced in the stead of that which was destroyed by fire is situated within the limits of what is known as "Spanish Fort;" and the contention of his counsel is that it was erected in a public street, or in what was denominated as a public street, of the city, and as such dedicated to public use, and therefore opponent is without right, title, or lien in the premises. Schwartz admits his purchase of Saiter's unexpired lease at sheriff's sale, but avers that he was prevented by opponent's injunction from obtaining possession of the leased premises thereunder, during its continuance, and from in any manner using or enjoying the same, and claims his exoneration from liability for the obligations of the lessee, whatever they may be, on that account.

1. It must be borne in mind that the seizure was of personal property exclusively, and of Saiter's unexpired lease, which terminated on December 31, 1885; and that our jurisdiction is restricted, in this character of action, to the property seized, and the determination of the rights of the contestants thereto, or the proceeds thereof. For this reason it is not our province to decide whether the soil on which the building and the electric light plant are situated is a *locus publicus*, or not. That question is not, however, a serious one, as our predecessors held, that "because the soil upon which a building is erected cannot be sold to pay the costs of its erection, it by no means follows that the building itself may not be. The §249th article of the Civil Code gives the lien upon the building and upon the lot of ground, and then proceeds to provide for the case where the lot of ground belongs to another than the party having the work done, and when, therefore, it is not alienable in satisfaction of the debt. We think the spirit of this article requires us to recognize the lien on the building." *McKnight v. Parish of Grant*, 30 La. Ann. 361. The claim made in the case and recognized was for materials furnished and work performed in the construction of a jail that plaintiff had built on a spur of ground that had been dedicated to public use. In that instance the contractor dealt with the police jury, a public corporation, while in this he dealt with the lessee of a private corporation. In the former the building was erected in a public square, while in the latter it is claimed to have been built in a public street. There is a complete parallel between the two cases; but if there is not it is quite evident that both contestants occupy the same attitude with reference to the enforcement of their respective liens on the property, and that the seizing creditor holds such relation to opponent's title as to preclude his questioning his ownership of the property leased to Saiter, Schwartz having been one of the directors and principal stockholders of the company that conveyed it to the opponent, and acted as his agent in negotiating and consummating the sale. Under this state of facts it would violate equity to permit Schwartz to take advantage of any defect in opponent's title, or avail himself of any possible deficit in the quantity of property sold.

2. With regard to opponent's contention that it was the duty of Saiter, under the contract of lease, to replace, at his own expense, the building and machinery that were destroyed or injured by fire, and that he, as lessee, was without right or power to make a contract with Schwartz for their construction, and bind it therefor, it would seem to be sufficient answer to refer to the following clause in the contract: "And it is expressly understood and agreed that the said party of the second part shall be held liable for any damage or loss of any property of whatsoever description, excepting only (that destroyed) by fire, the acts of the elements, *vis major*, and reasonable wear and tear." This provision of the contract is in exact conformity with the law, which declares that "the lessee is only liable for the injuries and losses sustained through his own fault." Rev. Civil Code, art. 2721. "He can only be liable for the destruction occasioned by fire, when it is proved that the same happened either by his own *fault or neglect* or by that of his family." Rev. Civil Code, art. 2723. There is no averment in the petition of opposi-

tion that the property of the company was injured or destroyed by fire through Saiter's fault or neglect; and if, as alleged, the insurance was paid him, the inference is that the loss was not occasioned by his fault or neglect. There is no force in the contention that the railroad company should be relieved from responsibility because the lessee gave it no notice of the loss by fire, and of the necessity of replacing the building and machinery, because of its judicial averments of the loss and injury by fire, without any averment that same were occasioned through the lessee's fault or neglect; and because it makes claim to the property put in the place of that which was lost and injured by fire. It is a matter of no special importance whether or not Saiter collected and used the insurance money, and failed to employ it in the replacement and repair of the lost and damaged property, as the effect of the stipulation of the contract on that subject must necessarily be confined to the parties, and cannot affect Schwartz. The company could have protected its lease by having required the lessee to place the insurance policy, as a pledge, in its possession; and, having failed in this, it must suffer the loss sustained thereby.

8. The next contention that we shall consider is that raised on the exception and plea in bar. It is undeniable that the sale of the unexpired term of a lease includes the obligations as well as the rights of the lessee, and that a purchaser who buys without qualification obliges himself to discharge his obligations. *Lehman v. Dreyfus*, 37 La. Ann. 587; *Bartels v. Creditors*, 11 La. Ann. 433; *D'Aquin v. Armant*, 14 La. Ann. 218; *Brinton v. Datas*, 17 La. Ann. 174; *Walker's Syndic v. McVean*, 39 La. Ann. 743. But Schwartz alleges that on the 11th of August, 1885, the day subsequent to the one on which the unexpired term of Saiter's lease was adjudicated to him, the opponent enjoined him from taking possession of said property; that its injunction remained in force until it was perpetuated in January, 1886; that in the mean while the full term of the lease had expired; and that, by the immediate operation and effect of said injunction, he was deprived of the enjoyment of the lease, and must of necessity be exonerated from the lessee's obligations. This assertion is fully borne out by the record. The opponent's injunction precludes its assertion against the purchaser of the implied obligations of the lessee.

4. The contention of opponent to the effect that a contractor, who furnishes material, and constructs a building upon leased premises, in pursuance of a contract with a tenant, has no lien or privilege on the property under lease, is supported by the authorities cited. *Hoffman v. Laurans*, 18 La. 70; *Sewall v. Duplessis*, 2 Rob. (La.) 66. But the 3249th article of the Revised Civil Code contains a provision not found in the corresponding article of the Code of 1825. It is in these words, viz.: "The above-named parties, *i. e.*, architects, contractors, etc., shall have a lien and privilege upon the building, improvement, or other work erected, etc., \* \* \* and if such building, improvement, or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease, and shall not affect the owner." We are not aware of any decision of this court that has ever given an interpretation of this article, but it is reasonable to infer from the provisions quoted that the lease contemplated is one of property that is unimproved; that the owner thereof shall not be affected by any construction subsequently erected thereon by the lessee, and which was not originally part of the "property under lease;" and that the contractor who erected it has a privilege thereon as an integral part of the "lease." Antecedent to the revision of the Code, in 1870, the contractor had no such privilege. It is not awarded against the lessee, but against the lease. The quoted paragraph declares that it shall not affect the owner. The employment of these terms clearly indicates the purpose and object to be that the construction forms a part of the lease, and that the privilege of the contractor attaches to it. In this manner it could be made effective. But should it be held that such a con-

struction or work became the property of the lessor of the lot of ground, free of the contractor's lien, it would be deprived of all force and efficacy, as nothing applicable to it would remain. There is a provision in the contract of lease to the effect that at the termination of the lease all the repairs and improvements made by the lessee shall become the property of the lessor; but that "the buildings and constructions put upon the property shall belong to the lessee," etc. It is therefore obvious that if the constructions under consideration had not been intended or designed to replace those lost and destroyed by fire, the lessee would have a seizable interest in them; hence we must conclude that inasmuch as the loss by fire was not occasioned by Saiter's fault or neglect, and as he was not bound to make their replacement, that Schwartz's seizure was justified, and must be maintained to that extent. Schwartz's judgment covers all the property that is mentioned in the itemized account, as having been either constructed or repaired; but we are of the opinion that it should be restricted to the constructions that were made in replacement of those which were destroyed by fire.

5. In respect to opponent's contention that his lessor's lien primes that of the contractor, it is only necessary to cite in answer the 3234th article of the Code, which declares that the contractor shall be paid "in preference to other privileged debts of the debtor, even funeral charges," etc. Rev. Civil Code, art. 3267. The contractor's privilege is therefore first in rank, *quoad* the new constructions and works, and should be paid from the proceeds of their sale, in preference to opponent's lessor's lien; but his lien does not attach to the property of the lessor which he repaired or improved under a contract with his tenant.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended in so far as to reject and disallow the privilege of the seizing creditor for materials furnished and work performed in the repair of "the property under lease," and to maintain and perpetuate the opponent's injunction to that extent. It is further ordered, adjudged, and decreed that in so far as said judgment recognizes and enforces the contractor's lien of the seizing creditor on the new buildings and other works erected in the replacement of those that had been destroyed by fire, and which contain the electric light machinery and apparatus, that the opponent's injunction be dissolved, and it be affirmed. The cost of appeal is taxed against the seizing creditor and appellee.

#### ON APPLICATION FOR REHEARING.

(April 16, 1888.)

WATKINS, J. Both appellant and appellee desire a rehearing on some points of minor importance. Without stating them in detail, we will simply say: 1. That the effect of the judgment of Schwartz against Saiter, both as to the debt and privilege, is confined to those litigants, and does not have any bearing or influence on the demands of the third opponent. This is elementary.

2. A simple perusal of our opinion will disclose the fact that the seizing creditor's mechanic's and contractor's lien, for materials furnished and work performed, in making repairs and constructions, was the principal question that was discussed therein. It is difficult to understand how a vendor's lien could be seriously asserted against the material contained in a building, or the parts thereof, and which had become thus indistinguishable.

3. It has been settled by numerous decisions, and is not an open question, that an appellant who succeeds in obtaining an amendment favorable to himself of the judgment appealed from is entitled to have the costs of appeal taxed against the appellee. This is true of the instant case.

4. But the appellant claims that as it was the plaintiff in third opposition in the court below, and a general judgment went against it therein, from which he has obtained relief in part in this court, and thus procured the per-

petuation of his injunction against the seizure *pro tanto*, it is entitled to have the costs of the court *a quo* taxed against the appellee. In this view we think his counsel are correct. It is the rule of law that if the plaintiff recover any portion of his demand, he is entitled to costs. Had the judge *a quo* rendered the judgment we have pronounced it would have carried costs in his favor; and, as our decree sustains its demands in part, and *ab initio*, it must have a like effect.

5. The further contention of appellant's counsel is that our decree should be supplemented so as to limit the portion of Schwartz's judgment that is to be enforced against the property subject to his contractor's lien. This is a reasonable and proper request. Having restricted his seizure and lien to the constructions established in the replacement of those that were destroyed by fire, the amount of Schwartz's demand therefor should be likewise restricted, so that he should receive from the proceeds of sale, when made, nothing in excess thereof in case a larger sum should be realized. But this amount can be easily ascertained from the judgment of the lower court and Schwartz's account, which forms a part thereof, and hence it is unnecessary that a rehearing should be granted for that purpose.

It is therefore ordered, adjudged, and decreed that the following items of indebtedness of W. S. Saiter to and in favor of Moses Schwartz, seizing creditor, shall be collected from the proceeds of the sale made in pursuance of our judgment and decree, and no others, viz.:

Building, inclosing machinery, and one cistern,	\$650
Roofing and tinner's work	75
Building foundation	60
Labor in erecting and constructing same	125

\$910

Cr.: By amount of value of old dynamo . . . . . 125

Amount balance . . . . . \$785

It is further ordered, adjudged, and decreed that the cost of the lower court be taxed against the seizing creditor and appellee, and that, as thus limited, our former decree remain undisturbed. Rehearing refused.

(40 La. Ann. 277)

**PEOPLE'S BREWING CO. v. BABINGER et al.**

(Supreme Court of Louisiana. April 16, 1888.)

ON MOTION TO DISMISS.

**1. INJUNCTION—TO EXECUTION OF JUDGMENT—FILED IN ORIGINAL SUIT—APPEAL.**

Under the rules of the civil district court an injunction proceeding against the execution of a judgment is filed and treated as part of the suit in which the judgment enjoined was rendered. In such a case, after judgment rendered in the injunction proceeding, where neither appeal requires any bond, except for costs, appeals from both judgments may well be taken under one order and one bond fixed by the court. *Succession of Clark*, 80 La. Ann. 801; *Succession of Gaddes*, 85 La. Ann. 968.

**2. APPEAL—REQUISITES—INACCURACIES IN BOND—DESCRIPTION OF JUDGMENT.**

Inaccuracies in an order or bond of appeal in describing the judgments appealed from will not invalidate the appeal if the description contains statements sufficient to identify the judgments referred to.

ON THE MERITS.

**1. CORPORATIONS—REFUSAL TO DELIVER SUBSCRIPTION LIST—RIGHT OF CORPORATION.**

Defendants were sued to deliver a list containing subscriptions of various parties to 800 shares of the stock of plaintiff corporation of the face value of \$50 per share, and, in default of such delivery, for judgment condemning them to pay the value of said list. *Held*, that the utmost consequence which the law could attach to defendant's default in non-delivery of the list could not exceed a personal obligation to discharge the liabilities of the subscribers in accordance with the terms of their subscriptions, and that a judgment condemning them to pay \$40,000 cash on such

default, where the subscriptions were on terms of credit, and without recognizing or reserving their right to receive the stock subscribed for, is manifestly insupportable.

2. SAME.

The foregoing robs the injunction proceedings of all significance.  
(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

Suit by the People's Brewing Company against John Babinger and others for \$40,000, plaintiff claiming same as amount due it for subscriptions collected by defendants. The latter appeal.

J. Q. A. Fellows, for appellants. Branch K. Miller, for appellee.

#### ON MOTION TO DISMISS.

FENNER, J. The plaintiff, alleging itself to be a corporation, obtained and confirmed a judgment by default against the defendants, condemning them to deliver up certain subscription lists within 24 hours after the judgment should become final, and in default of such delivery within said time to pay to plaintiff \$40,000, with right to execution for said sum at the expiration of the delay without delivery of the lists. The judgment was signed on December 16, 1887, and on January 7, 1888, *fi. fa.* was issued, under which the sheriff was proceeding when arrested by an injunction issued on the petition of defendants. The petition for injunction denied the corporate existence of plaintiff, and made its alleged president, E. Ehrensing, a party individually, together with the sheriff. In this latter proceeding judgment was rendered dismissing the action and dissolving the injunction. Under the rules of the civil district court injunction proceedings to enjoin the execution of judgments are "treated as parts of the original suits out of which they arise," and are "docketed and numbered as parts of such suits." Hence, desiring to appeal from both the original judgment and that in the injunction proceeding, defendants applied for and obtained a single order of appeal from both, directing the furnishing of a single bond fixed at \$250, which was executed, and under these proceedings the appeal is brought up.

Various grounds are assigned for dismissing the appeal, which, however, may be summarized as follows:

1. That the two appeals could not be embraced in one order of appeal, or supported by a single bond. We think the appeals are fully protected by the equitable rule announced in *Succession of Clark*, 30 La. Ann. 801, and affirmed by the present bench in *Succession of Geddes*, 36 La. Ann. 963. Under the rules of the court both judgments were rendered in the same suit. The two judgments are so closely related to each other that the ends of justice will be advanced by considering them together. The first judgment is appealed from only devolutively, and the second did not condemn the appellants to pay any money or deliver anything. Therefore a bond for costs was all required in either case, and, as said in *Clark's Case*, "the costs are as fully secured by one bond with sufficient security in a sufficient amount as by any number of bonds." So as far as the distinctness of parties is concerned it is more apparent than real. The sheriff is a nominal party without interest and need not be considered. It is evident that Ehrensing is enjoined as the party representing the original plaintiff in executing the judgment, and the only reason why he is not sued in the capacity of president of the brewing company is because defendants expressly deny the corporate existence of said company. The suggested difficulty of adjusting the costs under one bond for two separate judgments was considered and disposed of in *Clark's Case*. The only effect of separating the appeals would be to increase the costs.

2. It is claimed that both the order and the bond of appeal are defective for want of sufficient description of or reference to the judgment appealed from.

We have examined the order and bond, and find that both give correctly

either the date of rendition or the date of signature of each judgment in such manner as fully to identify the judgments referred to. *Pasley v. McConnell*, 8 South. Rep. 485, recently decided. The motion to dismiss is, therefore, denied.

ON THE MERITS.

FENNER, J. As appears from our opinion on the motion to dismiss, this appeal is taken from two judgments, which we shall consider separately.

1. The substance of the petition on which the first judgment was rendered is that the defendants, Babinger and Auer, had obtained subscriptions to the stock of plaintiff company to the amount of 800 shares at the par value of \$50 each, and that the lists of said subscription had been delivered into the possession of plaintiff's secretary; that subsequently said Babinger and Auer had obtained possession of said list, through certain false pretenses, and had refused to return the same; that said list was of the value to petitioner of \$40,000; and judgment was asked condemning said defendants to deliver said lists within 24 hours from finality of judgment herein, in default of which they be condemned *in solido* to pay the petitioners the sum of \$40,000. Judgment by default was taken and confirmed according to the prayer of the petition. A new trial was applied for and refused, and after the lapse of 24 hours from the signing of the judgment execution was issued against defendants for \$40,000. We need not go further than to say that the alternative part of the judgment cannot be sustained. The allegations of the petition, and the evidence on which the default was confirmed, show that the lists contained subscriptions by unknown persons to the stock of the company to the amount of, say, \$40,000, payable only as the price of 800 shares of the stock of said company, to be delivered to the subscribers on such payments, and payable only partly in cash and partly at certain deferred periods. Manifestly the utmost consequence which the law could attach to the defendants' abstraction and non-deliverance of the list could not exceed a personal obligation to discharge the liabilities of the subscribers thereon, in accordance with the terms of their subscriptions, and the list could not have a greater value to petitioner, or to anybody else, than would result from such discharge. A judgment condemning them for such default to pay \$40,000 cash, and without even a reservation or recognition of their right to demand and receive a corresponding amount of stock, is certainly unsupported by any consideration of law or equity. We decide, and even express an opinion upon, no other question in the case except that the judgment as rendered cannot be maintained, not even suggesting whether any other, or what other, judgment might have been rendered. We think the ends of justice require that the judgment should be reversed, and the case remanded for further proceedings according to law, upon the default taken, and without prejudice to the rights of defendants to set the same aside on filing answers.

2. The foregoing decision robs the injunction proceeding from the judgment in which appeal is also taken of all significance. We need not consider or disturb it. It is therefore ordered, adjudged, and decreed that the judgment confirming the default rendered on December 2, and signed December 16, 1887, be, and the same is hereby, reversed and set aside, and that the case be remanded to the court below for further proceedings on the default taken, without prejudice to the rights of defendants to set same aside on filing answer. It is further ordered and decreed that the judgment in the injunction proceedings be affirmed, costs of appeal to be divided between appellants and appellee.

(40 La. Ann. 417)

WILLIAMS v. PULLMAN PALACE CAR CO. *et al.*

(Supreme Court of Louisiana. April 16, 1888.)

1. **RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—RULINGS OF SUPREME COURT.**  
In dealing with matters of litigation growing out of the construction of railway law in connection with railway accidents, the supreme court of Louisiana will endeavor to place its rulings in line and in harmony with the adjudications of the supreme court of the United States, and of the courts of last resort of the states of the American Union, in all cases in which they do not conflict with the special and exceptional system of laws prevailing in Louisiana.
2. **SAME—ACCIDENTS TO TRAINS—WHO ARE SERVANTS—PULLMAN CAR PORTER.**  
In cases involving the responsibility of a common carrier, such as a railway company, for injuries sustained by one of its passengers, the porter and other employees of the Pullman Car Company, forming part of the railway company's train, will be considered as the servants and employees of the railway company.
3. **SAME.**  
Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, is the negligence of the railroad company. *Pennsylvania Co. v. Roy*, 103 U. S. 451; *Thorpe v. Railroad Co.*, 76 N. Y. 402.
4. **MASTER AND SERVANT—ASSAULT ON PASSENGER BY RAILROAD EMPLOYEE—LIABILITY OF COMPANY.**  
A railway company is liable in damages for a wanton and malicious assault by one of its servants on a passenger. *Goddard's Case*, 57 Me. 202.<sup>1</sup>
5. **SAME—ASSAULT ON PASSENGER BY SLEEPING CAR EMPLOYEE—LIABILITY OF COMPANY.**  
A railway company is responsible for injuries received by one of its passengers at the hands of a porter of a sleeping car, forming part of the railway company's train, if it appears that said passenger was not a trespasser on the sleeping car.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

Suit by Henry E. Williams against the Pullman Palace Car Company and the Louisville, New Orleans & Texas Railway Company, for \$25,000, for injuries inflicted upon him by a porter of defendant's car. He appeals from judgment rejecting his demand against the railway company. For appeal from judgment in his favor against the Pullman Car Company, see 3 South. Rep. 631.

W. S. Benedict and Reade & Goodale, for appellant. Percy Roberts and Farrar & Kruttschnitt, for appellee.

POCHE, J. This appeal presents plaintiff's claim for damages against the Louisville, New Orleans & Texas Railway Company for personal injuries received by him, at the hands of the porter of the Pullman Car Company, on the 23d of November, 1885, while he was a passenger of the railway company between Zachary station and Baton Rouge. His demand was against both companies *in solido*, but on motion separate trials were granted, resulting in a verdict in his favor against the Pullman Company, and in the other case in favor of the railway company. On appeal to this court the judgment in his favor against the Pullman Company was reversed, and his demand rejected. His present appeal is from the judgment below which rejected his demand against the railway company. The pleadings and the evidence are the same in both cases; and, as they are stated with precision and at length in our opinion in the first case, they need not be repeated here. See *Williams v. Car Co.*, 3 South. Rep. 631. It is in proof, and it is not disputed, that plaintiff had paid his fare as a passenger on the defendant's train, and that he was, as such, entitled to all the privileges and to the protection which a common carrier or transporter owes to its passengers. Defendant's main contention is

<sup>1</sup>See, also, *Railway Co. v. Savage*, (Ind.) 9 N. E. Rep. 85; *Murphy v. Railroad Co.*, 28 Fed. Rep. 667; *Railroad Co. v. Wood*, (Ind.) 14 N. E. Rep. 572.

that plaintiff was a trespasser in the Pullman car, and that he thereby forfeited his right to protection from the railway company, according to the terms of his contract of transportation. Under our understanding of the issues presented by the pleadings, plaintiff's right of recovery against the railway company hinges upon the proper solution of the two following questions: (1) Can the railway company be held liable for the acts of an employe of the Pullman Car Company under any circumstances? (2) Was plaintiff a trespasser on the Pullman car when he was struck by the porter, or was he then entitled to the full protection of the railway company as one of its passengers.

1. An extended review of decisions of American courts has brought to our attention several adjudications which hold the affirmative of the first question which we are called to discuss in this case. In one of those decisions, the following principle is announced: "Passengers upon a railroad taking a drawing-room car have a right to assume that they are there under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts in the discharge of their duty it is liable." *Thorpe v. Railroad Co.*, 76 N. Y. 402. The substantial facts of that case were that a passenger on one of the defendant's trains, finding all the seats occupied in the ordinary or day coaches, walked into a drawing-room car attached to, and forming part of, the train, and took a seat therein. When called upon by the porter to pay the extra charge for a seat in that car, he refused to pay the sum demanded, for the reason that he could find no seat elsewhere, whereupon the porter attempted to eject him from the car, and for this assault he brought a suit for damages. On appeal from a judgment in his favor, and against the railway company, the court of appeals of New York recognized his action, and enforced the liability of the railway company for the acts of the porter or employe of the drawing-room car company. Among other things, the court said: "The general principle is well settled that, to make one person responsible for the negligent or tortious act of another, the relation of principal and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrong-doer and the person sought to be charged. The defendant relies upon the absence of that relation between the porter and the company as conclusive against its liability for his acts. But we are of opinion that this defense is not available to the defendant, or rather that the persons in charge of the drawing-room car are to be regarded and treated, in respect to their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company." Sanctioning the same rule, the supreme court of the United States enforced the liability of a railway company for damages received by one of its passengers while he occupied a seat in a Pullman Company car attached to the defendant's train. The accident had been caused by the falling on the head of the passenger of the upper berth of the sleeping car, and was due to the unsafe condition of the brace or arm which supported the upper berth, and which was afterwards found to be broken. *Pennsylvania Co. v. Roy*, 102 U. S. 451. In dealing with the question which now concerns us, the court said: "The undertaking of the railroad company was to carry the defendant in error over its line, in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car, with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping car, constituting a part of the carrier's train, for an additional sum paid to the company owning such car. As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace Car Company, or that such company provided, at its own expense, a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not consistently with the law, and the obli-

gation arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. \* \* \* For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employes of the railroad company. [Italics are ours.] Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company." In a case predicated on similar facts, the supreme court of Ohio applied the same rule. *Railroad Co. v. Walrath*, 38 Ohio St. 461. Commenting on the preceding and other adjudications, Wood, in his work on Railway Law, has formulated the rule as follows: "The practice of running trains controlled by two distinct and separate corporations has become quite common in this country, and, as a result, questions as to the relation or liability of these corporations will be likely often to arise. It has been held in several cases that when a passenger has purchased a ticket of a parlor-car company, entitling him to ride in its car, and also a passage ticket of the railway company, the railway company is to be regarded as liable for the negligence of the parlor-car company, and that its servants are to be treated as the servants of the railway company in everything that regards the safety and security of the passenger." 8 Wood, Ry. Law, p. 1442, § 366.

Believing that, in a question of such vast importance on matters of litigation likely to arise in all parts of the American Union, this court should seek to place its rulings and jurisprudence in line and in harmony with those of the supreme court of the United States and of the courts of last resort of our sister states, wherever those decisions do not militate against the principles of our special and exceptional system of laws, we deem it our duty, without hesitation, to adopt the conclusions which so clearly flow from the highly respectable authorities to which we have just referred, and from which we have thought it proper and useful to make the foregoing copious quotations. Applied to this case, in which it appears that the Pullman car was attached to the defendant's train, under the same circumstances, rules, and regulations, and for the same purposes, as shown in the cases hereinabove mentioned, the rule of law, thus sanctioned, leads to the legal conclusion that, for the purposes of this contention, the porter of the sleeping car, by whom Williams was stricken down and injured, must be treated as being, at the time, a servant or employe of the defendant company, and, as such, intrusted with the duty of contributing, in the performance of his legitimate duties, to the safety and security of the passenger whom the railway company had undertaken to carry safely over its line. Hence it follows that the railway company must be held liable for injuries sustained by one of its passengers through the negligence or fault or other acts of the porter in question; and, under well-established jurisprudence, it is equally clear and logical that such liability extends to and embraces injuries inflicted on the passenger by means of a willful and malicious assault by a railroad employe on the passenger. That responsibility is the subject of a very able and masterly discussion by the supreme judicial court of Maine in the *Case of Goddard*, 57 Me. 202, in which a passenger was allowed exemplary as well as compensatory damages for gross insult heaped upon him by a brakeman on the train on which he was then traveling. In that opinion, from which we made copious extracts in our previous decision, (3 South. Rep. 631,) the court enforced the rule that "a common carrier of passengers is responsible for the willful misconduct of his servants towards its passenger." "A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train, has a remedy therefor against the company." In *Railroad Co. v. Van-diver*, 42 Pa. St. 365, the railway company was held liable for injuries in-

flicted on a passenger by a violent ejection from the train. A like responsibility was decreed against the railroad company for injuries sustained by a lady passenger in a general fight between drunken passengers in the coach in which she occupied a seat, on the ground that the conductor had not used the proper means to quell the disturbance. *Railway Co. v. Hinds*, 53 Pa. St. 512. Our own jurisprudence has sustained an action by a lady passenger against the owner of a vessel for insulting and abusive language used to her and about her by an employee of the common carrier. The principle is thus summarized in that opinion: "The master of a vessel is liable for the indecent and inhumane conduct of himself and of his crew, enacted by him towards a passenger." "Owners of vessels carrying passengers for money are subject to the same responsibility for a breach of duty by their officers to the passengers as they would be in regard to merchandise committed to their care." *Keene v. Lizardi*, 5 La. 431. We therefore conclude that the case is with plaintiff, unless it should appear that he was a trespasser on the Pullman car when the incident occurred resulting in his injuries.

2. And this brings us to the consideration of the second question involved in the controversy. Under the result of our examination of the evidence as announced in our previous opinion, this question offers no difficulty in the present case. We said on that subject: "We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to have the privilege, and that, in addressing the porter, he was dealing with him as a servant of the company." A second examination of the record has had the effect of confirming the correctness of that conclusion. The preponderance of the evidence on that point, although very conflicting, shows, to our entire satisfaction, that plaintiff did ask permission of the porter to wash his hands, and that, after an exchange of a few unpleasant words, the porter struck him on the head with a blunt instrument while plaintiff was standing at the threshold of the door of the Pullman car. He was stunned by the blow, which felled him to the platform, whence he was picked up and brought to the forward car by one of his friends. His testimony, as to the main features of the incident, is corroborated by that of two other witnesses, although no witness saw the whole incident. Hence we conclude that the attack was unprovoked, unjustifiable, and willful on the part of the porter, for whose conduct the defendant company must be held liable in damages. As the Pullman Car Company, the immediate and direct employer or master of the wrong-doer, has been shielded from responsibility by our previous decree, the case may be a hard one on the defendant; but, under the authorities by which we have been guided, the hardship appears inevitable. Our ruling in that case rested on a pivotal feature that there existed no contractual relations between plaintiff and the company. Our conclusions find ample support in the decision of the case in 76 N. Y., hereinabove referred to, in which the railway company was made to respond for the ejection of a passenger from the drawing-room car in which he claimed the right of occupying a seat without paying therefor. On this point we quote from the opinion of the supreme court of the United States in *Roy's Case*, 102 U. S. 458, the following utterances: "Whether the Pullman Car Company is not also and equally liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any questions between it and others." Under all the circumstances of the case, we hold that plaintiff is entitled to recover damages in the sum of \$1,000.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the verdict of the jury set aside;

and it is now ordered that plaintiff do have and recover judgment of the defendant, the Louisville, New Orleans & Texas Railway Company, in the sum of \$1,000, and for costs in both courts.

(40 La. Ann. 437)

### Succession of DEJAN.

*DEJAN et al. v. SCHAEFFER.*

(*Supreme Court of Louisiana.* April 16, 1883.)

**1. DESCENT AND DISTRIBUTION—RIGHTS OF SURVIVING WIFE—SEPARATION OF PROPERTY.**

The collateral attack, by simple heirs, on the validity of a judgment of separation of property between a deceased husband and his surviving wife, must be restricted within the same limits which would circumscribe an attack made by the husband himself if he were alive.

**2. SAME—RIGHTS OF CREDITORS AND FORCED HEIRS.**

Creditors and forced heirs alone can, in a collateral manner, justify an inquiry into the validity of such judgments on their merits.

**3. SAME—RIGHTS OF SIMPLE HEIRS.**

Simple heirs at law derive their rights from the husband or wife, as the case may be, and can institute no attack and no inquiry which would not be opened to the deceased, under whom they claim, if he or she were alive.

**4. SAME—JUDGMENT OF SEPARATION OF PROPERTY—ACTION TO SET ASIDE.**

In such a case the inquiry must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceeding established by law.

**5. HUSBAND AND WIFE—COMMUNITY PROPERTY—CREATION OF—LEGAL MARRIAGE.**

To create a community sought to be dissolved at the instance of the wife, there must be a lawful marriage; but it is immaterial whether the particular marriage declared upon be valid or not, provided it be shown that there was a lawful marriage between the parties.

**6. SAME—WIFE'S SEPARATE ESTATE—WHAT CONSTITUTES.**

All the property purchased by a wife, duly separated in property from her husband, after the date of the judgment of separation, becomes her separate estate, to which the husband or his heirs at law can lay no claim.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans.

The plaintiffs in this case, Jules, Arthur, and Victor Dejan, natural brothers of decedent, Pierre Dejan, seek by this proceeding to recover, as heirs at law, the ownership of certain property owned in community by their said brother and his spouse. They appeal from a judgment rejecting their demand.

*D. C. & L. L. Labatt and T. J. Semmes*, for appellants. *Paul E. Theard & Sons and Frank D. Cretien*, for appellee.

POCHE, J. Plaintiffs, suing as the natural brothers of Pierre Dejan, deceased, claim, as his only heirs at law, the naked ownership of the property belonging to him, as forming part of the community alleged to have existed between him and his surviving wife up to the day of his death, on the 30th of October 1886; he having left no children and no will. The defense is that there is no property belonging to the community which once existed between Pierre Dejan and his widow; that said community was dissolved by the judgment of a competent court, rendered on April 24, 1876, in execution of which the defendant bought in all the property which then stood in the name of her husband; and that all the property, one-half of which is claimed by plaintiffs, is her own separate estate, earned, acquired, and purchased by her since the dissolution of said community. That defense prevailed below, and plaintiffs appeal. From the record it appears that the pivotal question in the case is the alleged absolute nullity of the judgment of separation of property, rendered at the instance of the wife in April, 1876. The pertinent facts are as follows: Pierre Dejan, who was a colored man, and Josephine Schaeffer,

widow of Paul Kraok, who was a white woman, began to cohabit together as man and wife in 1858; and being, under existing laws, (Old Civil Code, art. 95,) incapacitated from contracting a lawful marriage, they had recourse to a religious ceremony or marriage in order to sanctify their union, which took place in September, 1858. On the 18th of February, 1869, they appeared before a justice of the peace, and contracted what they understood, and what purported to be, a lawful marriage. But, for reasons which are not apparent in the record, the parties went before a notary public in June, 1869, and ratified the private or religious marriage of 1858, in accordance with the provisions of act No. 210 of 1868. On the same day, and before the same notary, Pierre Dejan made a declaration to the effect that, at the time of his marriage with Josephine Schaeffer, in September, 1858, she possessed in her own right the sum of \$28,000, which she had acquired during her widowhood by her industry and through lucky circumstances. It appears that, up to that time, she had been employed as housekeeper or servant by a family in this city, and that subsequently she assisted her husband or consort in his labors as a small dealer in furniture; his business consisting for some time mainly in purchasing, repairing, and reselling second-hand furniture. The business prospered, and was soon transformed into a considerable furniture store, carried on in the name of Pierre Dejan. But he met with reverses, and in 1876 he was heavily indebted and greatly embarrassed, in consequence of which his wife brought a suit against him for the restitution of her personal funds in the sum of \$28,000, and for a separation of property; averring, among other allegations, her ability and desire to carry on a furniture or grocery business, and her fear of losing the fruits of her earning through the embarrassed condition of her husband's affairs, and in the confusion, with his losses, resulting from speculative ventures. After personal citation on the husband, a default on his failure to answer, and, after other due proceedings, trial and proof of his wife's demand, judgment was rendered in her favor, as prayed for. After publication, execution issued; and, at the sale made thereunder, property of the husband, aggregating some \$11,000, was adjudicated to the wife. That sale included the furniture store, which the wife has since carried on in her own name, and as her separate industry, being therein assisted by her husband, who filled the functions of salesman and general clerk. In addition to the property thus and then acquired, Mrs. Dejan has since purchased considerable immovable property, in her separate right, as separate in property from her husband, by whom she was in every act of sale authorized and assisted.

Plaintiffs' contention is that the judgment of separation of property of April 24, 1876, is absolutely null and void, fraudulent and collusive, and that it covers a consent judgment and voluntary separation between the spouses prohibited by law; and that, therefore, the community existing between the spouses was not dissolved before the death of Pierre Dejan in October, 1886, and that all the property purchased in the name of the wife fell in the community. The main ground of that contention is that the marriage of February 18, 1869, on which Mrs. Dejan had declared in her suit for separation of property, was itself an absolute nullity, for the reason that the legal incapacity which impeded a lawful marriage between the parties had not yet been removed, and that, therefore, no community could flow from such an abortive attempt of marriage, as without a lawful marriage there can be no community of *acquets* and gains. Plaintiffs then contend that the only lawful marriage existing between Pierre Dejan and Josephine Schaeffer was that of September 11, 1858, as legalized by the notarial act of June 4, 1869, under the provisions of act No. 210 of 1868, from which they argue that, under that statute, the community between the spouses dated and took effect from September, 1858, and not from February 18, 1869, as fraudulently alleged by the wife, and as decided by the court in the decree rendered in her favor. That

theory is first antagonized by plaintiffs' own pleadings, in which they allege that Dejan and his wife had been married on February 18, 1869; which averment was admitted by the defendant in her answer, thus judicially settling the *status* of the spouses, and closing out all contestation or discussion thereon between the same parties. Plaintiffs could not complain of being subjected to a rule of practice which, in another branch of the case, they invoked against their opponent, and which announces the doctrine as follows: "We understand it to be a rule in the administration of justice that a man shall not be permitted to deny what he has solemnly acknowledged in a judicial proceeding, nor to shift his position at will to a contradictory one in relation to the subject-matter of litigation, in order to prostrate and defeat the action of the law upon it." *Gredly v. Conner*, 4 La. Ann. 416. But, as they urge in argument that they took the date of the marriage from the wife's petition in the suit for separation of property, by which they had been led into an error, we are disposed to give them the benefit of a doubt, and to release them from the rigor of the rule, preferring to rest our decision of the cause on other considerations.

Now, as their whole theory rests, not only on an admission, but also on an actuality, on the argument that Dejan and his wife were legally married when the judgment of separation of property was rendered, it is undeniable that there did exist a community of *acquets* and gains at the time that the suit was instituted. Hence naturally flows the conclusion that the judgment is not a nullity on the ground that it purported to dissolve a community which had no legal existence, and therefore the community, which avowedly existed, must have been dissolved by the judgment, unless it turns out to be null and void on other grounds. It is apparent, and it is not denied, that the court which rendered it had jurisdiction *ratione materiæ et personæ*; that citation had been issued and served; that issue had been joined by default; that a trial was had, proof administered and considered, and that, after such hearing, judgment was rendered and signed in open court; that publication of the same was made; and that execution was issued thereon. Upon the face of the papers the judgment is valid. Can it be attacked collaterally? The law and jurisprudence answer that it may, but only by creditors and forced heirs whose rights would be affected thereby. And such an attack, even as restricted to creditors and forced heirs, is itself an exception to the general rule which shields the binding force and effect of the judgments from collateral attacks. As plaintiffs stand before the court as collateral or simple heirs, it is elementary that they can urge no other claim, and direct no other attack, but those which the deceased could himself advocate in his own behalf if he were alive. If, therefore, it were true, as contended by plaintiffs, that Mrs. Dejan did not and could not own in her own right, at the time of her union with the deceased in 1858, the enormous sum of \$28,000, for which she obtained judgment in 1876, it is clear that, after solemnly acknowledging the fact in a notarial act in 1869, after having knowledge of the proof made thereof on the trial of the suit for separation of property, after quietly submitting to the execution of the judgment predicated on that fact, and after acquiescing therein for 10 years, Dejan could not be allowed, in a collateral attack, to impair the full force of such a judgment. It is equally clear that his simple heirs at law, who claim under him, who can exercise no rights but those which are derived from him, have no better standing in court for the same purpose and for the same line of attack than he could himself command. Whence could they derive a right to complain, being neither creditors nor forced heirs, even if it were apparent that the deceased tacitly or actively produced the result which they desire to avert? As to them, the judgment which they seek to avoid is protected from a collateral attack, not only by reason and law, but by the authority of numerous adjudications of this court, going back to the early history of our jurisprudence: in the case of *Kerwin v. Insurance Co.*, 85 La.

Ann. 33, this court, in dealing with the pretensions of certain heirs who sought to claim, as belonging to the community, property which had been purchased in the name of the wife, with the assistance and authorization of the husband, denied the right of the husband or of his legatees or simple heirs to avoid the effect of such a contract, and it added: "Only creditors and forced heirs are excepted from this rule, and the latter to the extent of the *legitime* only, and for the purpose of protecting the same." A similar claim was presented in the case of *Brown v. Stroud*, 34 La. Ann. 374, in which the court, guided by the same doctrine, used the following words: "The plaintiff, claiming only as an object, of his [the deceased] bounty, being neither creditor nor forced heir, has and could have no better right than the testator possessed, and we clearly see that he has none." The case of *Compton v. Maxwell*, 33 La. Ann. 685, is directly in point, presenting a collateral attack by heirs on a judgment of separation of property between their ancestors. As in this case, the plaintiff there denied that the community between the spouses had been dissolved, and the court said: "We find in the transcript the entire record of a suit instituted in the name of Mrs. Compton against her husband, \* \* \* in which judgment was rendered in her favor on a moneyed demand, and decreeing the dissolution of the community. This judgment was rendered after citation to the husband, was duly published, and followed by an execution, on which there was a return of *nulla bona*. The separation of property purporting to be established by the judgment was subsequently and uniformly recognized by both parties thereto by many acts and proceedings. This recognition is shown by the purchase of property in the name of the wife, \* \* \* in some of which purchases the husband joined to authorize her. \* \* \* Surely, all these facts must, to the legal mind, far outweigh the uncertain evidence afforded by the parol testimony of the mother of the plaintiff, and one of the plaintiffs themselves, contradictory of that derived from those acts and judicial proceedings, and by which such solemn acts and proceedings of the parties are sought to be overthrown. Under our settled jurisprudence, the effect of authentic acts and judicial proceedings cannot be so easily impaired, nor titles to real estate, resulting therefrom or evidenced thereby, so easily destroyed. In the face of these acts and proceedings, it would hardly be contended that Thomas A. Compton, if alive, could be listened to in asserting a claim to the property. His heirs, claiming through him, stand in no better condition." See, also, *Drumm v. Kleinman*, 31 La. Ann. 124; *Stewart v. Mize*, 30 La. Ann. 1036; *Hebert v. Leye*, 29 La. Ann. 511; *Barbet v. Roth*, 16 La. Ann. 271; *Raiford v. Thorn*, 15 La. Ann. 81; *Henderson v. Trousdale*, 10 La. Ann. 548; *Wolf v. Lowry*, Id. 272; *Penn v. Crockett*, 7 La. Ann. 343; *Davock v. Darcy*, 6 Rob. (La.) 342.

From our uniform jurisprudence, the following rule may be culled, and must be considered as resting on most solid foundations: Barring the exception in favor of creditors and forced heirs touching judgments of separation of property between husbands and wives, the inquiry or collateral attacks against the validity of judgment "must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceeding established by law. No inquiry can be made as to the correctness of the judgment on the merits." *Pasteur v. Lewis*, 39 La. Ann. 5, 1 South. Rep. 307. Under the effect of principles so well settled in our jurisprudence, it becomes immaterial, for the purposes of this decision, to determine whether the marriage of February 18, 1869, was null or valid. It is conceded that there existed a legal marriage between the parties to the suit for separation of property. Hence there was a community which the wife was seeking to dissolve, and that community was dissolved by the judgment of April 24, 1876. Beyond this no inquiry can be made into the judgment, which is valid upon the face of the papers. The validity of the judgment cannot be impaired by the

assertion, even if true in point of fact, that the moneyed judgment in favor of the wife was in amount in excess of what it should have been. We therefore conclude that all the property subsequently earned and purchased by Mrs. Dejan, became and remains to this day her personal and separate estate, and that plaintiffs' claim must be rejected.

Having reached these conclusions, we find no warrant for a discussion of numerous other points made in the case, and presented with marked ability and great learning by counsel, both in their oral argument and in their briefs. Judgment affirmed.

Rehearing refused May 7, 1888.

(65 Miss. 357)

### McGEHEE v. FITTS.

(*Supreme Court of Mississippi*. March 12, 1888.)

**TAXATION—VOID SALE OF LAND FOR TAXES—REFUNDING PURCHASE MONEY—CODE MISS. § 537.**

Plaintiff levied an execution against A. on certain land held by A. and F. under a tax deed, and at the execution sale purchased A.'s interest in the land. After the levy, A. assigned his interest in the land to F. Subsequently it appeared that the land was not subject to sale for taxes, and the entire purchase money was refunded to F. by the state and county. *Held*, under Code Miss. § 537, providing that the purchase money paid at a tax sale shall be refunded to the purchaser, or the holder under him by descent or purchase, when the land was not liable to be sold for taxes, that plaintiff was the holder under A., and could recover from F., in an action for money had and received, the amount of the purchase money paid by A.

Appeal from circuit court, Wilkinson county; J. B. CHRISMAN, Judge.

In 1883, W. A. Fitts and one Alston purchased some land from the state, receiving therefor the auditor's deed, which was duly recorded in Wilkinson county, where the land was situated. In January, 1884, J. Burmes McGehee, a creditor of Alston, attached Alston's interest in this land. In the spring of 1884, after McGehee's attachment was levied on the interest of Alston, he (Alston) assigned his interest to Fitts. Fitts having ascertained that the land was not liable to be sold for taxes, applied to have the money he and Alston had paid in the purchase of the land refunded. The matter was audited, and Fitts received back from the state and county treasuries the money so paid out. McGehee prosecuted his attachment suit to judgment, had the land sold by the sheriff, and bought it in, and brought this suit against Fitts to recover from him Alston's half of the money received from the state and county. Code Miss., § 537, provides that if land shall be sold for taxes when no taxes are due on it, or it is not liable to be sold for taxes, the sum paid by the purchaser for the amount of his bid, and the costs of the sale and conveyance, with 6 per cent. interest per annum, shall be refunded by the state or county, respectively, to him, or the holder under him by descent or purchase. The trial resulted in a judgment in favor of Fitts, from which McGehee appealed.

*D. C. Bramlett*, for appellant. *J. H. Jones*, for appellee.

CAMPBELL, J. By section 537 of the Code, the purchaser of the land, or the holder under him by descent or purchase, was entitled to have the purchase money refunded by state and county. The purchaser, if he had not conveyed the land he had purchased, was entitled under the statute, and the holder under him of the land was entitled, to the money from state and county, respectively, if he had parted with his interest. The right is an incident of the land,—runs with it, in the language of the books, as to covenants. It makes no difference whether the holder acquires by the conveyance of the purchaser from the state, or by the conveyance of the sheriff under a judgment and execution against him. In either case he is holder under him. McGehee, by his purchase and the conveyance of the sheriff, acquired the right of Alston, as to the land, as of the date of the levy of the attachment; and

the transfer by Alston of his interest and right to Pitts, after the levy of the attachment, was not effective to prejudice the rights of McGehee thus acquired; and, after the levy of the attachment, Alston could not transfer any right to the land or incident to it. His transfer did not give Pitts any right to his share of the money obtainable from the state and county. But Pitts, by the use of the transfer from Alston, was enabled to and did get from the state and county the money paid for the land by himself and Alston. As to so much of this money as he was able to get as transferee of Alston, he is liable to McGehee, the holder of the title of the land under Alston. He has money in his hands which *ex aequo et bono* he is not entitled to retain from McGehee, and which he obtained from the state and county in the character of assignee of the right of Alston, after his right had become affected by the lien of the attachment.

There are cases which deny the right to maintain an action for money received under such circumstances, but we prefer to follow those which sustain the action in such case.

Reversed, and remanded for a new trial.

(65 Miss. 284)

#### CITIZENS' BANK v. BUDDIG.

(*Supreme Court of Mississippi*. March 12, 1883.)

##### 1. PLEADING—COMPLAINT—AVERMENT OF INDEBTEDNESS.

An averment that complainants were, before a certain date, and are now, creditors of defendants, sufficiently alleges an indebtedness between the parties.

##### 2. FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—COMPLAINT.

A bill alleging that a debtor gave a deed of trust on certain property intended to hinder, delay, and defraud creditors, and that the person secured thereby obtained a decree of sale in furtherance of such fraud, and praying a stay of the execution of the decree until an accounting can be had, and for a discovery, is not demurrable on the ground that it fails to show that the debtor was insolvent, and that there was no other property out of which complainants' demands could be satisfied.

##### 3. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

An objection to a pleading, for want of definiteness, precision, and certainty, will not be considered for the first time in the appellate court.

Appeal from chancery court, Harrison county; S. EVANS, Chancellor.

C. & K. were indebted to the Citizens' Bank of Louisiana. While so indebted, said C. and K. gave to appellee, Buddig, a deed of trust to secure to him the sum of \$13,000. Buddig filed a bill, and secured a decree for the sale of the property covered by the deed of trust; whereupon the Citizens' Bank filed the bill in this case, seeking a stay of the execution of the decree of sale until an accounting could be had, and seeking a discovery. A demurrer to the bill was sustained. Plaintiff amended its bill, which was again demurred to, and the demurrer was sustained, and the bill dismissed, from which the Citizens' Bank appealed.

J. J. Curtis, for appellant. T. S. Ford and Brame & Alexander, for appellee.

CAMPBELL, J. The averment that complainants were, before a certain date and are now, creditors of the defendants C. & K. is sufficient to show a debt due. No objection was made in the court below to the structure of the bill. Its want of definiteness, precision, and certainty is called in question by argument here, but that was not made special ground of objection in the chancery court, and can not avail here.

The bill presents a case good on demurrer. It avers that complainants were and are creditors of C. & K., and that the arrangement between their debtors and Buddig was made to hinder, delay, and defraud creditors, and that the decree obtained by Buddig against C. & K. was but the furtherance of that scheme; and the object of the bill is to arrest its consummation by suspend-

ing the execution of the decree until an ascertainment of the true state of accounts between the parties, a discovery of which is sought. It is apparent that the ground on which the chancellor sustained the demurrer is that, to maintain the bill, it should show that C. & K. were insolvent, and that complainants had no other means of obtaining satisfaction of their demands except by resorting to the property sought to be reached by this bill. This view is not maintainable. It is sustained by a number of decisions in Indiana, where the supreme court, confounding the distinction between a voluntary conveyance by a husband to his wife, a father to his child, and the like, the validity or invalidity of which is determinable by the circumstances of the donor at the time of the gift, and a conveyance made to hinder, delay, and defraud creditors, has held that a creditor attacking a conveyance as made for the purpose of defrauding must aver and prove the insolvency of the debtor when the conveyance was made, and continued to the time of instituting the suit; and has displayed remarkable consistency and persistence in this erroneous view against the sentiment of the bar and inferior courts, as indicated by the multitude of cases in which it has been questioned. We cannot follow such leading. The right of a creditor to attack any fraudulent conveyance or device resorted to for the purpose of hindering, delaying, or defrauding creditors is clear. Code, § 1843.

Reversed, demurrer overruled, and cause remanded for answer in 30 days after mandate herein received in the court below.

#### DANIEL *et al.* v. DANIEL.

(*Supreme Court of Mississippi*. March 19, 1883.)

##### 1. ASSUMPSIT—COMMON COUNTS ON SPECIAL CONTRACT—WHEN MAINTAINABLE.

Where a plaintiff, suing for wages due under a special contract, has fully performed his part of the contract, he may recover either on a special count on the contract, or upon the common counts in *indebitatus assumpsit*.

##### 2. TRIAL—INSTRUCTIONS—SEPARATING AND GROUPING FACTS.

Where certain facts are proved, it is error on the part of the court to separate them into groups, and to instruct the jury whether this group or that does or does not support certain conclusions.

##### 3. SAME—INSTRUCTIONS—WEIGHT OF EVIDENCE.

It is error, in an action for wages due, to charge that plaintiff's evidence must be accepted as true, and that unless disproved he should have a verdict for "the full amount testified by him to be due and unpaid," and that, if the evidence left it doubtful whether plaintiff's testimony had been successfully opposed, the law was for him, as such instructions are upon the weight of the evidence, and in direct support of the credibility of a single witness.

Appeal from circuit court, Copiah county; T. J. WHARTON, Judge.

M. Daniel was a merchant, and became involved, and attachments were sued out against his stock, etc. Zollie Daniel, a nephew of M. Daniel, had been in his uncle's employment as clerk of his store for several years; and, when the attachments were levied, he interposed a claim for a considerable sum as wages due him as clerk. The case goes off on the instructions, which are sufficiently noted in the opinion. The trial resulted in favor of Zollie Daniel, from which M. Daniel *et al.* have appealed.

*J. S. Sexton*, for appellants. *Miller & Conn*, for appellee.

COOPER, C. J. The court properly refused the instruction, asked by the defendants, that the plaintiff, counting only in *indebitatus assumpsit*, could not recover for services rendered under a special contract. Where a special contract had been fully executed, according to its terms, by the plaintiff, and nothing remains to be done by the defendant than to pay the money earned by the plaintiff, a recovery may be had either upon a special *assumpsit* on the contract or upon the common counts. 2 Greenl. Ev. 104.

At the instance of the plaintiff, the court separated and grouped the cir-

cumstances relied upon by the defendants to show that the debt sued on was simulated or had been paid, and gave several instructions, by which the jury was told that one fact and another and another, considered separately or together, were insufficient to defeat the action, and then that another fact and another and another were equally ineffectual. By this course of instructing, the successive group of facts were enfeebled, and presented to the jury by instructions each of which was upon the weight of the evidence.

By the eleventh instruction given for the plaintiff the jury was, in effect, told that the evidence of Zollie Daniels, the plaintiff, must be accepted by the jury as true, and that, unless this evidence was disproved by a preponderance of evidence, the plaintiff should have a verdict for the "full amount testified by him to be due and unpaid;" and it concluded by informing the jury that, if the evidence left it doubtful whether Daniels' testimony had been successfully opposed, the law was for the plaintiff. This instruction was not only objectionable as being upon the weight of the evidence, but as being a direct and specific support of the credibility of a single witness. Reversed, and remanded.

(65 Miss. 410)

PRICE v. ANDERSON *et al.*

BIAS v. FREDERICK.

(Supreme Court of Mississippi. April 23, 1888.)

JUDGES—APPOINTMENT AND TENURE—REDUCTION OF NUMBER OF DISTRICTS—CONSTITUTIONAL LAW.

Act Miss. March 8, 1888, reducing the number of judicial districts, and assigning to the new districts certain of the judges then holding office, is not unconstitutional in that it makes no express provision for several judges whose terms were unexpired at the time the act took effect; since, it being within the power of the legislature to reorganize the districts, if it is not admissible to dispense with the extra judges during their term of office, in the absence of express provisions dispensing with them, it will be presumed that they are to continue to discharge their duties in the old districts until the expiration of their term. ARNOLD, J., dissenting.

Appeal from circuit court, Lafayette county; W. M. ROGERS, Judge.

Appeal from chancery court, Union county; B. McFARLAND, Chancellor.

The state of Mississippi was divided into 11 circuit court districts, and 11 chancery court districts; and there was a circuit judge and chancellor for each district. The legislature on March 8, 1888, passed an act reducing the number of circuit court districts to 8, and the number of chancery districts to 6; and by the act designated the 8 of the 11 circuit judges, and 6 of the chancellors, by name, who were to be judges and chancellors of the new districts as created by the act. Nothing was said in the act concerning the 3 circuit judges and 5 chancellors, not assigned to districts, most of whose terms will expire (some having already expired) in a short time after the passage of the act. The act was to go into effect from and after its passage. On the 9th day of March, 1888, an act supplemental to that of March 8th was passed and approved, providing that the act should go into effect on April 1, 1888, and making some further provisions as to the holding of courts. On the first Monday of April Judge ROGERS, who had been assigned by the act to the district in which Lafayette county is situated, as circuit judge, opened court in Lafayette county. Appellant Price had filed a declaration against Anderson *et al.* to recover on a note. The appellees, Anderson *et al.*, filed a plea to the jurisdiction, to the effect that Judge ROGERS was not the judge of that court; that the bill was unconstitutional which redistricted the state. To this plea Price filed a demurrer, which was overruled, and judgment given for defendants, from which Price appealed. In like manner, Chancellor McFARLAND went to Union county, (not having been before the chancellor of that district,) under the act, and, to a bill filed by Frederick against Bias, a plea was filed by Bias

which raised the question of the right of Chancellor McFARLAND to preside, which plea was overruled by him, and from that Bias appealed.

*T. M. Miller, Atty. Gen., for appellant Price and appellee Frederick. H. A. Barr and John W. U. Watson, for appellant Bias and appellees Anderson et al.*

CAMPBELL, J. In view of the great public interest involved in the question of the validity or invalidity of the act entitled, "An act in relation to the judicial districts for circuit and chancery courts," approved March 8, 1888, we yield to the earnest request of counsel, and decide it without regard to the manner in which it was raised. The right of the legislature to establish and change judicial districts at pleasure, and prescribe the time for holding courts in each county, is undeniable. If the act under consideration contained a provision that it should not take effect, as to circuit judges and chancellors in office during their terms, except as herein expressly provided, and that they should continue to discharge their functions as before, in the territory formerly assigned them, during their terms, but according to this act as to time, and, when their terms of office should end, the districts should be as it provides; or if the form of the act was that, as the terms of certain judges and chancellors should expire, successors should not be appointed, and the counties composing their districts should be put in other districts, no objection could have been urged to the act. This is the result of the act, in one view of it. It makes no mention of retaining for their terms certain judges and chancellors; but the constitution silently, by its inherent force, adds to every act of the legislature its modifying influence, and, if it is true that it is not admissible for the legislature to dispense with the services of a supernumerary judge or chancellor during his constitutional term, it follows, that the constitution adds to the act of the legislature the provision above mentioned, and, thus supplemented, it is free from objection on constitutional grounds. The legislature did not undertake to deprive certain judges and chancellors of their offices. It simply reorganized judicial districts, and prescribed the time for courts. This it had the right to do. It did not usurp executive functions in appointing judges and chancellors. It designated certain ones who should perform duty in the districts newly created. These were already duly-constituted judges and chancellors liable to be put at service in any district the legislature might determine. It is for the legislature to divide the state into convenient districts. It must decide what is convenient. It may reorganize and change them at pleasure. There is no such thing as an unchangeable district, or one unchangeable during a judge's term, if the legislature determines on a change. No judge has a vested right in a particular district, any more than a district can have a vested right in a particular judge. This was true when judges were elected by districts. *Miazza v. State*, 36 Miss. 613. *A fortiori* now when judges are made by the entire state, through the governor and senate representing the whole people, the right of the legislature to take counties from one district, and add them to another, must be conceded. Certainly, duly-constituted judges and chancellors, to whose districts counties are added, are none the less than before judges because of such additions. This applies to many of the judges and chancellors of the state. If it is true that a judge or chancellor cannot be dispensed with, and left unprovided with a district for the performance of his functions, it follows that existing judges and chancellors, for whom no districts are provided by the act, are entitled to continue on duty, as before, in their formerly existing districts, which, as to them and for this purpose, still exist during their term. This view maintains the validity of the act as to the provisions it contains, and the right of judges and chancellors for whom districts are not made by it to continue in their former districts, regarding the provisions of the act as to time; and thus the act will have effect to accomplish the legislative purpose to rid the state of supernumeraries,

v. 480. nos. 3, 4—7

hindered for a time in part, but soon to be relieved by mere efflux of time of all obstacles to its complete operation. There is no unconstitutional provision in the act. The objection made is not for what it contains, but for what it omits. If it had expressly made districts for certain judges and chancellors not named in it, not an objection could be urged against it. If, as to them, their old districts are held to remain, as no new ones were made for them, no complaint can justly be made. The mere fact that the act cannot, because of some obstacle, have full and complete operation at once, is no valid objection to giving it effect as far as can be. Even a permanent hinderance to the complete effect of a law is not an objection to its having such operation as it can, and, surely, a temporary and transient obstacle cannot be ground for condemning a law. If some express provision of the act was unconstitutional, it would not cause the whole to fall, unless the incurable infirmity infected the body of the act,—the scheme as a whole. If the trunk is sound, a decayed limb will not cause the tree to be destroyed. If a single member is incurably diseased, and the disease is local, and not constitutional, only the member should perish, and not the whole body. This is both Scripture and good sense. If part of an act be void, and it is not one essential as part of a whole, dependent in some degree on it, that will not prevent the operation of the other which is so independent of the rejected part as in no degree to rest on it for support. This distinction pervades the cases, and resolves them all. It is not allowable to enter the field of uncertain conjecture as to the probable action of the legislature, but the criterion of connection and dependence between parts must be applied for the solution of the question. A multitude of cases illustrate the distinction. They are too numerous to be cited, but they rest on the distinction adverted to above. The cases in this state sustain this view, and this is the generally accepted doctrine. In *Fant v. Gibbs*, 54 Miss. 396, the only question was whether or not Fant was entitled to his salary, and the act of the legislature was held void in so far as it ousted him of his office, and deprived him of the salary, and no further. The court carefully abstained from any intimation against the full and complete operation of the act as to all else except the "unassigned officers," as CHALMERS, J., expressed it, and the opinions of the judges show plainly their view to be that, in every other respect, the law was to have effect. Therefore, if some part of this act was admittedly unconstitutional, that would not defeat it, unless it was such an essential part as to make the other incomplete without it. But, as said before, no provision of this act is objectionable. It is a consequence of the act,—something outside of it, and not in it,—which is claimed as ground to condemn it. It omits something it should have contained, and which, if contained, would remove all objection, it is said. If the constitution supplies the omission, who can complain, and what is the harm?

There is, perhaps, a mistaken notion about judges and chancellors, caused by our experience of one for each district. From that we are apt to associate judges and districts as made for each other; but the constitution does not so ordain. It requires the appointment of judges of the circuit court, and chancellors. The state shall be divided into convenient judicial districts and convenient chancery districts. A circuit court shall be held at least twice in each year, and judges of said courts may interchange circuits with each other, as may be prescribed by law. These are the provisions of the constitution on this subject, and there is no requirement in them of one judge or chancellor for a district. A judge of the supreme court for each of three districts is expressly provided for by the constitution; but such language is not employed as to circuit judges and chancellors. The nearest approach to a suggestion by the constitution of a judge of the circuit court having a district or circuit is in the language, "the judges of said courts may interchange circuits with each other;" but there is nothing in that to exclude the idea of several judges doing duty in a district. Literally, a circuit is the act of going around.

Probably the sense in which it is employed by the constitution in this connection is, as Webster defines it, "a certain division of a state or country established by law for a judge or judges to visit for the administration of justice;" and, if so, the existence of several judges in one district or circuit, or whose duty it was to visit it periodically, would not prevent them from interchanging circuits with each other, as contemplated. Were the legislature to divide the state into five judicial districts, and provide for ten judges of the circuit court, and for each to make an annual circuit, the constitution would not be violated, if judges and districts must co-exist, for there would be the convenient districts, as determined by the legislature, and judges of the circuit courts, and courts held twice a year, and their circuits might be interchanged, as provided for by law. Every provision and implication of the constitution, as to these courts, would be satisfied by this arrangement. This shows the plenary power of the legislature over the arrangement of districts or circuits and terms. In practice, a judge is appointed for a particular district, because it has been so arranged by statute; but it would not violate the constitution if he was appointed a judge of the circuit court under a law requiring any prescribed number of judges who should itinerate by districts throughout the state, in a manner to be provided. Convenient districts are provided for, not with reference to judges, but for other purposes. It may be for interchange of circuits. That is all that is mentioned specially in connection with districts or circuits. It might be deemed desirable that a different judge should appear at every semi-annual term of the circuit court. To secure this interchange may have been the whole object of districts. It is for the legislature, not only to create districts, but to determine how many judges of the circuit court and chancellors shall be appointed, and nothing forbids several to perform duty in each district, if the legislature so determines. The primary idea of a judge of the circuit court is one to make the circuit prescribed by law periodically, to administer justice in court. He must have a portion of territory to visit, in order to make a circuit; but that is determinable by the legislature, which might require every judge of the circuit court in his turn to make the circuit of every judicial district in the state. There is no indissoluble connection between a judge and a district. Judges are made by the whole state, for service in districts arranged for convenience, and with a view to interchangeability, and are subject to assignment to duty anywhere in the state. They have no vested territorial rights, as against legislative power of change. If a judge is appointed for a particular district, he holds subject to a legislative change of districts, and must conform to it. If a judge and a district must co-exist, it is for the legislature to prescribe his district, and, as he has no vested right, he must take what is prescribed for him. He is a public servant, subject to all legitimate commands of the sovereign. Assigned to duty in a particular locality, he belongs there until ordered elsewhere, according to the public exigency. If the judgeship is beyond legislative reach, the field of its operations is subject to control. If the office is inviolable, the place for its exercise is not. Place and time are subject to legislative control, where neither is fixed by the constitution. To deny this is to withhold from the legislature the right to consult and conserve the public interest, in deference to the assumed right or interest of the judge; whereas the public good is the paramount object of constitutional government. The right of the legislature to abolish unnecessary offices, where the number is not fixed by the constitution, must be granted. This may be done by abolishing districts, and thus dispensing with the judges appointed for them, and thus providing that successors shall not be appointed for those districts; or by expressly declaring that successors shall not be appointed for certain judges. There is no other conceivable way of doing it. It cannot be that too many are to continue because of incapacity to be rid of them. If the thing aimed at and done is allowable, the mere form of accomplishing it cannot matter, if the constitu-

tion is not disregarded as to manner. The power of the legislature to do what it attempted by the act cannot be questioned. It concluded that there were too many judges of the circuit court, and chancellors, and, with this conviction, properly resolved to reduce the number to the needs of the state. The terms of office of the judges and chancellors expired at different times. They had been appointed under the legislative plan of one for each district, designated by number. As said above, if the shape of the enactment was that, at the expiration of the term of each judge and chancellor named, no successor should be appointed, and the counties of his district should be parts of other districts, not an objection would have been heard to the act as violative of the constitution. But the point made is that certain judges and chancellors are ousted during their term. But they are not, by the terms of the act; and if, by the constitution, they could not be, they are, as to all except time of courts, left just as before. Like a grant of something incumbered, which operates as far as it can, and fully when the incumbrances are extinguished, this law, hindered for a time, on the view taken, will, when the several hindering terms end, have unobstructed effect.

But it is said the effect of that is to put two judges in one district for a time. There cannot be a doubt of the right to do that. Would any doubt the right of the legislature to meet a public exigency by such an arrangement? Suppose an eminent judge, whose services were of great value and were properly appreciated, should become temporarily incapacitated for the duties of his circuit, might not the legislature grant him leave of absence for a year or longer, and provide for the appointment of a judge to perform duty in his district? May it not create judgeships at large, independent of particular locality, to supplement the services of overworked judges in certain districts? But it is said the purpose or effect of the act is, as to certain judges and chancellors unassigned, to create *emeritus* officers, with office and pay and no duties, contrary to the genius of our government. That is not true, if, by the constitution, they are still on duty in their former districts. Better that, for a little while, when the difficulty will be removed, than to perpetuate an unnecessary number of officers. With the wisdom of the action of the legislature we have nothing to do. With conflicts alleged to exist in the act, its constitutionality is in no manner involved. If it be true that, under it, district attorneys cannot attend all the courts in their districts, because of the arrangement as to time for court, that certainly does not go to the constitutionality of the act. It was never before heard of that an act of the legislature should be pronounced unconstitutional merely because of conflict in its details, or difficulty in its practical operation incidental to its main purpose.

We see nothing violative of the constitution in the act, and that ends our functions in dealing with the question.

ARNOLD, J., (*dissenting*.) I dissent from the opinion of the majority of the court. In my judgment, the acts in question go beyond the boundaries of legislative authority, and have not, and should not have, the force and effect of law. The constitution of the state contains these provisions: "The state shall be divided into convenient judicial districts. Judges of the circuit court shall be appointed by the governor, with the advice and consent of the senate, and shall hold their office for the term of six years. A circuit court shall be held (in each county) at least twice in each year, and the judges of said courts may interchange circuits with each other in such manner as may be prescribed by law. \* \* \* The legislature shall divide the state into a convenient number of chancery districts. Chancellors shall be appointed in the same manner as the judges of the circuit courts, \* \* \* and they shall hold their office for the term of four years. They shall hold a court in each county at least twice in each year. \* \* \* All civil officers under this state shall be liable to impeachment for treason, bribery, or any high crime or mis-

demeanor in office. Judgment in such case shall not extend further than removal from office, and disqualification to hold any office of honor, trust, or profit under this state. \* \* \* For reasonable cause, which shall not be sufficient ground for impeachment, the governor shall, on the joint address of two-thirds of each branch of the legislature, remove from office the judges of the supreme and inferior courts: provided, the cause or causes of removal be spread on the journal, and the party charged be notified of the same, before the vote is finally taken and decided, and shall have an opportunity to be heard, by himself or counsel, or both."

The act of the legislature in relation to the judicial districts for circuit and chancery courts, approved March 8, 1888, and the act supplemental and amendatory to the same, reduce the number of circuit and chancery court districts in the state, from and after the 1st of April, 1888, by consolidating some of the old districts, and by placing counties composing some of the former districts into other districts; thus enlarging some of the old districts, and abolishing others. In each of the old districts there were a judge and chancellor, duly appointed, qualified, and acting, at the time of the passage of these acts, and, at the time when they were to go into effect, some of whose terms did not expire for several months, and in one instance not until more than three years afterwards; and, by the process of redistricting, several of them are left without districts, and without any official duty being required by the acts to be performed by them. Without naming these disfranchised judges and chancellors, other judges and chancellors are expressly assigned by the acts to each of the districts formed by the acts. The acts provide that district attorneys shall continue, to the expiration of their terms of office, as district attorneys for the counties constituting the districts to which they were elected; but there is no such provision or any provision in regard to judges and chancellors who are left without districts and official duties. The pay of judges and chancellors is increased by the acts, in these words: "There shall be allowed and paid to each judge and chancellor, in monthly payments, a salary of twenty-seven hundred and fifty dollars per annum;" but it is not provided whether this shall apply to the retired judges and chancellors with the others, or only to those who are assigned to districts and duties. According to the new arrangement, courts occur at the same time in two or more counties which were formerly in the same district, where such counties are distributed among different new districts; so that, in one or more districts, the former judge or chancellor of such counties and former districts would not be able to hold the courts in the counties of their former districts at the times specified in the acts, if they were to attempt to do so, unless they could overcome the natural impediment of being in different places and holding court in different counties at the same time.

The statement of a few simple principles will aid in the comprehension and solution of the issues involved. An office is a public charge or employment, and a public officer is one who has some duty to perform concerning the public. 7 Bac. Abr. 280; *Hill v. Boyland*, 40 Miss. 618; *Shelby v. Alcorn*, 36 Miss. 273. The term "office" embraces the ideas of tenure, duration, emoluments, and duties. *U. S. v. Hartwell*, 6 Wall. 385; *Hoke v. Henderson*, 25 Amer. Dec. 677, and note. Without argument, and without the citation of authorities, it may be said that there is nothing better settled in this state and in American law than that, when an office is created by statute, it is wholly within the control of the legislature. The term, the duties, and the compensation of such an office may be changed, or the office itself may be abolished, at pleasure, without reference to the wishes or interest of the incumbent, if there is no constitutional inhibition against it, and the legislature is the sole judge of the necessity or propriety of doing either. And it is quite as well settled—it is believed there is no authority to the contrary—that, if the term of an office is prescribed by the constitution, the legislature cannot remove its lawfully

elected or appointed incumbent, or abridge his term, either directly or indirectly, except in the manner provided by the constitution. *Fant v. Gibbs*, 54 Miss. 396; *People v. Dubois*, 23 Ill. 547; *State v. Messmore*, 14 Wis. 163; *Com. v. Gamble*, 62 Pa. St. 343; *Lowe v. Com.*, 8 Metc. (Ky.) 240; *Cooley*, Const. Lim. \*277, and note. It is incomprehensible to me how this could be doubted in this state since the decision in *Fant v. Gibbs*, *supra*. I stand by *Fant v. Gibbs*. It seems not to be overruled by the opinion of the majority, just read, or, if it is, it is not so declared. In the light of these principles, it is clear to me that an attempt by the legislature to remove a judge or chancellor from office during his constitutional term, by the indirect method of denying him any compensation, or by depriving him entirely of a district, and of all the authority and functions of his office, would be as much a violation of the constitution as it would be to declare in express terms that the office was vacant, or that the incumbent should be and was thereby removed from office. The legislature may enlarge or curtail judicial districts, and increase or diminish judicial duties; provided, always, it does not thereby virtually remove existing judges and chancellors by depriving them entirely of districts and duties.

The manifest object of the constitution in fixing the term of judicial officers was to secure, to some extent at least, an independent judiciary,—the palladium of private rights and public liberty, wherever there is wisdom and virtue enough to support it,—by placing the tenure of officers in that department beyond the influence and control of the other departments of the government, and by making its duration dependent, not on the varying and uncertain will of the legislature, but on the constitution itself, which changes not except by the action of the people in their sovereign capacity. The constitution is above and controls all the departments of the government. It is the paramount law; and between the will of the people, as expressed in the constitution, and that of the legislature, as declared by statute, the former must always prevail. It seems to me that a plainer case of attempting to remove judges and chancellors indirectly, and in a mode different from that provided in the constitution for such purpose, than is furnished by the acts of the legislature in question, cannot well be conceived. After being entirely ignored by these acts, stripped of districts and official duties and authority, what more could be done to deprive them of their offices? The express retention of the district attorneys in service by the acts till their terms expire, without any such provision as to the omitted judges and chancellors, excludes the idea that the latter were to be continued in service. The doctrine of the maxim, *expressio unius exclusio alterius*, applies. It is impossible to avoid it. The assignment of certain judges and chancellors to each of the new districts implies and means that they shall hold the courts in such districts, and nothing being said or required of the other judges and chancellors implies and means that no official duty is imposed on them, or expected of them. If the legislature intended that they should toil not, how can this court say nay, and subject them to the burdens of labor, if the acts of the legislature are sustained? Which is to govern, the constitution, the legislature, or this court? These acts of the legislature are unconstitutional and void, and are as if they were not, in so far as they attempt to remove or retire a part of the judges and chancellors of the state from office before the expiration of their terms; and the question is then presented, does this render the whole of the acts inoperative and of no effect? In my judgment, it does.

A statute may be unconstitutional, either because it proposes to accomplish something prohibited by the constitution, or to accomplish some lawful and even laudable object by means repugnant to the constitution. It is an elementary principle that the same statute may be in part constitutional, and in part not constitutional; and that if such parts are wholly independent of each other, that which is constitutional may stand, while that which is not constitutional must fall. Judge Cooley states the rule thus: That, "where a part

of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed the one without the other. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley, Const. Lim. \*178, \*179. Striking from the statute what is obnoxious to the constitution, the same author says again: If "that which is left is complete in itself, sensible, and capable of being executed, wholly independent of that which is rejected, it must be sustained." Id. \*149. Substantially the same rules are recognized and approved in *Fant v. Gibbs, supra*. In that case, Judge CHALMERS said: "While it is true that one portion of a law may be upheld while the rest is overthrown, this is only true where they are so far independent provisions that it may be presumed that the legislature intended one to subsist, even though the balance perished. The principle is that, where a particular clause of a statute is manifestly based upon certain other clauses which are pronounced unconstitutional, it will fall with them, though itself not obnoxious to constitutional objections." Every doubt must be resolved, and every presumption must be made, in favor of the validity of an act of the legislature; but, where a part of an act is inoperative on account of being unconstitutional, a different rule prevails in regard to the remainder of the act. "It is obvious," says Judge Cooley, "in any case, where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in favor of a complete act, when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole to have effect, and we should sustain it, if possible; in the former we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in one case, the act should be sustained unless the invalidity is clear, in the other, the whole should fall, unless it is manifest that the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void." Cooley, Const. Lim. \*179, and note.

Now, applying these rules and tests to the acts in question, it is readily seen that the removal of judges and chancellors before their terms expired, and redistricting the state, and increasing salaries, and changing the time for holding courts, and assigning judges and chancellors to new districts, are all parts of a common design, not wholly independent of each other, but based upon each other, and mutually connected with and dependent on each other, as conditions, considerations, inducements, and compensations for each other, and operating together for the same purpose, and that neither is complete in itself, sensible, and capable of being executed without the rest. I cannot presume that the legislature would have passed one part of these acts without the other, or that it intended that some parts of them should stand, though another vital part should fall. I know that the legislature designed that the whole should have effect. I do not know that it intended that only a part should have effect, or that the acts should take effect and operate in any other

manner than that prescribed upon their faces. And, if the acts are put into operation at all, it seems to me that it will be questionable whether they are the acts of the legislature or of this court. It is plain to me that the legislature contemplated that the acts should operate as a whole, and that they should take effect in all their parts at the time and in the manner specified in the acts, and not otherwise, and that there would have been no such redistricting and increasing salaries, and changing the times for holding courts, and assigning judges and chancellors, as provided for in the acts, if it had been supposed that judges and chancellors, sought to be placed in a condition of salaried repose, would be judges and chancellors with duties to perform to the end of their terms, notwithstanding the acts. The doubts that may exist as to when and for whom salaries are to be increased if the *emeritus* judges and chancellors continue to act to the close of their terms; the uncertainty which must arise, under the same circumstances, as to which judge or chancellor in some districts shall hold court, and as to whether some of the courts can or will be held for months and years in some of the counties, in one or more of the new districts, at the times designated in the acts, and the fact that the scheme would have operated without friction or confusion if judges and chancellors could have been retired in the manner attempted,—all proper to be considered, under the circumstances, to ascertain the legislative intent,—are persuasive that the legislature would not have passed the acts as they exist, unless it intended them to operate as a whole, including the feature that some of the judges and chancellors were removed and put out of the way. I find, in the constitution, limitations on the powers of the legislature, as well as on the other departments of government, which are mandatory; but no provision to save a statute which violates that instrument. There is nothing in the constitution which cures or removes the defects, or which enables any court to supply the essential qualities, of an act of the legislature when it is in violation of the constitution. I was not so brought up at the feet of the Gamaliels, nor so taught according to the perfect manner of the law of the fathers, as to be able to believe that any court in this land has power and authority to do any such thing. In this, as in every other case of the construction of statutes and constitutions, I regard it rather as the province of courts to ascertain, if possible, from the whole and every part of the instruments considered together, the meaning and intention of the law-makers, and to be guided and governed by them, whether they lead to the maintenance of such instruments or to their overthrow.

But there is another view, from which these acts cannot, in my judgment, be put into operation without violating the constitution. After it is determined that judges and chancellors cannot be ousted from office in the manner provided by the acts, (and the opinion of the majority of the court holds that they are still judges and chancellors,) if the acts are then maintained, it must result that there are, and must be for some time to come, two circuit judges and two chancellors in each of several of the new judicial districts; and, while all of them will be entitled to their salaries, only one-half of them, to-wit, those assigned by the acts to the new districts, will be required by law to perform the duties of the office. I deny the authority of the legislature to create two judges and two chancellors in the same district, in this manner, or to expend the public money to pay salaries to judges and chancellors who are such merely in name, and of whom no official duty is required. It is against the spirit and the theory and the purpose of the constitution and of our institutions. The constitution requires that judges and chancellors shall be appointed to hold courts, and to perform the gravest, the most important, and the most arduous of all public duties. The law requires that they shall be paid, because the laborer is worthy of his hire. Judges and chancellors are, *ex vi termini*, public officers; but a judge or chancellor without a court, and without a district, and without official functions to perform, cannot be brought:

within any legal definition of a public officer. He is, to all intents and purposes, a private citizen, with the rank and pay of a judicial functionary. Toleration of such legislation may not be detrimental to the public welfare in the present instance, but it will be a precedent which, in the changes of men and parties, may be invoked at pleasure, to depose any judge or chancellor, or to subvert the judicial system of the state as organized under the constitution, and even to establish a system of judicial pensions and bounties. And the precedent will be the more dangerous, because it holds out to judges and chancellors who may be in the way of others the temptation of the state continuing to pay their salaries, if they will consent to accept it, and retire from office, and do nothing and say nothing about it.

(84 Ala. 313)

*HOMER et al. v. SCHONFELD.*

(Supreme Court of Alabama. May 1, 1883.)

**1. HUSBAND AND WIFE—ACKNOWLEDGMENT OF DEED BY WIFE—SUFFICIENCY OF CERTIFICATE—CODE ALA. § 2508.**

Where the certificate of a wife's acknowledgment to a deed is in the form prescribed by Code Ala. 1886, § 2508, except that "without restraint or threat on the part of the husband" is used, instead of "without restraints or threats on the part of the husband," the acknowledgment is sufficient.

**2. DEED—ACKNOWLEDGMENT—MISTAKE IN DATE OF CERTIFICATE.**

Where the certificate to the wife's acknowledgment recites that the wife appeared and acknowledged the deed September 4th, the same date of her husband's acknowledgment, and then affirms that the certificate was made on a previous date, the date in the body of the certificate is the true one, the second date being clearly a mistake.

**3. MORTGAGE—FORECLOSURE—PARTITION OF PROPERTY—RIGHTS OF ADULT DEFENDANTS.**

On foreclosure of a mortgage where the land is susceptible of division, and the defendants, whose titles will be affected by a sale, are adults, the court may, unless such proceeding is invoked, decree a sale of the property without first ascertaining whether the sale will be for the interest of such defendants.

Appeal from chancery court, Mobile county.

*Hannis Taylor and John R. Tompkins*, for appellants. *Overall & Bestor*, for appellee.

STONE, O. J. This bill was filed for the foreclosure of a mortgage, made by William H. Homer and wife, E. B. Homer. The mortgage has no subscribing witnesses. It is contended in defense that the premises purporting to have been conveyed were the homestead on which Homer resided with his family, and that the certificate of acknowledgment by the wife is not sufficient to divest the homestead title.

The mortgage bears date July 17, 1883. Following this is a certificate of acknowledgment by the husband, made before a justice of the peace, dated September 4, 1883, and certified by him, in strict compliance with the statute. Code 1886, § 1802. No question is raised on the sufficiency of this certificate. Next follows a certificate, made by the same justice of the peace, the only evidence offered of the voluntary signature and assent of the wife. Its language is: "I, Edwin Tardy, a justice of the peace in and for Mobile county, do hereby certify that on the 4th day of September, 1883, came before me the within-named E. B. Homer, known to me to be the wife of the within-named Wm. H. Homer, who, being examined separate and apart from the husband touching her signature to the within conveyance, acknowledged that she signed the same of her own free will and accord, without fear, constraint, or threat on the part of the husband. In witness whereof, I hereunto set my hand this 7th day of August, 1883. EDWIN TARDY, J. P. M. C." Comparing this certificate with the form given in Code 1886, § 2508, it will be observed that the words "constraint" and "threat" are used in the singular number, while the form furnished has them in the plural. There is

nothing in this. If there be no constraint or threat, there cannot be any constraints or threats. The absence of one is certainly the absence of more than one. It is urged, however, that inasmuch as the mortgage in this case is without witnesses, and could not operate as a conveyance until it was acknowledged by Homer, the assent of Mrs. Homer was obtained at a time when there was no conveyance to assent to, and hence it was inoperative. We consider it unnecessary to decide this question. The certificate has two dates. It first certifies that Mrs. Homer appeared before the justice September 4th, "separate and apart from her husband," and then and there made the requisite acknowledgment. It then affirms that the justice made his certificate of such acknowledgment August 7th, 28 days before the acknowledgment was made. This was an impossibility, and shows conclusively that a mistake was made. In construing such certificate we must have regard to the whole instrument; and in a liberal, rather than technical, spirit. If the substantial provisions of the statute have been complied with, it is our duty to pronounce the conveyance valid. Deeds are interpreted most strongly against the grantor, — *ut res magis valeat, quam pereat*. *Sharpe v. Orme*, 61 Ala. 268; *Gates v. Hester*, 81 Ala. 357, 1 South. Rep. 848. We hold the second date is a mistake, and the one in the body of the certificate the true one. In what we have said it is not our intention to impair our former rulings, nor to break down any of the safeguards the legislature has erected around the homestead. *Scott v. Simons*, 70 Ala. 352; *Motes v. Carter*, 78 Ala. 553. When by chancery decree a mortgage is foreclosed on lands which are susceptible of division, and there are infant defendants whose titles will be affected thereby, it is error to decree a sale, without first ascertaining whether or not the interest of the infants will be probably promoted by a sale in parcels. *Walker v. Hallett*, 1 Ala. 379; *Walker v. Bank*, 6 Ala. 452; *Fry v. Insurance Co.*, 15 Ala. 810. But there is no such rule when the defendants are adults; unless such proceeding is petitioned for, or is otherwise invoked, before a decree of sale is rendered. *Ticknor v. Leavens*, 2 Ala. 149; *Eslava v. Lepretre*, 21 Ala. 504; 2 Brick. Dig. 260, § 169. *Gladden v. Mortgage Co.*, 80 Ala. 270. The defendants in this case were adults, and no application was made in the court below raising such inquiry. It was not the duty of the court to move in this matter *ex mero motu*.

What we have said above renders all other inquiries immaterial. **Affirmed.**

(34 Ala. 115)

**PORT OF MOBILE v. LOUISVILLE & N. R. Co.**

(*Supreme Court of Alabama. May 8, 1888.*)

**1. RAILROAD COMPANIES—FRANCHISES—LICENSE FROM CITY.**

A grant by a city ordinance to a railroad company, whose charter authorizes it to build its track "through any street or highway," of the right to build a track along a city street, is a franchise in the proper sense of the term, as the authority to exercise such right in fact comes from the legislature through the corporate authority of the city as agent of the state.

**2. SAME—FRANCHISE GRANTED BY CITY—IRREVOCABLE GRANTS.**

Under a charter authorizing a railroad company to obtain by grant from cities or villages any rights, privileges, or franchises in reference to the construction, maintenance, and management of its cars, locomotives, and its business, a grant by a city to such railroad of the right to build a track along a business street is a franchise within the meaning of the charter, and, as such, is irrevocable, such grant having been made before Const. Ala. 1875, prohibiting irrevocable grants of special privileges, went into effect.

**3. SAME—FRANCHISE GRANTED BY CITY—CONTINUED ENJOYMENT OF.**

Where a city granted to a railroad company the right to lay a track, with the necessary sidings and turn-outs along a business street, in such manner as the company might deem expedient and necessary for its business and interests, and the company, having laid such tracks, had for 18 years loaded and unloaded its cars on said street, the city cannot deprive the company of the right thus to load and un-

load its cars there in the future, as such right is not only a necessary incident of the original grant, as properly construed, but the long exercise of the right, without objection, must be regarded as establishing such a construction.

4. **SAME—FRANCHISE GRANTED BY CITY—ATTEMPT TO DISCONTINUE.**

Where a railroad company is legally vested with the right to load and unload its freight cars along a city street, and the city attempts, by an ordinance, to discontinue the exercise of the right, thus paralyzing the freight business of the company in the city, equity will interfere to protect the franchise of the company.

5. **SAME—ATTEMPT BY CITY TO DISCONTINUE FRANCHISE—INJUNCTION TO RESTRAIN.**

Where a city attempts to destroy an alleged franchise of a railroad company, the validity of the franchise depending upon the construction of a grant from the city, authorized by the railroad's charter, the railroad company need not establish its right at law before equity will afford protection, as, the construction of the grant being for the court, the right of the company is not in law doubtful.

6. **SAME.**

Where a city attempts unlawfully to take away the right of a railroad company to load and unload its cars along a city street, equity will not refuse to protect the company simply for the reason that the attempted invasion of its rights are accompanied by acts constituting personal trespass.

7. **SAME.**

Where a city attempts, by an ordinance, to deprive a railroad company of a vested right to load and unload its freight cars along a city street, equity will not refuse to interfere in behalf of the railroad company simply because the ordinance is *quasi* criminal in character.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge. *R. H. Clarke*, for appellant. *Gaylord B. Clarke* and *F. B. Clarke, Jr.*, for appellee.

SOMERVILLE, J. The present bill is filed by the Louisville & Nashville Railroad Company against the port of Mobile to enjoin the enforcement of an ordinance of that municipality, which declared it unlawful for any person or corporation to load or unload cars in the public streets of the city, under a penalty of not less than \$25 for each and every violation of the provision. The ordinance excepts cotton, coal, and ice in certain localities, but this exception has no material bearing on the present controversy. The bill claims for the complainant a vested franchise to exercise the right of loading and unloading freight along the line of its track constructed through Commerce street, in said city, and that the enforcement of the ordinance in the manner which has been threatened by the municipal authorities will operate as a total destruction of this valuable franchise, which the company had been peaceably exercising for about 18 years. It is averred that the ordinance in controversy is the exercise of unauthorized municipal power, and is therefore void, and that the defendant corporation, the port of Mobile, is insolvent, and the public officers and others who have undertaken to enforce the ordinance, by the threatened arrest of the complainants' employes, are pecuniarily irresponsible; and facts are stated from which it is made clear that the injury which will be suffered by the complainant in the abrogation of this right, and the consequent paralysis of its business, will be irreparable, and cannot be recompensed by suits for damages at law. We, *first*, inquire as to the origin and nature of the right or privilege claimed by the complainant; *second*, whether the ordinance in question operates as an illegal interference with it; and, *third*, as to the jurisdiction of a court of equity to interfere by the aid of injunctive relief.

1. The basis of the alleged right in the complainant is a grant by the city of Mobile, in the form of an ordinance, passed in September, 1869, for the particular purpose, as the bill alleges, of enabling the railroad to reach the stores and warehouses situated on Commerce street; this grant being made under the authority of the charter of the railroad company created by legislative enactment. The complainant, as the owner of the charter of the New Orleans, Mobile & Chattanooga Railroad Company, is shown to be entitled to all the rights vested in that corporation. The charter of the latter company,

enacted in November, 1866, expressly authorized the construction of its road across or through any street or highway; the only limitation upon the right being that the usefulness and convenience of such street or highway to the public should not be unnecessarily or materially impaired. Acts 1866-67, pp. 6, 15, § 13. An amendment to this charter, approved February 12, 1867, contained the following provision: "That the said company is hereby authorized and empowered to obtain, by grant or otherwise, from any incorporated city or village within the state, that may be situated upon or at the intersection or *termini* of any of its railroads, any rights, privileges, or franchises that any of said incorporated cities or villages may choose to grant in reference to the construction, maintenance, and management of the railroad of said company, its depots, cars, locomotives, and its business within the limits of such incorporated city or village, as hereinbefore named, is hereby authorized and empowered to grant to said company any such rights, privileges, and franchises as it may deem proper and advisable; and such privileges and franchises, when granted to and accepted by said company from any such incorporated city or village, shall be deemed and taken as rights, privileges, and franchises vested and confirmed in said company, and not liable thereafter to be revoked, changed, injured, or impaired, except with the consent of said company." Acts 1866-67, p. 400, § 5. That the legislature, under the general police power inherent in the state, had the constitutional power to authorize the city of Mobile to grant the right to construct a railroad track, upon which steam-engines are operated, across and through the streets of that city, must be conceded; and, after such permission, it would be in the mouth of no one to complain that the changed use of the street would *per se* be a nuisance. *Perry v. Railroad Co.*, 55 Ala. 418. Under the authority thus conferred in the charter of the company, the city of Mobile, on September 7, 1869, passed an ordinance by which it "granted" to the railroad the right of way through certain streets, including "also the right to lay a single track, with the necessary sidings and turn-outs, from the northern boundary of its depot, \* \* \* through Commerce street, \* \* \* in such manner as said company may deem expedient and necessary for its business and interests." Upon the faith of this grant the track of the road was constructed through Commerce street, with the necessary sidings and turn-outs, for the purpose of loading and unloading freight and merchandise into and from the various stores and warehouses located upon said street, and has been ever since continuously used for this purpose from day to day, without complaint or objection from any source, for a period of 17 or 18 years, until the attempted revocation of the ordinance in December, 1886. The privilege thus granted is obviously a franchise of the most valuable kind, being one of the most common examples of such a grant or privilege. *Davis v. Mayor*, 67 Amer. Dec. 186, 193. It is certainly a "right, privilege, or franchise" within the meaning of the company's charter, having reference, as it does, to the construction and management of the railroad, and the conduct of its business of transportation within the limits of the city of Mobile. Such a special privilege, conferred directly by legislative enactment, or in a mode provided for by such enactment, becomes a contract between the state and the corporators, and, as such, has always been protected from impairment by legislative action by virtue of both the federal and state constitutions, each of which prohibits the passage of any law by which the obligation of existing contracts is impaired or lessened. *City of Burlington v. Railway Co.*, 49 Iowa, 144, 81 Amer. Rep. 145. "A grant, in its own nature," observes Chief Justice MARSHALL, in *Fletcher v. Peck*, 6 Cranch, 87, 137, "amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right,"—a principle which has been held in this state to be applicable to franchises lawfully granted by municipal corporations. *Stein v. Mayor*, 49 Ala. 362, 20 Amer. Rep. 283. The charter itself declares, moreover, that, when once

granted in the mode provided for, such privilege should become a vested and irrevocable right, not liable to be revoked or impaired in any manner. Acts 1866-67, p. 400, § 5. It was not until the present constitution of 1875, now in force in this state, went into operation, that irrevocable grants of special privileges of this nature were prohibited. *Railway Cases*, 79 Ala. 469.

2. The privilege in question is none the less a franchise, in the proper sense of that term, because it was granted, not directly by legislative enactment, but by the municipal authorities of Mobile under the sanction of the charter, which is itself a legislative enactment. The grant by the city without such sanction would be unauthorized by law, and void. It is therefore referable to the charter, and may be considered as a grant by the legislature on the condition precedent that the corporate authorities of Mobile should assent to it; that municipality being regarded as a political agent for the state for this purpose, as it is for other governmental and police purposes. A case strongly analogous may be found in the grant of a license by the court of county commissioners, under the authority of the statute, to establish a toll-bridge or a ferry, which have been held by this court to be privileges in the nature of legislative franchises granted directly by the state, and subject, in general, to be governed by the same principles. *Harrell v. Ellsworth*, 17 Ala. 576; *Gates v. McDaniel*, 2 Stew. (Ala.) 211; *Mayor v. Rodgers*, 10 Ala. 37, 49; *Railway Cases*, 79 Ala. 465. This principle seems to us to be based on sound and practical reason, and is essentially just in its results. It is a mere logical sequence of the common adage, *qui facit per alium, facit per se*. An act done by this state, through its duly-authorized agent, is an act done by the state itself.

3. The chancellor decided that the grant made by the city to the appellee conferred, by necessary implication, not only the right of transit through Commerce street, but the right to load and unload at the adjacent stores and warehouses. In this conclusion we are disposed to concur, notwithstanding the force of the rule that the charters of corporations are to be construed strictly against the corporators, and what is not unequivocally granted in such acts must be taken to be withheld. The power claimed must, in other words, be granted in clear terms, or else must be necessarily implied. *Railway Cases*, 79 Ala. 472. It has been held by a respectable and learned court that the grant to a railroad company of the mere right of transit through the streets of a city would carry, as a necessary incident, the right to load and unload merchandise, provided ample room was left to accommodate public travel on the street, and the time occupied in exercising the right was reasonably short. *Mathews v. Kelsey*, 58 Me. 56, 4 Amer. Rep. 248. The present case does not require us to carry the principle so far. Here the railroad already possessed the naked right of transit. This had been conferred expressly and directly by legislative enactment, as declared in the original charter. The amendment to the charter would seem, therefore, to have in view the giving of some additional right or privilege. It would otherwise have been useless. The language of the city ordinance bears out this view. It not only confers the right to lay the main track through the street, thus confirming what the company already had, but it goes further, by adding, "with the necessary sidings and turn-outs," and these to be laid in such manner as the railroad company might deem "expedient and necessary for its business and interests." Why, we may ask, give the power to lay these "aidings and turn-outs" along the streets, and within the company's discretion, if the right to use them was to be withheld? The right to lay a track through a street implies by necessary implication the right to use such track in the mode ordinarily adopted by railroad companies, and subject to reasonable regulation under the police power of the proper authorities. The right to lay side tracks and turn-outs, in like manner, implies the right to use them, and the only use which could be reasonably contemplated by their construction is for

the transportation of goods to and from the adjoining stores and warehouses. Add to this the significant fact that the railroad company, after being placed in possession of its franchise, construed it to confer this right, and exercised it uniformly, without complaint or interruption, for between 17 and 18 years. A contemporaneous construction of a law is of very high authority. The practical exercise of a right under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction, thus established by years of uniform usage, is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts; the court being always strongly inclined to interpret every agreement as the parties themselves have done by practical usage, regarding their conduct, in the every-day execution of its terms, as an agreed interpretation of them. Our conclusion is that the railroad company was possessed of an irrevocable franchise, conferred by the city ordinance, giving it the right to load and unload freight at its sidings and turn-outs, constructed on Commerce street, subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired.

4. The ordinance of December, 1886, here sought to be enjoined, is a manifest attempt to abrogate this privilege, by declaring its exercise unlawful, and fixing a penalty to it. The announced determination of the police authorities to arrest all employees of the road who seek to exercise the franchise, if executed, must operate to its utter destruction. The allegations of the bill, which the demurrer admits to be true, negative all facts from which it is possible to suppose that the purpose of the objectionable ordinance was to abate a nuisance. There is no sort of pretense that it was a mere police regulation. There is no complaint on the subject from those most interested in the use and occupancy of the highway. It comes from those who neither are property holders, nor engaged in business there. Facts, moreover, are averred from which it seems clear that the loading and unloading of cars of freight by the railroad along the street, so far from seriously obstructing travel and traffic by the public, greatly facilitate the convenient use of the streets for these purposes, by relieving it of the burden of being constantly crowded with drays and other vehicles. The case, therefore, raises no question as to a resort to the police power of the city or state to abate an alleged nuisance, or as to an attempted regulation of an admitted right. The purpose of the defendant corporation is obviously to destroy the franchise which it has conferred; and the ordinance under consideration, having this effect, if executed, must be held to be void.

5. The jurisdiction of a court of equity to protect a franchise of this kind from unlawful invasion or disturbance is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the prevention of irreparable injury, or such as cannot be adequately estimated in damages at law; at other times, the avoidance of a multiplicity of suits, and again the abatement of annoyance in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege, as well as the parties particularly interested. *Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51. The party aggrieved is not required to establish his right at law, before he is permitted to invoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right is here determined by a municipal ordinance in the nature of both a grant and a contract, which is in writing. Its construction is for the court, and not for the jury. *Mayor v. Rodgers*, 10 Ala.

57; *Turnpike Co. v. Ryder*, 1 Johns. Ch. 611; *Harrell v. Ellsworth*, 17 Ala. 576; *Turnpike v. Miller*, 9 Amer. Dec. 274; *Com. v. Railroad Co.*, 24 Pa. St. 159, 62 Amer. Dec. 372; *Attorney General v. Helshon*, 18 N. J. Eq. 410, 2 Dill. Mun. Corp. § 907.

6. It is too clear for argument that it is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise sought to be protected is accompanied by acts which are personal trespasses. A court of equity will not, it is true, interfere to enjoin a mere trespass of an ordinary character either upon the person or property. The remedies afforded at law are deemed adequate in cases of this kind. *Railroad Co. v. Walton*, 14 Ala. 207. But the cases are numerous in which the arm of this court has been successfully invoked to enjoin trespasses, which, if unrestrained, would probably result in irreparable mischief, or where such mischief might be completely effected before a trial at law could be had as to the controverted right. Judge Story thus states the rule: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation if the facts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed," he concludes, "courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country." 2 Story, Eq. Jur. § 923. The chancery court of England had come up to this advanced view of the law as early as the days of Lord HARDWICKE. *Coulson v. White*, 3 Atk. 21. And this view is now supported by an unbroken array of uniform authorities, speaking with one voice on the subject. *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Amer. Dec. 484, note, 493-507; *Lyon v. Hunt*, 11 Ala. 295, 46 Amer. Dec. 216; *Scudder v. Falls Co.*, 23 Amer. Dec. 756; *Poindexter v. Henderson*, 12 Amer. Dec. 550; *Burnley v. Cook*, 13 Tex. 586, 65 Amer. Dec. 79; *White v. Flannigan*, 1 Md. 525, 54 Amer. Dec. 668. The case of *Osborn v. Bank*, 9 Wheat. 738, is a familiar and high authority, from one of the greatest of judges, for the position that where a trespass, or a series of trespasses, operate, in effect, to destroy or seriously impair the exercise of a franchise; a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction. And in *Stacy Co. v. Society*, 15 Abb. Pr. (N.S.) 51, it is expressly held that an injunction would lie to restrain the persistent commission of trespasses of a mere personal nature, where they affect a corporate franchise. And the same principle has been recognized by this court in a case where it was sought to enjoin the enforcement of a municipal ordinance, the violation of which was attended with a penalty. *Moses v. Mayor*, 52 Ala. 198. The equity of the present bill can be supported upon the ground that the court will lend its aid to prevent the destruction or serious impairment of a vested franchise, the value of which cannot be adequately estimated in damages. The case is strengthened by the further consideration of preventing expensive and vexatious litigation accompanied by a multiplicity of suits, and the insolvency of the defendants, by whom the alleged grievances are threatened,—facts which strongly corroborate the alleged inadequacy of any legal remedy open to the complainant in the courts of law. The records of our courts present few cases of threatened injury so irreparable in nature, or for which a verdict of damages at law would furnish so inadequate compensation. *Jerome v. Ross*, 11 Amer. Dec. 484, note, 500-507.

7. The suggestion that the court, under the peculiar circumstances of this case, must abdicate this jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi criminal character, the violation of which is made an offense, does not strike us favorably. The power to prevent irreparable injury flowing from the deficiencies and injus-

lice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subject to it. They must stand in our courts upon terms of equality with all other corporations and with natural persons. Our constitution declares that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." Const. 1875, art. 14, § 12. "The legal effect of this provision is to place municipal corporations, as nearly as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state." *Railroad Co. v. Morris*, 65 Ala. 193; *Davis v. Mayor*, 1 Duer, 452. And the rule, accordingly, must apply with peculiar force with us, which is said by Mr. Dillon to be generally recognized elsewhere, that "equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in other cases." 2 Dill. Mun. Corp. § 908. It cannot be tolerated that a municipal corporation, in view of these principles, should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal and void ordinance, which is designed as a repudiation of its own valid grants or contracts, especially in a case where the public are largely concerned, and a court of law can afford no remedy adequate for the prevention of irreparable injury that would probably result from the enforcement of such ordinance. There is nothing in the case of *Burnett v. Craig*, 30 Ala. 135, 68 Amer. Dec. 115, which is in conflict with the foregoing views, as will appear from the later case of *Moses v. Mayor*, 52 Ala. 198. The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights. 1 High, Inj. § 20; *Mayor v. Radecke*, 49 Md. 217, 33 Amer. Rep. 239; *Railroad Co. v. New York*, 54 N. Y. 159; *Mayor v. Waring*, 41 Ala. 139, 8 Wall. 110. The decree of the chancellor, refusing to dismiss the bill for alleged want of equity, and refusing to dissolve the injunction, is in harmony with the foregoing views, and must be affirmed.

(34 Ala. 126)

FORCHHEIMER *et al.* v. PORT OF MOBILE.

(Supreme Court of Alabama. May 3, 1883.)

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge.

The appellants, who were wholesale merchants and warehousemen in the port of Mobile, do business on and near the street upon which the railroad track runs. They filed their bill in the present case, and sought to enjoin the enforcement of a municipal ordinance passed by the port of Mobile, prohibiting the loading and the unloading of cars in the public streets of Mobile. The ordinance is the same as that discussed in the case of *Port of Mobile v. Railroad Co.*, ante, 106. The facts in the two cases are the same; the only difference being that in the case of *Port of Mobile v. Railroad Co.* the complainant was a corporation, and in the present case the complainant is simply a partnership, without ever having any franchise granted to it by the law-making power of the state.

Overall &amp; Bestor, for appellants. R. H. Clarke, for appellee.

SOMERVILLE, J. Under the principles settled in *Port of Mobile v. Railroad Co.*, ante, 106, (decided at the present term,) and the case of *Burnett v. Craig*, 30 Ala. 135, 68 Amer. Dec. 115, the facts stated in the complainants' bill do not present a case of irreparable damage threatened by the enforcement of the municipal ordinance sought to be enjoined; and, no question being involved as to the protection of a franchise, the decree of the chancellor must be affirmed. Before the injunctive aid of a chancery court can be successfully invoked in this case, the complainants must first establish the invalidity of the ordinance in question by judgment of a court of law. Their remedy at law is not shown to be inadequate. Affirmed.

(65 Miss. 439)

PARISOT *et al.* v. TUCKER *et al.*

(Supreme Court of Mississippi. April 23, 1883.)

## HOMESTEAD—EXTENT—VALUATION—RIGHTS OF HEIRS.

The respective rights of creditors and heirs as to a homestead allotment in the land of a deceased debtor should be determined, as far as affected by value, by the value of the land at the time of the death, as that is the statutory time for determining the rights of heirs, and not at the time of a subsequent action by creditors to subject the land, as far as not included in the homestead, to the debts of deceased.

Appeal from chancery court, Yazoo county; E. G. PEYTON, Chancellor.

One Birmingham died leaving a residence, livery stable, etc., at Vaughan's station, situated on 4 acres of land which was part of an 80-acre tract owned by him. After his death, creditors filed a bill to subject the 80 acres to the payment of his debts, *i. e.* to subject the excess of the homestead exemption in value, claiming that they were entitled to have it valued as at the time of Birmingham's death. The property having greatly depreciated in value since, the heirs claim that they are entitled to have it valued at the date of the decree. The testimony as to the value of the land at the time of Birmingham's death is contradictory. The chancellor held that it should be valued as at the time of filing the bill, and on the testimony gave a decree for the heirs, from which the creditors have appealed.

*Bowman & Bowman, T. H. Campbell, and J. C. Prewett, for appellants. Hudson & Holt, for appellees.*

COOPER, C. J. The heirs at law of Birmingham took by descent, freed from the claims of his creditors, so much of the land upon which he resided at his death as did not exceed 80 acres in extent or \$2,000 in value. If an execution had been levied on the lands during Birmingham's life, the valuation at the time of allotment of the homestead would have prevailed; and, if the part allotted had thereafter increased in value, there could have been a new allotment, so as to keep the property within the limits of the law. But his death is made by the statute the point of time at which the right of the heir at law is to be measured, and a subsequent appreciation or depreciation in value would not change the allotment. But it is not clear from the conflicting evidence that the value of the whole land exceeded \$2,000 at the date of Birmingham's death, and it is certain that the whole was less than 80 acres.

The decree of the chancellor is therefore affirmed.

(65 Miss. 383)

## PULLMAN'S PALACE CAR CO. v. EHRMAN.

(Supreme Court of Mississippi. April 16, 1883.)

## CARRIERS—OF PASSENGER—SLEEPING CARS—REFUSAL TO MAKE UP BERTH.

Evidence that plaintiff, while on a car which was both an eating and sleeping car, ordered his berth to be made up; that the porter replied that it would be done as soon as he had furnished two lunches previously ordered; and that, after an angry dispute, plaintiff went into a forward car, and sat up all night, though the berth was made up for him,—does not sustain a verdict for damages for plaintiff.

Appeal from circuit court, Warren county; RALPH NORTH, Judge.

Charles Ehrman was in New Orleans, and bought a ticket to Vicksburg, by a car which was a combination car,—both an eating and sleeping car. He was assigned to berth No. 6; and, after leaving the city of New Orleans, he desired his bed made down, approached the porter on the subject, and the porter replied that the bed would be made just as soon as he got through furnishing two lunches which had been ordered by other passengers of the same car. Ehrman then demanded the presence of the conductor having charge of the car, and the porter brought him, when Ehrman demanded to know whether that was a sleeping or eating car. The conductor replied that it was both;

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that the rules required orders of passengers to be filled in order given; that Mr. Ehrman's bed should be made as soon as the porter furnished the two lunches ordered before he (Ehrman) had asked for his bed, and directed the porter to make his bed as soon as he got through. Ehrman demanded that his bed should be made then and there, or that his money be refunded. The conductor refused to refund the money, but said his bed should be made down as soon as the porter got through with the orders on hand. Ehrman says he was treated abusively, and he left the car, went forward, and sat up all night, or till he arrived at Vicksburg. It was proved that all the berths were made down by 9 o'clock; that the porter made Ehrman's berth as soon as he finished furnishing the two lunches previously ordered. Ehrman sued for damages, and recovered a verdict and judgment against the palace car company, from which it has appealed.

*Per: y Roberts*, for appellant. *J. M. Gibson*, for appellee.

CAMPBELL, J. The verdict is not sustained by the evidence. It is manifest that no wrong was done the appellee of which he can justly complain; and whatever unpleasantness he encountered appears to have been brought about as the direct and natural result of his own conduct. He had no right to have his bed made instantly, as demanded, under the circumstances; and as it was made ready in good time, and he chose not to use it, as he might, he can blame no one but himself for the discomfort of sitting up all night. The rudeness complained of in the altercation with the servants of the appellant sprang naturally from the manner and language of the appellee, and furnish an apt illustration of Solomon's proverb, "An angry man stirreth up strife." Reversed.

#### RIGBY v. HARDY *et al.*

(*Supreme Court of Mississippi*. April 9, 1883.)

##### COURTS—JURISDICTION—AUTHORITY OF SUPREME COURT TO ENTER JUDGMENT.

Where judgment without notice is entered against a surety who moves to vacate the same, and the supreme court, holding the judgment invalid for want of notice and consequent want of jurisdiction, expressly reverses it, but renders judgment anew against the surety on the ground that his appearance gives the court jurisdiction, such judgment is authorized by Code Miss. § 1415, providing that the supreme court shall render the proper judgment itself in case the judgment appealed from is reversed.

Appeal from chancery court, Warren county; WARREN COWAN, Chancellor.

Bill by Thomas Rigby against I. Hardy and others to cancel an alleged fraudulent conveyance. The bill was dismissed, and complainant appeals. Section 1415 of the Code, referred to in the opinion, is as follows: "The supreme court shall hear and determine all cases properly brought before it, according to law, at the return, unless cause be shown for a continuance; and, in case the judgment, sentence, or decree of the court below shall be reversed, the supreme court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action, or prosecution shall be remanded to the court from which it was brought, for a final decision; and, when so remanded, shall be proceeded with in the court below according to the directions of the supreme court, or according to law, in the absence of such directions."

*Catchings & Dabney*, for appellant. *Birchett & Gulland*, for appellee.

ARNOLD, J. Appellant, claiming to be the owner of a judgment wherein Forbes & Beck are plaintiffs and Brereton and Hardy defendants, filed the bill in this case to cancel a certain conveyance made by Hardy, with intent,

it is alleged, to defraud his creditors, and to subject the property conveyed to the payment of said judgment. On final hearing on bill, answers, and proof the chancellor dismissed appellant's bill. The answers filed challenged the validity of the judgment in favor of Forbes & Beck, rendered on appeal in this court at the October term, 1885, in so far as it relates to Hardy, and the arguments of counsel here are devoted exclusively to the question whether that judgment is valid or not. As to the judgment, it appears that Forbes & Beck sued out an attachment against Brereton, and that certain property was seized under the writ of attachment. Under section 2428 of the Code the defendant executed a bond with Hardy as surety, whereupon a part of the property levied on was delivered to the defendant, and the attachment was thereby discharged as to that part of the property. The attachment was sustained, and plaintiffs had judgment on the merits, and judgment was entered against the defendant, but not against Hardy as surety on the bond. On motion of plaintiffs, made at a subsequent term of the court, judgment was entered on the bond against both the defendant and Hardy, but without notice to Hardy; which judgment, at another term of court, was set aside as to him, on his own motion. From this action of the court plaintiffs appealed, and on the appeal we approved of the setting aside the judgment against Hardy, because it was taken without notice to him, but we disapproved the action of the court in so far as it discharged him, or failed to enter the proper judgment against him. We held that, upon the facts of record, after plaintiffs had obtained a verdict against defendant, they were entitled, as matter of right, under section 2428 of the Code, to judgment on the bond, and that the appearance and motion of Hardy to vacate the judgment against him gave the court below jurisdiction over him to render the proper judgment against him after the first judgment against him was vacated, and, the facts being undisputed, we rendered the judgment here against him which should have been entered in the lower court. In this we fail to discover any error or irregularity. The judgment of this court as to Hardy was not only reversed in effect, but it was expressly declared to be reversed, as shown by the record of the judgment here. There was no want of jurisdiction as to the subject-matter or the parties, and the judgment of this court was according to law and the practice of the court. Code, § 1415; George, Dig. p. 383.

The decree is reversed, and the cause remanded.

(65 Miss. 365)

PEOPLE'S BANK OF MERIDIAN v. ALABAMA G. S. R. CO.

(*Supreme Court of Mississippi*. April 9, 1888.)

**LICENSE—PRIVILEGE TAX—ACTION ON BILL OF LADING.**

Under St. Miss. providing a privilege tax to be paid by the persons exercising the privileges enumerated, with a punishment against those unlicensed, and declaring that "all contracts made with any person who shall violate this act \* \* \* shall be null and void so far only as such person may base any claim upon them, and no suit shall be maintainable in favor of such person on any such contract," where plaintiff is assignee of a bill of lading, since it acquires title to the goods, it may maintain an action upon the contract in the bill of lading made between plaintiff's assignor and defendant, whether plaintiff has paid the privilege tax or not.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

The defendant, the Alabama Great Southern Railroad Company, received from a firm styled Wilder & Co. several bales of cotton, and delivered to said Wilder & Co. its bill of lading for said cotton, wherein it stipulated to transport and deliver said cotton to a firm in New York city. Wilder & Co. transferred and delivered, for value, said bill of lading to the plaintiff, the People's Bank of Meridian; and, after this was done, Wilder & Co. failed in business, and attachments were run against them, some of which were levied on this cotton in the hands of the railroad company. The railroad company failed to deliver the cotton as per bill of lading, and the bank sued the railroad company

to recover the value of the same. The railroad company pleaded the general issue, and an additional plea to the effect that the People's Bank had failed to pay a proper privilege tax; hence, under the statute, could not enforce a contract. The court, among others, gave the eighth instruction, to the effect that if the jury believed from the evidence that, at the time of the indorsement of the bill of lading to it, the bank had not paid a sufficient privilege tax, the law denies the bank the right to maintain this suit, and the jury will find for the defendant. There was a verdict and judgment for the defendant railroad company, from which the plaintiff appeals.

*Walker & Hall*, for appellant. *John W. Fewell*, for appellee.

COOPER, C. J. The eighth instruction for the defendant should not have been given. Whether the bank had paid a proper privilege tax at the time it acquired the bill of lading is not material to its right to sue. The object of the suit is not to enforce a contract made by the bank in the course of its business, but is to recover property, or its value, acquired by it from a third person. If the contract between the bank and Wilder & Co. was an executory one, and bank was suing that firm upon the contract, the suit might be defeated by proof of the fact that it had not paid the privilege tax required by law when the contract was made. The statute, after fixing the sums to be paid by the persons exercising the privileges enumerated, and declaring punishment against the unlicensed party, proceeds: "And all contracts made with any person who shall violate this act, in reference to the business carried on in disregard of this law, shall be null and void so far only as such person may base any claim upon them, and no suit shall be maintainable in favor of such person on any such contract." The act is of a highly penal character; and while its terms should not be refined away, upon familiar rules of construction, it should not be extended by implication, or broadened by construction. The evident purpose and extent is to impose a disability upon the delinquent to enforce executory contracts, or to recover in any action on the contract itself. As was said in *Pollard v. Insurance Co.*, 63 Miss. 244: "The statute does not deprive the owner of his property embarked in the business illegally carried on. The title is not in any manner affected. All the incidents of title remain, with the rights of owner, in all respects, as to the property, except that no contract made in reference to the business not duly licensed can be enforced by him who has violated the law. The owner may resort to the courts, and maintain any action to the maintenance of which title to the property entitles him, unaffected by the fact that the property is employed in business unlawfully carried on, because the disability imposed by the statute extends only to rights founded on contracts made in reference to the business. The distinction is between title, with its incidents, and power to contract with reference to the subject of it. Not the title of the delinquent owner is impaired, but his capacity to make a contract he can enforce whereby to make successful the business he is illegally conducting." One conducting a business in violation of the statute acquires title to the goods he purchases in the markets of the world, though he might be unable to enforce an executory contract for their purchase, or to sue upon a warranty of title or of quality. If he buys on credit, the seller may enforce payment of the purchase price, for the contract is void only as to the violator of the law, and as to him only so far as he may base a claim upon them; *i. e.*, endeavors to maintain an action upon the contract. An anomalous condition of things would exist if a merchant, transacting business without payment of the license required, was disqualified to receive title to property bought and paid for in the usual course of trade. He certainly could not recover the price paid from the seller; for, as to the seller, the contract is valid. But, if he does not acquire title by a consummated sale, he would be unable to protect his possession from the unlawful interference of strangers having no sort of connection with the "con-

tract" which the law condemns. Since, by the assignment of the bill of lading by Wilder & Co., the bank acquired title to the cotton in controversy, and sues upon the contract made between the defendant and Wilder & Co., and not upon the contract between itself and Wilder & Co., it is entitled to maintain its suit, although it deduces title through a contract on which it could not have sued. Reversed and remanded.

(65 Miss. 450)

**BERRY v. BROACH.***(Supreme Court of Mississippi. April 9, 1888.)***CORPORATIONS—MEMBERS AND STOCKHOLDERS—SALE OF PROPERTY AND BUSINESS.**

The majority of the stockholders of a co-operative association may sell the property and business; and, even if such sale is voidable by the remainder of the stockholders, after being ratified by them, it cannot be avoided by one of those participating in it.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

The "Grangers" had a store, of which the appellee, Broach, was the manager. The business began to fail, and it was apparent that money was being lost by the continuance of the store, and at a regular meeting of the stockholders the store and business was sold out to Broach. This meeting was composed of a majority of the stockholders, and the appellant, Berry, was one of the stockholders present at the meeting, and joined in the sale to Broach. Berry was indebted to the store, and refused to pay, and Broach sued to recover it from him. Berry defended on the ground that all the stockholders did not join in the sale, and therefore that it was void. There was a verdict and judgment in favor of Broach, from which Berry appealed.

*Witherspoon & Witherspoon*, for appellant. *G. H. Shamburger*, for appellee.

COOPER, C. J. It was within the power of a majority of the stockholders to make the sale of the assets of the Meridian Grange Co-operative Association, an incorporated company doing an unsuccessful and unprofitable business. 1 Mor. Priv. Corp. § 413; Wood's Field, Corp. § 445; Cook, Stocks, § 667. If the act of the majority was conceded to be voidable at the election of the non-participating stockholders, the defendant, who participated in the sale, could not avoid the contract which has been ratified by the acquiescence of the other stockholders. The judgment is manifestly right on this branch of the case, and the question of the amount of the defendant's indebtedness was fairly submitted to the jury. The judgment is affirmed.

(65 Miss. 455)

**LAND, Clerk, v. ALLEN et al.***(Supreme Court of Mississippi. April 16, 1888.)***COUNTIES—LIABILITIES AND INDEBTEDNESS—ALLOWANCE OF CLAIMS.**

Under Code Miss. § 2159, requiring an order of the board of supervisors allowing a claim against the county to be entered on the minutes, specifying the amount allowed, the page and section of the law under which the allowance is made, etc., and the clerk to issue a warrant for the amount, the clerk is justified in refusing to issue such warrant where the order fails to state the names of the parties and the section of the law, as required.

Appeal from circuit court, Attala county; C. H. CAMPBELL, Judge.

The board of supervisors employed appellees, Allen & McCool and H. O. Niles, as county attorneys for a year, having no authority to so do. It was discovered that the outgoing county treasurer had failed to turn over to his successor certain bonds which belonged to the county. Suit was brought by the appellees, as attorneys for the county, on the treasurer's bond. The matter was arranged, and Allen & McCool and Niles applied to the board of supervisors for their fee. The board made the following order; "Ordered that

the action of the county attorneys in bringing suit against John Riley for the recovery of the United States bonds be hereby approved, and that they be paid the sum of \$125 for their fee." The board had not specially employed said attorneys to bring the suit against the treasurer; but, having selected them as the attorneys for the county for the year, said attorneys brought the suit without being specially employed. The attorneys applied to the clerk, the appellant, H. L. Land, for a warrant on the treasurer for the fee allowed by the above order, but the clerk refused to issue a warrant on said order because the board had failed to follow the law in making the allowance; whereupon Allen & McCool and Niles sued out a *mandamus* to compel the clerk to issue the warrant. The *mandamus* was granted, and the clerk appealed.

*Monroe McClurg* and *E. F. Noel*, for appellant. *Allen & McCool* and *H. C. Niles*, for appellees.

COOPER, C. J. Since the board of supervisors might have made a valid contract with appellees for the services rendered by them, we see no objection to its subsequent ratification of the act, and payment for the services of which the county had the benefit. But the order making the allowance does not refer to the law under which it is made; and, while we do not decide that it was on this account void, it was sufficient to justify the action of the clerk in refusing to issue the warrant. Section 2159 of the Code requires that "the order allowing the claim shall be entered on the minutes, specifying the amount allowed, the page and particular section of the law under which such allowance is made, and on what account; and the clerk shall issue a warrant on the county treasurer, under the seal of his office, in favor of the claimant for the amount allowed." In the order neither the name of the parties, nor the section of the law under which it was made, is given, and the clerk rightly refused to act under it. The law is intended for the protection of the counties against unlawful claims, and a rigid compliance with its terms should be required by the clerks of the boards as a condition of their action in issuing warrants. It is the fault of the claimants that they did not see to the entry of the proper judgment on their claim. The judgment is reversed, and the suit dismissed.

(65 Miss. 454)

#### DUNLAP v. CLAY.

(*Supreme Court of Mississippi*. April 16, 1883.)

#### OATH—WHAT CONSTITUTES.

One need not "hold up his hand and swear" to make his act verifying the truth of matters set out for grounds of attachment an oath; both he and the officer understanding that everything necessary to complete the oath was done.

Appeal from circuit court, Newton county; A. G. MAYERS, Judge.

Virginia V. Dunlap, by her agent, sued out an attachment before a justice against A. Q. Clay. The justice used a blank form, with the bond on one side, (printed,) and the affidavit on the other. The agent, in reply to the question whether he swore to the grounds of the attachment, answered that he did, but failed to hold up his hand and swear. He signed the bond, but did not sign the affidavit. On the writ being returned to the circuit court, plaintiff asked leave to amend the affidavit, which was refused, and, on motion of defendant, the affidavit was quashed, because insufficient, and a writ of inquiry awarded to ascertain damages for the wrongful suing out of the attachment. From a judgment rendered on the finding plaintiff appealed.

*S. B. Watts*, for appellant.

COOPER, C. J. It was not necessary that the agent of the plaintiff should "hold up his hand and swear" to make his act an oath to the truth of the matters set out for grounds of attachment. The affiant and the officer both un-

derstood that what was done was all that was necessary to complete the oath, and what was done was sufficiently formal. Whart. Crim. Law, § 2205. The judgment is reversed, the motion to quash overruled, and cause remanded.

**JACKSON v. SMITH.**

(*Supreme Court of Mississippi. April 16, 1888.*)

**REPLEVIN—INSTRUCTIONS—SALE—CONDITIONAL SALES.**

In replevin for a chattel taken by defendant under a deed of trust from one to whom plaintiff had sold the same, retaining the title to himself until the purchase price was paid, an instruction that, if the deed of trust was given without the consent or knowledge of plaintiff, and he did not turn over the chattel to defendant, the verdict should be for plaintiff, is erroneous, as not submitting the question whether defendant's grantor was or was not the owner of the chattel.

Appeal from circuit court, Sunflower county; J. H. WYNN, Judge.

Appellee, Smith, sold a mule to one Rodgers, retaining the title to himself till the purchase price was paid. Rodgers, without the knowledge of Smith, gave a deed of trust on the mule to certain parties to secure supplies. Failing to pay for the supplies, the trustee took possession of the mule. Smith demanded the mule, and the trustee, Jackson, failed to give it up; whereupon Smith brought this suit in replevin to obtain possession of the mule. The court gave the third instruction mentioned in the opinion, and there was a judgment for Smith, from which Jackson appealed.

*McCabe & Anderson*, for appellant. *Stewart & Chapman*, for appellee.

COOPER, C. J. The third instruction for the plaintiff announced a *non sequitur*. By it the jury was instructed to find for the plaintiff if Rodgers (under whom the defendant claimed) gave a deed of trust on the mule without the consent or knowledge of plaintiff, and plaintiff did not turn over the mule to the defendant. But if the mule was in fact the property of Rodgers, and not of Smith, then the circumstances stated in the instruction would not warrant a verdict for plaintiff. The instruction must have been inadvertently given, but it is fatal to the verdict. Reversed and remanded.

(65 Miss. 362)

**CITY OF MERIDIAN v. PHILLIPS.**

(*Supreme Court of Mississippi. April 16, 1888.*)

**1. TAXATION—SALE FOR NON-PAYMENT—EXEMPT PROPERTY.**

Under Code Miss. § 468, exempting, among other things, from taxation, all property belonging to a city, a sale of city property for taxes is void.

**2. SAME—DECISION OF BOARD OF SUPERVISORS.**

Where a board of supervisors, who are charged with the correction and approval of the assessment rolls, adjudges property, exempt from taxation to be taxable, such judgment does not preclude the owner from asserting his title to such property at any time.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

The land in controversy was the property of the city of Meridian, and had been used at one time for a location of the pest-house. There had been no recent occasion to use it. The land in some way got on the assessment rolls, and was sold for taxes, and, after the period for redemption had expired, the plaintiff, J. M. Phillips, bought the land from the state, and brought this suit of ejectment to recover possession of the same, and there was a judgment in his favor, from which the city appealed.

*Woods & Williams*, for appellant. *Whitaker, Dial & Witherspoon*, for appellee.

ARNOLD, J. The judgment of the court below cannot be maintained. It is not disputed that the property in controversy belonged to appellant when it

was attempted to be sold for taxes. Section 468 of the Code exempts from taxation, among other things, property belonging to the United States, or to the state, or to any county, or to any incorporated city or town in the state. Liability of property to taxation is the basis of the power to sell it for taxes; and, where property is exempt by law from taxation, it cannot be subjected thereto by any action of the board of supervisors, or the officers charged with the assessment and collection of taxes, and a sale of it for taxes under such circumstances is void. *Horne v. Green*, 52 Miss. 452; *Cooley, Tax'n*, (2d Ed.) 477, 478; *Blackw. Tax Titles*, (4th Ed.) 453. Boards of supervisors are charged with the examination, correction, and approval of the assessment rolls before they are delivered to the tax collectors, but their action in the matter is conclusive only as to mere irregularities or matters of fact, such as excessive valuation, misdescriptions, listing property to the wrong person, and the like. *Horne v. Green, supra*. If, in discharging these functions, they should adjudge property to be taxable when it is in fact exempt by law, their judgment would not have the effect to repeal the law, or to bar or preclude the owner from asserting his title whenever he chooses to do so. The owner of property exempt by law from taxation may justly assume that it will not be assessed or sold for taxes; and it is not necessary for him to object to the action of the assessor, or of the board of supervisors, in placing it on the assessment rolls as liable to taxation or to the sale, in order to preserve his rights. The judgment is reversed, and judgment here for appellant.

#### BARBER *et al.* v. KINARD.

(*Supreme Court of Mississippi*. April 16, 1888.)

##### ATTACHMENT—INTERVENTION—TRIAL OF TITLE—EVIDENCE.

On the trial of an issue of the title to a lot of corn, between the claimant of the corn, under an alleged fraudulent deed from one L., and an attaching creditor of L., evidence that the claimant told several parties that he had bought the corn from L. is inadmissible.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

One Lowe was indebted to appellants, Barber, George & Lyerly. Lowe sold to appellee T. C. Kinard various articles, including some corn, and Barber, George & Lyerly sued out an attachment, which was levied on the corn, insisting that the sales to Kinard were fraudulent, and made to defeat creditors. Kinard interposed a claim to the corn, and on the trial of this issue the court permitted Kinard to testify that he had told several parties that he had bought the corn from Lowe, and there was a verdict and judgment in favor of Kinard, from which Barber, George & Lyerly have appealed.

*Cochran & Cochran*, for appellants. *Walker & Hall*, for appellee.

COOPER, C. J. It was not competent to sustain the claim of the appellee to the property sued for by evidence that he had said to other persons that he had bought it from the defendant in attachment. For the error in admitting such evidence, the judgment is reversed, and cause remanded.

(55 Miss. 387)

#### GRESHAM v. KING.

(*Supreme Court of Mississippi*. April 16, 1888.)

##### 1. HUSBAND AND WIFE—PROPERTY RIGHTS—JOINT TENANCY.

Code Miss. 1880, § 1197, providing that "all conveyances or devices of lands made \* \* \* to husband and wife shall be construed to create estates in common, and not in joint tenancy or entirety, unless it appears from the tenor of the instrument that the intention was to create an estate in joint tenancy, with right to survivor," etc. has no retroactive effect.

##### 2. SAME.

Code Miss. 1880, § 1197, removing the common-law disabilities of married women, does not affect the limitations to their power over estates held in joint tenancy.

Appeal from chancery court, Yazoo county; E. G. PREYTON, Chancellor.

Appellee, King, married a widow, and in 1877 bought some land located partly in Yazoo county and partly in Holmes county, and took the title to himself and wife. In 1880 the Code was adopted, containing section 1197, which provides that all conveyances or devises of lands made to two or more persons, or to husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it appears from the tenor of the instrument that the intention was to create an estate in joint tenancy, with right to survivor, etc. In 1881, Mrs. King died, leaving a son, the appellant, Gresham. King continued to occupy the place until 1886, when Gresham desired a settlement. King filed a bill, alleging that Gresham had no interest in the land, and asked that it be so decreed, and also prays in the alternative for a decree of partition. Gresham filed an answer and cross-bill, in which he sought the performance of a special agreement which he claimed had been made between them. King denied that there had been any special agreement or contract; and then King filed his amended bill, charging that he and his wife held the land as tenants by entireties, and that Gresham had no interest in it, because, at the death of his wife, the land vested in him (King) as the survivor, and he prayed that Gresham's claim be decreed to be a cloud on his title, and removed. The chancellor gave a decree in accordance with the prayer of the amended bill of King, and denied that of Gresham's cross-bill, from which Gresham appealed; insisting that section 1197 (above referred to) and section 1167 (which abrogates the common-law disabilities of married women) of the Code of 1880 are retroactive, and apply.

*T. H. Campbell and J. Wiener*, for appellant. *Hudson & Holt*, for appellee.

CAMPBELL, J. There is nothing to indicate a purpose to apply section 1197 of the Code to conveyances or devises made to husband and wife before its existence; and, according to the settled rule, a retroactive effect will not be given to it, if the legislature had the power to affect estates created before the act was passed, as to which it is unnecessary to decide. The question involved is not affected in any manner by section 1167 of the Code. It completely removes the common-law disabilities of married women, but it was not because of her want of capacity as a married woman that she could not dispose of an estate held by entireties. The husband could not dispose of it either. The curious incidents of such an estate sprang from its peculiarity, arising from the unity of husband and wife, from which it was said that each was seized of the whole estate, and it required the act of both conjointly to dispose of it. The estate of King and wife, held by entireties when the Code of 1880 became operative, on the death of Mrs. King, in 1881, vested in King as survivor. This was an incident of the estate, not affected by any statute to hinder its operation. We agree with the chancellor in his refusal to decree a specific performance of the contract alleged in the cross-bill. Affirmed.

(65 Miss. 385)

BEDFORD v. LOUISVILLE, N. O. & T. RY. CO.

(*Supreme Court of Mississippi*. April 16, 1888.)

RAILROAD COMPANIES—STOCK-KILLING CASES—NEGLIGENCE—EVIDENCE.

Evidence that an engineer sounded the whistle when he saw an animal running to the railroad is not evidence that he did all that he properly could for her safety, and does not warrant an instruction to the jury to find for defendant.

Appeal from circuit court, Warren county; RALPH NORTH, Judge.

Appellant, T. C. Bedford, sued the Louisville, New Orleans & Texas Railway Company, in three counts, for the killing of three horses. Under the first count, the killing was proved, and the railroad company failed to show the circumstances of the killing charged; under the second count, the testi-

mony of the railroad company showed that the killing was unavoidable; and under the third count, for the killing of the gray mare, the engineer testified that he saw the mare running towards the railroad, and that he sounded the whistle. The court instructed the jury to find for the plaintiff under the first count, but to find for the defendant under the second and third counts. Verdict was so rendered, and judgment entered thereon, from which plaintiff appealed.

*Shelton & Crutcher*, for appellant. *Murray F. Smith*, for appellee.

CAMPBELL, J. It was wrong to instruct the jury to find for the defendant as to the gray mare; for as to that killing the evidence does not show that everything was done which could and should have been to avoid collision between the mare and the train. The only witness, the engineer, testified that, when he saw her running to the railroad, he sounded the cattle whistle, and that is all that he claimed to have done. He did not say that was all he could have done, properly, for the safety of the animal, and the court cannot affirm, as matter of law, that it was. It may have been; but that is not so apparent as to authorize a direction to find for the defendant. In all else the judgment is affirmed; but, as to the action for killing the gray mare, the judgment is reversed, and a new trial awarded.

(40 La. Ann. 339)

STATE *ex rel.* WOOD *v.* BOARD OF LIQUIDATION OF THE CITY DEBT, (SUM MUT. INS. CO., Intervenor.)

(*Supreme Court of Louisiana.* April 16, 1888.)

1. MUNICIPAL CORPORATIONS — LIABILITIES AND INDEBTEDNESS — NEW ORLEANS PREMIUM BOND PLAN.

This premium bond plan included all the bonded debt of the city of New Orleans of date antecedent to the adoption of the premium bond act in 1876, but it did not include any part of the city's floating debt.

2. SAME—ACT OF 1882.

Act 58 of 1882 includes all of the city's bonded debt other than that which had been funded into premium bonds.

3. SAME—ACTS OF 1876 AND 1882.

Acts 81 of 1876, and 58 of 1882, operate as contracts between the city and her bonded creditors, and were based upon adequate consideration.

4. SAME—SURPLUS OF THE PREMIUM BOND TAX.

The surplus of the premium bond tax, beyond the requirements of holders other than the city, received its destination to the retirement of outstanding bonds, not funded into premium bonds, by the terms of the premium bond act in 1876, antecedent to the adoption of the constitution of 1870, and this covenant was but reaffirmed and reannounced in act 58 of 1882.

5. SAME—ACTS OF 1882 AND 1884.

There is a conflict between the provisions of section 4 of act 67 of 1884, and that of section 7 of act 58 of 1882, both of them having the common object of dedicating to two different classes of city debts the surplus of the premium bond tax.

6. SAME—RIGHTS OF CREDITORS.

Persons who deal with political or municipal corporations, possessed of limited power to contract debts, must rely for their payment upon the annual revenues provided for them by law, in the absence of any special statute authorizing the creation of a contract therefor.

7. SAME—CONSTITUTIONAL LAW—IMPAIRING CONTRACTS.

Any posterior law which has for its object to confer on such creditors as originally possessed no contract rights the prerogatives of those who had, and thereby infringes the latter, is amenable to the objection of impairing the obligation of protected contracts.<sup>1</sup>

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; F. A. MONROE, Judge. Relator, Samuel Wood, is the holder of 43 bonds of the city of New Orleans, issued under act 67 of 1884, and institutes this action to compel the board of

<sup>1</sup>See *Fasende v. City of Houston*, 84 Fed. Rep. 95, and note.

liquidation of the city debt to carry into effect sections 3 and 4 of said act. He appeals from an adverse judgment.

*W. S. Benedict*, for appellant. *Leovy & Blatr*, for intervenor. *J. P. Blatr* and *Henry C. Miller*, for appellee.

*WATKINS, J., (after stating the facts as above.)* This is a proceeding by *mandamus* on the part of a holder of bonds of the city of New Orleans, bearing date July 1, 1884, and which were issued under and in pursuance of act 67 of 1884, to coerce the board of liquidation to comply with its terms, and particularly with those of sections 3 and 4. Relator avers that it is the respondent's duty to apply, in the manner therein specified, the revenues, property, and assets of the city to the payment of the interest and the redemption and cancellation of the capital of his bonds. He further avers that it is the duty of respondent to advertise for sealed proposals for the exchange of drawn premium bonds in the possession of the city, for the bonds issued under said act, to the amount of \$50,000, after each allotment of series; and that, as said statute has been in force since its passage, on the 9th of July, 1884, and all the bonds in contemplation thereof have been issued, there should now be advertised for exchange, in accordance with sections 3 and 4 of said act, for the various series allotted after that date, and regularly hereafter, bonds to the amount of \$50,000 to each allotment of series within that time. He further avers that the respondent is in possession of funds in excess of the interest due on said bonds, and also in excess of the amount that is necessary to carry out the provisions of said act, and its failure to do so is a plain violation of law, and an impairment of his contract, in the sense of the state and federal constitutions. The respondent's return is elaborate, and we make the following synopsis of it, viz.: That the premium bonds were given in exchange for other valid bonds of the city, that were issued under laws anterior in date to the enactment of the premium bond act, on the 6th of March, 1876, and which pledged and dedicated to their payment adequate and sufficient taxes. For their discharge, on the premium plan, a five-mill tax was authorized and consecrated thereto, and, on the faith of it they were surrendered and funded, to the extent of \$13,000,000, and of which there are extant about \$8,000,000 at this time. That the premium act provided that the bonded debt, aggregating \$20,000,000 when exchanged for premium bonds of \$20 each, should be divided into 10,000 series of 100 bonds each; the whole to be numbered from 1 to 10,000. That a certain amount of those series should be annually paid, in pursuance of an allotment, made from the numbers of all the series; and that premiums should be awarded on the bonds of the drawn series in a similar manner. That, as all of said bondholders had not participated in the plan, and funded their bonds, all of the series, drawn at the different allotments, did not pass into the hands of holders, but near \$3,000,000 thereof remained in the possession of the city. That the premium bond tax, to the extent it would have been applied to its proportion of the premium bonds, constituted, in contemplation of the premium bond act, a surplus represented by the drawn premium bonds in the possession of the city; and that this surplus was, by the terms of the act, dedicated to the payment of these unfunded bonds or exchanged therefor. That the bonds contemplated by the premium bond act were binding contracts between the city and bondholders, and the adequate and sufficient taxes, dedicated to their payment by the laws under which they were issued, were enforceable and valid. That in 1882 the legislature made further provision for those unfunded bonds, by authorizing the issuance of another class of bonds therefor, known as "extended, consolidated, and certificate bonds," to the payment of which an additional five-mill tax was dedicated, and said surplus of the premium bond tax was pledged; and that, on the faith of said pledge and dedication, \$5,000,000 of same were exchanged therefor, and are still extant, and solely dependent thereon for payment, and

to which they have a vested right. That of said bonds there are remaining unfunded, under either act, \$3,000,000, which are still entitled to claim the benefits of both, and to participate in said tax and surplus, and which right the legislature, by any subsequent act, is impotent to impair or take away. That, in pursuance of the statutes of 1876 and 1882, the city has levied, and is annually levying, a 1 per cent. tax for the exclusive benefit of all of said bondholders, whether their bonds have been funded or not; and, as it is charged with the custody and application of the proceeds thereof, it is wholly without power to divert them to any other object. That act 67 of 1884 provides for the issuance of bonds, into which are to be funded judgment or floating debts, as contradistinguished from contract or bonded debts, aggregating \$900,000 in amount, the greater part of which has been created since 1873, and no part of which was contracted prior to 1870, which was originally entitled to no special or sufficient tax for their payment, but which were wholly dependent upon the adequacy of the annual revenues for their discharge, and which are not entitled to participate in the 1 per cent. tax. That said act, in providing for an exchange of drawn premium bonds, in the possession of the city, for said floating debt bonds, undertakes, in effect, to appropriate to the latter, in advance of their maturities, the said surplus, to the extent of \$200,000 annually, or \$500,000 for the time which has elapsed since the passage of the act, to the prejudice of the contract creditors of the city; and that this will the more clearly appear from the fact that respondent has in hand neither funds nor property of the city, such as is mentioned in the act, with which to pay any part of said floating debt bonds. That the amount of the premium bonds to be annually paid is annually increasing in value, and hence the proportion of the five-mill tax applicable to the payment of each succeeding drawn series thereof is annually increasing to such an extent that the aggregate yearly excess is less than \$80,000; therefore, if drawn premium bonds in possession of the city are given in exchange for floating debt bonds, to the amount required, not only would the surplus be consumed, but the proceeds of the premium bond tax would be absorbed, and the premium bondholders, and the holders of bonds not funded, would be deprived of the amount annually due them therefrom. Finally, the respondent returns that the act of 1884 is, in effect, an attempt to divert and misapply the 1 per cent. tax, in contravention of the pledges contained in prior laws; and, if enforced, contracts made in pursuance thereof will be impaired, in the sense of the state and federal constitutions.

The Sun Mutual Insurance Company intervened, and joined the respondent in resisting the enforcement of the act of 1884. It claims to be the holder of certain extended, consolidated, and certificate bonds of 1882, and contends that, if said act is carried into effect, its contracts under various other and prior laws, enacted in 1853, 1854, 1869, 1870, 1871, 1873, and 1876, under which the bonds given in exchange were authorized and issued, as well as those under the law of 1882, would be impaired and violated, and said bonds depreciated in value to the amount of \$5,000. It also claims to be the owner of certain premium bonds; and, if said act is enforced, its contract rights, under the premium bond act, will be likewise impaired, and said bonds depreciated in value to the extent of \$5,000. It further avers that, by the terms of said statutes, all of which were enacted prior to 1879, the state of Louisiana and the city of New Orleans contracted with the bonded creditors of the latter to provide a sufficient tax for their payment; that the undertaking, on the part of the state, acting for the city, as set forth in sections 5 and 6 of act 58 of 1882, to levy a five-mill tax for the exclusive benefit of the bonds issued thereunder, and others which were issued under prior laws and not yet funded, was in furtherance of the contract rights created thereunder, and that its pledge of the surplus of the premium bond tax to the payment thereof was in further fulfillment of the same; that to said five-mill tax and surplus, said

bondholders not only had and have a vested right, but they gave an adequate consideration therefor, in surrendering their old bonds, the payment of which was secured by an adequate tax, and in extending their paper for 40 years, and that the exchange contemplated by the act of 1884, if enforced, would impair its contracts in the sense of the constitution and the law. As a part of its petition, it adopted the averments of the respondent's return. Its alternate prayer is that, in the event the desired relief is granted the relator, its contract rights, under prior laws, be protected. Hence the grounds of the respondent's and intervenor's resistance to the demands of the relator may be summarized as follows, viz.: *First*, that the debts of the city for which the bonds of 1884 were issued, were floating debts, which were created under the general laws of the state, which made no other provision for their payment than such as may be contained in the annual revenue laws; *second*, that the premium bond plan only included the bonded debt of the city contracted under special statutes enacted prior to the passage of the premium bond act in 1876, and which provided sufficient and adequate taxes for their payment; *third*, that the five-mill tax provided in the premium bond act was dedicated to all such bonds, whether exchanged for premiums or not, and that the five-mill tax provided by act 58 of 1882, and the surplus of the premium bond tax, were pledged to the bonds issued thereunder, and others that still remained unfunded; *fourth*, that if the provisions of the act of 1884 are enforced, as demanded by the relator, the vested rights of the bonded creditors, those who have not funded their bonds, as well as those who have, will be divested, and their contract rights impaired.

1. From the record we have obtained the following statement of facts, viz.: That the amount of the bonded indebtedness of the city that was included in the premium bond plan was about \$20,000,000 in capital alone. Of this amount there were exchanged for premium bonds the sum of \$18,263,800. They were issued under the following several statutes, viz.: Act 40 of 1883, act 71 of 1852, acts 108 and 109 of 1854, act 49 of 1869, act 7 of 1870, acts 48 and 100 of 1871, act 73 of 1872, and acts 71 and 103 of 1874. Of the remainder of the bonds, not funded into premiums, \$3,259,000 were funded into 40-year bonds, under act 38 of 1882, and there remained a surplus of bonds, not funded under either act, aggregating \$2,988,400, which are still extant. The amount of premium bonds in the hands of third persons, other than the city, is \$7,418,240. The annual yield of the 1 per cent. tax for the four years antecedent to 1887 was as follows, viz.: For 1883, \$960,240; for 1884, \$947,950; for 1885, \$994,480; for 1886, \$8,410. The total amount of funds in the hands of respondent on the 1st of March, 1887, derived from the 1 per cent. tax, was \$294,000, subject to a reduction for unpaid interest on the bonded or contract debt to that date, \$180,000; and it has no other assets on hand, except some shares of the New Orleans Water-Works Company stock. There has been required annually for the redemption of premium bonds, and drawn premiums in the hands of holders other than the city, about \$400,000; and this amount has been and still is, under the premium bond plan, annually increasing, so that the yearly surplus applicable to drawn premium bonds in the possession of the city is less than \$80,000 and it is annually diminishing in amount. At the first drawing that occurred in 1887, the city drew 13 series, representing \$26,000 of premium bonds, while there were drawn by third persons extant 47 series, representing \$94,000 of premium bonds, and \$16,000 of premiums, the whole being equal to \$110,000. At this ratio, they would be entitled, under four quarterly allotments in 1887, to \$440,000; hence the surplus applicable to drawn premium bonds in the possession of the city would be \$50,000. The annual interest on the bonds issued under the act of 1882, and of unfunded bonds of the years antecedent to 1876, aggregates \$564,000. Therefore the surplus of the premium bond tax of 1887, if applied thereto, less the amount of the five-mill tax, would leave a deficit of \$40,000. The floating debt of the

city was incurred in years subsequent to 1870, and was to be paid out of the revenues of the respective years in which it was so incurred; and, when there was an insufficiency of money on hand to pay same when presented, certificates were issued, payable out of the revenues of said years, when collected; and such certificates evidence the floating debt. The amount of the judgment or executory debt, representing in great part the floating debt, funded into bonds under act 67 of 1884, is \$980,000.

2. From this state of facts the following propositions may be taken as clearly established, viz.: *First*, that the premium bond plan included all the bonded debt of the city prior in debt to the passage of act 31 of 1876, but that it did not include any part of the city's floating debt; *second*, that act 58 of 1882 included all her bonded debt other than that represented by the premium bonds; *third*, that all of those bonds were issued in pursuance of particular laws enumerated, and which authorized and directed the levy of sufficient taxes to meet them; *fourth*, that acts 31 of 1876 and 58 of 1882 operate as contracts between the city and her bonded creditors, and were based on an adequate consideration; *fifth*, that as there is, approximately, an annual surplus of the premium bond tax of less than \$80,000 applicable to the drawn premium bonds in the possession of the city, the bonds funded under the act of 1884, if relator's demand be granted, would not only absorb it, but would absorb a large proportion of that tax that is applicable to drawn premium bonds and premiums held by third persons. Relator's demand being for drawn premium bonds, he would, if successful, be entitled to immediate payment of the whole amount as soon as the exchange should be consummated. If it was for undrawn premium bonds, the consequence would not be so serious.

3. Section 4 of act 67 of 1884 is couched in the terms following, viz.: "That, for the further redemption of said bonds, the said board of liquidation is hereby authorized and required, after each allotment of series following the passage of the act, to advertise for sealed proposals for the exchange of drawn premium bonds in the possession of the city, for the bonds authorized herein, to the amount of \$50,000 of said bonds," etc. Now, as there are four allotments of series annually, the bondholders, under the act, would be entitled to exchange these bonds annually for \$200,000 of drawn premium bonds, and they would be entitled to \$500,000 thereof since the date of the passage of the act. The effect of this plan, if enforced, would be to enable the holders of such bonds to realize the capital and interest within a few years, whereas the holders of consolidated and certificate bonds must wait 10 and 40, and the holders of premium bonds must wait 50, years; *i. e.*, if the 1 per cent. tax were sufficient to pay them all. But we have seen that it would not; the annual requirements of the 1884 bonds being \$200,000; that of the drawn premium bonds held by third persons, \$440,000; that of the extended and unfunded bonds, \$564,000; and the 1 per cent. tax only yielding about \$900,000. There must, of necessity, be an annual deficit of \$215,000,—an amount in excess of that demanded annually for the bonded creditors of 1884. Not only is this true, but, if the entire amount of \$500,000, demanded by the relator, is allowed him, the entire proceeds of the premium bond tax would be insufficient to meet it, the same being \$495,000; and all the bonded or contract creditors would be deprived of any participation therein for at least one year; and of a large portion thereafter, until the \$980,000 of 1884 bonds should be fully paid. In this manner the premium bond plan of 1876 would be impaired, if not annihilated, and so would the extended debt scheme of 1882. But perhaps the most serious objection to the act of 1884 is that it intends to prefer the floating debt bonds, not bottomed on any contract, to bonded debts of the city, and thus impairs the latter's contract rights. It thus confers upon a class of creditors holding evidences of debt primarily unsecured, and having only the right to collect their claim from any balance there might be of the annual revenues of any particular year, not only the right to the proceeds of

a special tax, but to the particular tax dedicated to contract creditors who had made important concessions to obtain it, and years before. This is attempted and insisted upon in the face of the following provision of section 7 of act 58 of 1882, viz.: "That the surplus proceeds, if any, of the premium bond tax of each year remaining in the hands of the board of liquidation of the city debt, or surplus on hand at the time of the passage of the act, after the drawn series, interest and premiums thereon, exigible or due to the holders thereof, have been provided for, or fully paid, shall also be deposited with the fiscal agent of said board, to the credit of the account known as 'The City Debt Fund,' and applied exclusively as provided in section 5;" that is, "to the objects and purposes of this act." There is a conflict between this provision of the act of 1882 and the provision of section 4 of act 67 of 1884, which authorizes and requires the respondent "to advertise for sealed proposals for the exchange of drawn premium bonds in possession of the city." Both have exclusive reference to the surplus of the premium bond tax; and, as we have satisfactorily shown, it cannot meet both. Section 4 of act 67 of 1884, manifestly impairs the contract of the bonded creditors of the city as recognized and established under section 7 of act 58 of 1882. Persons who deal with political or municipal corporations, possessed of limited power to contract debts, must rely for their payment upon the annual revenues provided for them by law, in the absence of any special statute authorizing the creation of a contract therefor. Any particular law which has for its object to confer on such creditors as originally possessed no contract rights, the prerogatives of those who had, and thereby infringe the latter, is amenable to the objection of impairing the obligation of their protected contracts, and cannot be enforced by *mandamus*.

4. But our attention has been attracted to the opinion of the supreme court in *Board v. Hart*, 118 U. S. 136, 6 Sup. Ct. Rep. 995 *et seq.*; and it is relied upon by counsel for relator as announcing a contrary interpretation of the statutes which are drawn in question here, in determining a question similar to the one now before us. The one under consideration in that case was the right of the relator, Hart, to have his executory judgment funded into bonds, in pursuance of the provisions of section 2 of act 67 of 1884; it being "founded on contracts, for municipal purposes, made from 1871 to 1877." To his demand the respondent board interposed, as an objection to their issuance, "that all the property of the city not dedicated to public use, and also the surplus of what is known as the 'premium bond tax,' were pledged, under act 58 of 1882, and by previous legislation, to the payment of other bonds of the city, which were outstanding; and that the act of 1884, in so far as it directs a diversion of that property and fund, impairs the contract with the holders of these bonds, and is therefore unconstitutional and void." The court made a careful analysis of those statutes, and stated their conclusion thereon, and from which we make the following extracts, viz.: "There is no doubt of the right of the relator, under the act of 1884, to the bonds promised in compromise made with the city. His judgment is of the class of debts which it is made the duty of the board to retire and cancel, by the exchange of the bonds provided, or the sale of them and the application of their proceeds. \* \* \* As seen by the preceding statement, all of the property and funds of the city, and the excess of the proceeds derived from the tax for the interest on the premium bonds beyond what was needed, were, by the act of 1880, pledged to pay her entire debt except the floating debt previously created. This floating debt may have been as meritorious as the funded debt, and the duty to make provision for it equally as binding. Why all the property and funds of the city should be appropriated to the latter debt, to the exclusion of the former, does not appear. The constitution of 1879 contemplates that provision shall be made for the payment of the entire debt. It declares that the general assembly, at its next session, shall enact such legis-

lation as may be proper to liquidate the indebtedness of the city of New Orleans, and to apply its assets to the satisfaction thereof; and this means, obviously, the entire indebtedness, in whatever form it exists, whether bonded or floating debt, and not merely a part of it. And the application of the assets of the city is to be in satisfaction of all the debts alike," etc. From the foregoing it is evident to our minds that the court dealt with the question of the proper application of the "assets" and "the property and funds of the city," and not with the surplus of the premium bond tax; for it will be observed that the point of resistance in that case was "that the act of 1884, in so far as it directs a diversion of that property and funds, impairs the contract," etc. No question was made by the respondent upon the score of the premium bond surplus. It will be likewise observed that the court, when speaking of what was dedicated, both "the property and funds of the city" and "the excess of the proceeds" of the premium bond tax were included; but, in treating of what was applicable to the payment of the city's indebtedness, the phrase "property and funds of the city" was alone employed. This theory is demonstrated by the reasoning of the court which immediately follows our quotation, predicated on the article of our Code which declares that "whoever has bound himself personally is obliged to fulfill his engagement out of all his property, movable and immovable, present and future," (Rev. Civil Code, art. 3149;) and also on the article which declares that "the property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist some lawful cause of preference," (Rev. Civil Code, art. 3150.) It is manifest that a tax is but a forced contribution levied upon property of the citizen for the purposes of government, and is in no sense property of the corporation. As such, it does not respond to the articles cited, nor to the argument and reasoning of the court. This conclusion is fortified by the concluding paragraph of the opinion, viz.: "With the bonds, he will not have any preference over other bondholders, but will be entitled to share ratably with them in the proceeds of the property appropriated for the payment of their bonds." The reasoning and argument of the court was directed at section 3 of act 67 of 1884, which provides "that it shall be the duty of the city of New Orleans to turn over and transfer to the board of liquidation, immediately after the passage of this act, all the property of the city, real and personal," etc., for the purposes thereof. But that section is entirely eliminated from this controversy, because the proof discloses that the respondent is in possession of no "property or funds" of the city which are applicable, under that section, to any of the debts of the city. The sole question here is whether or not the legislature had the power to dedicate the surplus of the premium bond tax to bonds that were to be issued under section 2 of act 67 of 1884. We are of the opinion that it had not. In treating of the purpose and effect of the premium bond act, we said in the *Rivet Case* that the tax was denominated "the premium bond tax," and was separately mentioned on the tax-rolls and in the tax receipts, and that the law "provided that any surplus arising from the requirements of the plan, and all drawn series and premiums falling to the city, should be used in the retirement of outstanding bonds not funded in premiums." We styled this a legislative, reciprocal, and synallagmatic contract between the city and her bonded creditors. Rev. Civil Code, art. 1765; *Rivet v. City of New Orleans*, 35 La. Ann. 134. Hence it is apparent that the surplus of the premium bond tax, beyond the requirements of the holders of premium bonds, and in possession of the city, received this particular destination, by the premium bond act, prior to the adoption of the constitution of 1879. This the state, for the city, had a perfect right to do. In the act of 1882 this contract was but reaffirmed and reannounced. It cannot be questioned now. The contrary provisions of the act of 1884 must yield, and be treated and considered as not written, in so far as they are concerned.

The judge *a quo* correctly declined to make the alternative writ of *mandamus* peremptory. Judgment affirmed.

FENNER, J., (*concurring*.) The most perplexing problem that has confronted this court has been the adjustment of the rights and obligations of the city of New Orleans and her creditors under the state constitution of 1879. That constitution contained the broad provision: "No parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation." At the time of its passage the city owed debts exceeding twenty millions of dollars, arising mainly out of antecedent contracts, provision for which, in accordance with their stipulations, would, at the time, have required an annual tax far exceeding the limitation fixed, leaving not a cent for the necessary support or alimony of the city. Considering that the constitution did not terminate the corporate existence of the city of New Orleans, but obviously contemplated its continuance as a going municipal corporation, the conclusion was irresistible that the 10-mills tax authorized therein was designed, primarily and to the extent necessary, to be applicable to the support or alimony of the city, and that no creditor or other person could interfere with its appropriation to such purpose. On the other hand, the state constitution was utterly incompetent to impair the obligations of antecedent contracts, protected by the constitution of the United States, or to withdraw the powers of taxation applicable to their satisfaction at the dates of said contracts, which powers, under the settled jurisprudence of the United States supreme court, were read into and formed part of the contracts. We therefore held that the power of taxation possessed by the city was derived from two sources, viz.: *First*, from the state constitution to the extent of 10 mills, which was primarily applicable, so far as necessary, to the alimony of the city; *second*, from valid legislative authority, existing at the date, of valid prior contracts, forming part thereof, irrepealable, because protected by the constitution of the United States, and therefore continuing to exist until the contracts shall be discharged. *Saloy v. City*, 33 La. Ann. 79. We held further, however, that the constitutional limitation was absolutely destructive of the rights of every creditor to exact a higher rate of taxation for the satisfaction of his debt, unless his right was founded on antecedent contract, protected from impairment by the constitution of the United States. Hence, where a judgment creditor, on a cause of action founded in tort and not in contract, sought to invoke a higher rate of taxation possessed by the city at the date of his judgment, we denied his claim; and this decision was affirmed by the supreme court of the United States. *State v. Mayor*, 32 La. Ann. 709. The foregoing have been the germinal principles according to which we have determined the rights of all classes of the city's creditors, guided throughout by a close adherence to the decisions of the supreme court of the United States. *Moore v. City*, Id. 736; *Saloy v. City*, 33 La. Ann. 79; *State v. City*, 34 La. Ann. 477; *Rivet v. City*, 35 La. Ann. 134; *Carriere v. City*, 36 La. Ann. 687; *Marchand v. City*, 37 La. Ann. 14; *Gas-Light Co. v. City*, Id. 436; *Thorn v. City*, Id. 528; *Labatt v. City*, 38 La. Ann. 283.

The sole question presented for our determination in the present case is the validity of the section 4 of act No. 67 of 1884, which directs the application of drawn premium bonds in the possession of the city to the redemption of bonds issued under the same act in taking up the floating debt of the city. In view of the provisions of the premium bond act, dedicating the entire tax levied thereunder to the then existing bonded debt, whether funded into premiums or not so funded, and absolutely requiring said tax to be employed exclusively "in the execution of the provisions of this act," (section 11;) in view of the unequivocal provisions of act 53 of 1882, devoting the entire surplus of the said tax to the payment of the interest and principal of the bonds issued thereunder in exchange for the unfunded bonds; and in view of the

consistent jurisprudence of this court, that the premium bond tax could not be evaded, diminished, or diverted from the purposes to which it was devoted by the act itself,—the question presented would hardly possess the slightest seriousness but for the inferences drawn by plaintiff from a decision of the supreme court of the United States in the case of *Board v. Hart*, 118 U. S. 136, 6 Sup. Ct. Rep. 995. The chief opinion just read demonstrates very satisfactorily that the supreme court did not consider or deal with this particular question, and had not the slightest intention of thus overturning the jurisprudence of the state, destroying the vested rights of the bonded creditors, and deranging and undermining the entire settlement of the city's bonded debt. In the *Cases of Moore and Rivet*, 32 La. Ann. 736, and 35 La. Ann. 134, we exhaustively analyzed the premium bond act; and we held that, while those features thereof which impaired the contract rights of non-funding bondholders were absolutely null and void, yet that the rights of funding bondholders, who had accepted the proposition, and had exchanged their bonds for premiums, were equally entitled to protection. We maintained the validity of the act as a contract with the funding bondholders, entitling them, under all circumstances, to require the city to levy the entire tax provided therein, and to apply it as directed by the act; but we held, at the same time, that the rights of non-funding bondholders were not affected thereby, but remained intact as if the premium bond act had never been passed. We have never allowed the premium bond act to affect, in the slightest degree, the rights of non-funding bondholders, or of any other antecedent contract creditors. Thus, in *De Leon's Case*, 34 La. Ann. 477, where a holder of other bonds issued at a time when the city's power of taxation for general purposes was 15 mills, we allowed the necessary tax, saying: "Although the city may levy 10 mills for its alimony, and 5 mills for the premium bonds, the latter is not to the prejudice of the right of relator to have a tax levied within 5 mills, to the extent necessary to satisfy his contract." We applied the same principle in the *Cases of Carriere, Marchand, and Thorn*, 36 La. Ann. 687, 37 La. Ann. 14, and *Id.* 528, all of which were proceedings for the enforcement of contracts other than bonds, or part of the floating debt, passed prior to the constitutional amendment of 1874. In *Rivet's Case* we said, in analyzing the premium bond act: "It imposed on the council the duty to levy annually a tax which, after the year 1881, was to be at least one-half of one per cent. It provided that the tax so levied should constitute a special fund, to be used for no other purpose than the carrying out of the plan. \* \* \* It provided that any surplus arising above the requirements of the plan, and all drawn series and premiums falling to the city, should be used in the retirement of outstanding bonds not funded into premiums." In another part of the same opinion we said: "Under the law as it exists, the city is required to invest the part coming to her in retiring unfunded bonds. If it be desired that such portion should be applied to the payment of interest on bonds other than premiums, and thus reducing the tax necessary to pay such interest, application should be made to the legislature,—certainly not to the judiciary."

From the foregoing it conclusively appears that the premium bond tax was a special tax, intended to create a special fund dedicated and applicable, *ab origine*, exclusively to the then existing bonded debt of the city, so dedicated as a stipulation of a valid contract, which neither the state nor city could impair; that its imposition and application affected, in no manner, the rights of other creditors, which remained precisely as if the act had never been passed; and that the unbonded creditors had not, and could not, acquire any right to, interest in, or control over, the special fund arising from this special tax, because irrevocably dedicated exclusively to the bonded debt. Now, the act 58 of 1882 was an exercise of the legislative power, in exact accord with the suggestion made by us in the *Rivet Case*, above quoted, at least in so far as it dealt with the surplus of the premium bond tax and the drawn premiums held

by the city. These special funds were applicable exclusively to the unfunded bonds, and nobody but the bondholders had any right or interest in them. Any voluntary agreement between the city and the bondholders as to the disposition and application of these funds, in accordance with their destination, would be valid and binding, because they were the sole parties in interest, and the only ones whose rights could be affected. The act 58 of 1882 is fully analyzed in the chief opinion just read, and it exhibits a contract between the city and her bondholders perfectly binding as to the application of the premium surplus and drawn bonds, of which nobody can complain except non-consenting bondholders, who raise no voice against it, and which neither the city nor state can impair. The attempt of the state, in the subsequent act of 1884, to divert these special funds to the satisfaction of the city's unbonded debt, is a flagrant attempt to impair the obligations of antecedent valid contracts, which we are very certain the supreme court of the United States, with a proper understanding of the case, would never sanction, and which our duty, under both the state and federal constitutions, forbids us to countenance. The floating debt of the city of New Orleans is divided into two classes: *First*, that originating prior to the constitutional amendment of 1874; *second*, that originating after said amendment. The first class, so far as founded on contract, can suffer nothing by our decision herein, because it is entitled to satisfaction by taxation. *Carriere's Case*, 36 La. Ann. 687; *Marchand's Case*, 37 La. Ann. 14; *Thorn's Case*, *Id.* 528. The second class is not a debt of the city at all, but a mere claim on the uncollected revenues of the years in which they were incurred, and entitled to satisfaction from no other source. *Saloy's Case*, 33 La. Ann. 79; *Gas-Light Co.'s Case*, 37 La. Ann. 436. It is, to say the least, doubtful whether the word "indebtedness," as used in article 254 of the constitution, embraces these claims, and whether, under article 45, the general assembly has power to fasten such claims upon the city as debts. See *Labatt's Case*, 38 La. Ann. 283. But it is not necessary to consider these questions in this case, and they are only referred to for the purpose of showing that the major portion of the so-called floating debt dealt with in the act of 1884 is far from being equally meritorious with the bonded debt, or even equally binding in law.

All the judges concur in this opinion, as well as in the chief opinion.

(40 La. Ann. 434)

STATE *ex rel.* BARTHET v. HOUSTON, Judge.

(Supreme Court of Louisiana. April 16, 1888.)

1. CONTEMPT—APPEAL—REVIEW.

The supreme court will not interfere with inferior courts in cases of contempt, when it is found that such courts exercised a jurisdiction vested in them, that the decree rendered was a proper exercise of judicial power, and that disobedience of such order was punishable as a contempt.

2. SAME.

In such cases it has no concern with the question whether the act charged was or not committed, or did or not constitute a contempt, and will not review the facts on which the lower court acted to punish the contempt.

(Syllabus by the Court.)

Application by Louis Barthet for a writ of *certiorari* against W. T. Houston, Judge Division B, civil district court for the parish of Orleans. Relator was sentenced to 10 days' imprisonment for contempt of court, and seeks relief therefrom by this proceeding.

*F. Michinard*, for relator. *White & Saunders*, for respondent.

BERMUDEZ, C. J., (after stating the facts as above.) This is an application for a *certiorari*. The complaint of the relator is that the district judge has arbitrarily sentenced him for contempt for having violated an injunction which, at the time of its alleged infraction, had ceased to have any existence.

In his return the district judge sets forth reasons for his justification. The prayer is that the validity of the proceedings attacked be considered, and that the sentence be annulled to all purposes. It appears that the district court, in 1885, issued an injunction to prevent the defendant (relator) from carrying on the business of a slaughter-house within certain city limits; that, on appeal, the injunction was declared, by this court, in 1887, to have properly issued, because the defendant had undertaken to continue the business after revocation of the previously obtained permission to do so from the proper authority; that, since the injunction was perpetuated, the defendant obtained, in 1888, from the city council an ordinance permitting him to carry on the business within the limits in which he had first done so; that, the defendant having engaged in carrying on a slaughter-house within said limits, the plaintiff took a rule on him to show cause why he should not be punished for contempt for violating said perpetuated injunction; and that the defendant pleaded in justification the ordinance allowing him to do so. The district judge heard the rule, and came to the conclusion that the acts of the defendant were committed in contravention of the injunction, which had not ceased to be in force. He therefore sentenced him, for contempt, to 10 days' imprisonment. Having been confined, in furtherance of the sentence, the relator applied for relief in this court, and a restraining order was made suspending the execution of the sentence until the further order of this court, and the relator was provisionally released.

The writ of *certiorari* issues to an inferior judge only to ascertain of the validity of proceedings before him. Code Pr. art. 855. Such proceedings, in cases of contempt, can never be annulled unless the court had no jurisdiction or judicial power to make the order disobeyed, or disregarded the rules of procedure prescribed by law in proceeding to punish for contempt. Hence it is that when it is found that the court had such jurisdiction and power, and had proceeded in the manner and form required by law, the proceedings must remain unaffected, however erroneously the court may have determined the issue before it. It has consequently been uniformly held by this court that under an application for a *certiorari*, the intrinsic correctness of the judgment complained of could never be considered where the court had such jurisdiction and power, and exercised it in the proper form; and that the inquiry, where the court had such jurisdiction and power, must be restricted to the extrinsic correctness of the decree. The law, in clear terms, says that the writ issues to ascertain the validity of the proceedings; that is, their apparent correctness. In the present instance it is indisputable that the district court had jurisdiction to issue the injunction, for thus this court found. *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. Rep. 599. It is indisputable, also, that, having such jurisdiction, it had the power to enforce it, and coerce, by proper means, obedience to its behest; that is, to punish, on observing the forms of law, the violator of the prohibition of the injunction. Code Pr. art. 130. In a kindred case this court said: "All courts possess the inherent power of bringing to their bar, and punishing for contempt of their authority, not only the parties to the litigation, the jurors, the witnesses, the officers of the court, but also offenders not connected with the controversy, whenever they impede or obstruct the process of the court, disturb its proceedings, insult its officers, or commit any act which interferes or thwarts its administration of justice. Each court has necessarily the power of determining for itself, whether the act or acts thus done constitute or not a contempt of its authority; and when it has exercised that power, and passed sentence, in the manner and form prescribed and within the limitations fixed by law, it does not appertain to this court, as a rule, to inquire into the facts passed upon, with a view to ascertain and determine whether a contempt was or not committed, and to release the offender. The regular ruling of a judge in a question of contempt is no more revisable than his regular ruling in an unappealable case. It is

an essential, privileged, and significant attribute, which should be exercised with independence, but with discretion and dignity. It is unfortunately possible that, forgetful of his mission of peace and conciliation, a magistrate may palpably ill use that conservative power, so as to become reproachable with oppression in office; but in such instances, rarely to occur, the question of abuse of authority cannot be determined and remedied against by the process now sought." *State v. Judge*, 35 La. Ann. 1197; also *State v. Houston*, Id. 1194. To these conservative views we adhere. From the papers before us, it appears that the proceeding for contempt was by rule, contradictorily tried with the defendant therein, who is the relator here. This was the proper proceeding; the offense charged not having been committed in *faciem curiæ*, in which case a rule is not necessary.

Another complaint of the relator is that the district judge, in order to pass upon the rule for contempt, had to determine whether the permission obtained was or not valid; that he has done so; and that his judgment will constitute *res judicata* on the trial of such an issue, when presented in the case itself. There exists no room for such apprehension. When that matter will be presented, in proper pleadings, the district judge will have full power to change his views, should he determine that he erred in entertaining them when deciding the rule for contempt. The relator may, besides, rest certain that under no contingency will that ruling bind this court as *res judicata*, should the validity of the permission granted, pleaded in justification, ever be submitted to its consideration.

Finding, therefore, that in issuing the injunction, the court exercised a jurisdiction vested in it; that the injunction was a proper exercise of judicial power; that disobedience of such an order was punishable as a contempt; and that the proceedings were regular,—we conclude that, as we have no concern with the question whether the act charged was or not committed, or did or not constitute a contempt, we are powerless to grant the relief sought. It is therefore ordered and decreed that the restraining order herein made *in limine* be rescinded, and that the application herein be refused, with costs.

(40 La. Ann. 508)

#### HARRISON, Receiver, v. CITY OF NEW ORLEANS.

(*Supreme Court of Louisiana. May 7, 1883.*)

##### 1. MUNICIPAL CORPORATIONS—POLICE DEPARTMENT—COMPENSATION.

Under the provisions of act No. 16, of 1875, the city of New Orleans is required to pay certain officers and members of the metropolitan police, and has no right to deduct disbursements from the taxes collected for that institution, for the payment of such parties, for services rendered subsequent to the law.

##### 2. SAME—TAXES FOR POLICE DEPARTMENT—LIABILITY OF CITY FOR DEFAULTING COLLECTORS.

The city of New Orleans is not liable for taxes collected for that force, by defaulting sheriffs, simply because it allowed them privileges for accelerating the payment of such and her own taxes from delinquents.

##### 3. WITNESS—FEES AND COMPENSATION—EMPLOYMENT OF EXPERTS.

An expert appointed by a party to make researches deemed necessary for his defense must be paid by that party.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

Suit by R. F. Harrison, receiver of the board of metropolitan police, against the city of New Orleans on an account and for payment of taxes collected from certain parties. The city appeals from a judgment condemning her to pay \$24,050. Plaintiff joins in the appeal, seeking an increase of amount allowed.

W. H. Rogers, for appellant. Bayne, Denegre & Bayne and E. Evariste Moise, for appellee.

**BERMUDEZ, C. J.** This is a suit for the recovery of the amount of taxes collected by the city of New Orleans, under the laws relative to the board of metropolitan police, for the years of 1874, 1875, and 1876. The defense admits the levy of the taxes, but avers that the amounts collected have been accounted for. From a judgment for \$24,940 against her the city appeals. The plaintiff joins in the appeal, asking an increase of the judgment to \$40,512.46, with interest. Two experts were appointed to examine the books of the city, and they made separate reports, agreeing as far as the figures go, but disagreeing as to the credits to which the city claims to be entitled.

The plaintiff claims that for 1874 the city has collected the sum of	-	-	-	-	\$539,273 18
And after allowing a credit of	-	-	-	-	532,258 01
That he is entitled to the difference,	-	-	-	-	\$ 7,015 17
On the other hand, the city claims to be entitled to a credit for payment in excess of receipts,	-	-	-	-	10,698 00
The aggregate of these differences is	-	-	-	-	\$ 17,713 17
The city claims to have paid for the sanitary police,	-	-	-	-	\$ 16,402 54
And not to be liable for taxes collected by Sheriff Gauthreaux, which she never received,	-	-	-	-	1,310 63
					\$ 17,713 17
For 1875 the plaintiff claims that the city had on hand,	-	-	-	-	\$ 15,591 12
Of that sum the city's expert concedes	-	-	-	-	\$ 12,186 95
But the city refuses to be held liable for the difference, the same being for collections of Sheriff Gauthreaux,	-	-	-	-	3,404 17
					\$ 15,591 12
For 1876 the plaintiff charges the city with	-	-	-	-	\$ 17,906 17
The city's expert concedes	-	-	-	-	\$ 12,753 55
But the city declines liability for the difference, which consists of amounts collected by Sheriff Gauthreaux,	-	-	-	-	3,826 49
Do. do. Sheriff Waggaman,	-	-	-	-	1,026 13
And that the fund must be charged with fee of expert to examine the books of the board,	-	-	-	-	300 00
					\$ 17,906 17

From this statement it is apparent that the only questions to be decided are: *First*. Is the city entitled to the credit of \$16,402.54, claimed to have been paid by her to the sanitary police? *Second*. Is the city to be held liable for the amounts collected and not paid over by the defaulting sheriffs,—\$6,163.37? *Third*. Is the fund chargeable with the fee of the expert appointed by the city to examine the books of the board,—\$300?

1. The bill presented by the city to show payment of the metropolitan police runs from August, 1875, to June 22, 1876, and aggregates \$16,402.54. Under the provisions of act 16 of 1875, approved March 24th, and promulgated April 4th of the same year, it was directed that the officers and members of the metropolitan police force, detailed permanently with the board of health, and each of the municipal courts, shall be paid by the city of New Orleans. This meant, clearly, shall not be paid out of the metropolitan police fund, but by the city out of other funds. There is nothing to show that of this amount any part was expended for any liability anterior to the passage of the law.

2. The next question is whether the city is liable for the amounts collected

by the two defaulting sheriffs, and which never came to her hands. The ground upon which the city is sought to be made responsible is that she constituted the sheriffs her agents to collect by special contract, and that their delinquency is attributable to her. The authority relied on in support of this position is the ruling in *Frank v. Chaffe*, 34 La. Ann. 1203, in which sureties of a sheriff were released from liability because he had acted as the agent of the litigants, under their consent to sell some property attached. The court well held that in doing so he had not acted as sheriff, and hence that the sureties could not be held. The authority has no application to the facts of this case, which are simply that in order to accelerate the collection of all back taxes, which it would seem was not actively prosecuted, for want of means in the city to pay the costs and expenses for so doing, the council passed an ordinance authorizing the sheriff, who had the writs in hand, to proceed as such with the execution of the same, and even to employ counsel, and to defray the disbursements, and collect the fees from the surplus, *i. e.*, not out of the capital due for taxes. This they did in the line of official collection. Under such circumstances, clearly, the city cannot be held responsible.

3. As to the item of \$300 for the expert employed for the examination of the books of the board, it does not appear just that it should be charged to the plaintiff's account. The city is in no better condition in that respect than any other defendant. If she had researches to be made, she must pay those whom she intrusted with the duty. Had the plaintiff failed altogether, a question quite different might have been presented. The district court allowed the amount reported by the city's expert, \$24,940.40, but without the interest, to which the plaintiff is entitled. By disallowing the two items for which the city claimed credit, \$16,402.54 and \$300, the amount of the judgment ought to be increased by \$6,004.54.

It is therefore ordered and decreed that the judgment appealed from be increased to \$30,944.94, with legal interest from judicial demand, and that, so amended, it be affirmed, with costs.

(83 Ala. 162)

## HILL v. RUTLEDGE.

(Supreme Court of Alabama. December 8, 1887.)

## 1. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—CONDITIONAL SALES.

Upon trial of right of property seized on execution, where the claimant proves title by bill of sale from the judgment debtor, and the execution plaintiff introduces evidence tending to show that the bill of sale, though absolute on its face, was really a mortgage given by the debtor while in embarrassed circumstances, to secure an existing debt, and also future advances, it is error, under Code Ala. 1876, § 2120, which declares void as against creditors all conveyances made in trust for the use of the person making the same, to refuse to charge the jury that, although there was a valuable consideration to sustain the bill of sale, yet, if the person giving it was insolvent or embarrassed at the time, and it was intended to secure a debt, then it is fraudulent and void as to his existing creditors.

## 2. EXECUTION—CLAIMS OF THIRD PARTIES—TRIAL—EVIDENCE.

Upon trial of the right of property seized on execution, the bill of sale, upon which the claimant bases his title, is admissible in evidence, although there is evidence tending to show that it was fraudulent as against the plaintiff, no fraud appearing on the face of the instrument.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge.

The appellant, S. H. Hill, was a member of the firm of Kennon & Hill, in whose name a judgment was recovered against J. H. Blalock and Elizabeth Blalock. An execution on this judgment was levied on "one thousand pounds of cotton seed, more or less, and fifteen bushels of corn," which were found in the possession of said defendants, and to which a claim was interposed by W. T. Rutledge, affidavit being made and bond given to try the right of property. On the trial in the justice's court, there was judgment for claimant, from which plaintiff took an appeal to the circuit court; and on the trial in that

court he reserved a bill of exceptions, which states the points here presented for revision. The plaintiff having proved his judgment, and the levy of his execution on the property in controversy, while in the possession of the defendant, who told the officer making the levy "that the property belonged to Rutledge," the claimant offered in evidence a bill of sale signed by said John H. Blalock, which was dated April 10, 1883, and in these words: "Know all men by these presents, that I, John H. Blalock, for and in consideration of one hundred and fifty dollars to me paid by W. T. Rutledge, the receipt whereof is hereby acknowledged, do bargain, sell, and deliver to said W. T. Rutledge my entire crop of cotton, corn, peas, fodder, and potatoes, raised the year 1883. The above is for the purpose of making a crop this year. Witness my hand," etc. Plaintiff objected to the admission of this bill of sale as evidence, "because it did not pass any legal title to claimant;" and he duly excepted to the overruling of his objection. The plaintiff adduced evidence tending to show that this bill of sale, though absolute on its face, "was not in fact an absolute and *bona fide* sale of the crops therein mentioned, but was given to secure the payment of a pre-existing debt from said John H. Blalock to said Rutledge, and for the purpose of securing advances already made and to be made by said Rutledge to said Blalock; that said Blalock was then indebted to plaintiff, and he and his co-defendant were both financially embarrassed and insolvent at the time, and that said Rutledge had notice of that fact." There was evidence, also, on the part of the claimant, "tending to show that said sale was absolute and in good faith; that the whole sum given for the crop was paid on that day, and on the next; that the crop was delivered to the claimant on the day after the sale, and was cultivated as his." On this evidence the plaintiff asked the following charge in writing: "Although it may appear from the evidence that there was a valuable consideration to sustain the bill of sale, yet, if it appear from the evidence that the Blalocks were, when it was executed, insolvent or embarrassed, and it was intended to secure a debt due from them to Rutledge, then it is fraudulent and void as to the existing creditors of the Blalocks." The court refused to give this charge, and the plaintiff excepted to its refusal. The admission of the bill of sale as evidence, the refusal of the charge asked, and several charges given at the instance of the claimant, are here assigned as error.

*Geo. P. Harrison, Jr., and S. O. Houston, for appellant. William J. Samford, for appellee.*

CLOPTON, J. There can be no valid objection to the admission in evidence of the bill of sale, which was made by one of the defendants in execution to the claimant, by which he claims to have acquired title to the property. It constitutes the foundation of his claim of ownership, and if the transaction is *bona fide*, free from the taint of fraud either in law or in fact, title to the property in controversy was vested in him, effectual to sustain in his favor the proper issue in a statutory trial of the right of property.

The material question relates to the nature and character of the transaction. There is evidence tending to show that it was an absolute sale, and also evidence tending to show that the bill of sale was intended as security for an antecedent debt, and for present and future advances. The evidence thus presents the case in two aspects; and as the validity of the transaction does not appear to be assailed because of inadequacy of consideration, or on the ground that it is the product of actual fraudulent intent, the material issue is, was the transaction an absolute sale, or, in legal effect, a mortgage? Instructions to the jury were requested by both parties, referable to this decisive issue. In respect to those given at the request of the claimant, it may be remarked that they are based on the theory of an absolute sale; and, if such be the fact, they assert familiar propositions, and are free from error. It is unnecessary to consider them *seriatim*.

The plaintiffs requested the court to instruct the jury that if it appears from the evidence that the defendants in execution were embarrassed or insolvent, and that the bill of sale was intended to secure a debt due to the claimant, it is fraudulent and void as to the existing creditors of the grantor, although it may be supported by a valuable consideration. Without reference to the actual intention of the parties, the law condemns, as offending the rights of existing creditors, an absolute conveyance of property made by an embarrassed debtor, when there is a secret reservation for his benefit. The intent in such case is deduced from the transaction itself; the inevitable consequences being to hinder, delay, or defraud creditors. A conveyance absolute in form, but intended as security for a debt, operates a secret reservation, for the benefit of the debtor, of a valuable right and property,—the equity of redemption,—which is capable of being subjected to the payment of his debts. On this ground rests the settled doctrine of this court, that such conveyances, when made by an embarrassed or insolvent debtor, are obnoxious to the provisions of the statute, which declares void as against creditors all conveyances "made in trust for the use of the person making the same." Code, § 2120; *Bryant v. Young*, 21 Ala. 264; *Sims v. Gaines*, 64 Ala. 392. The instruction requested by plaintiff simply asserts this legal proposition in abstract and general terms, which is applicable to one aspect of the evidence. It does not affirm that the plaintiff is entitled to recover on the rule as stated, nor does it profess to set forth all the facts and circumstances under which the jury should condemn the property to the plaintiff's execution. If given, it no doubt would have been followed, or should have been, by definite instructions as to the circumstances under which the asserted principle should govern the decision of the case, and as to the facts requisite to entitle the plaintiff to recover. Such instructions would have raised the question whether it is essential, in order to avoid the conveyance, that the claimant should have had notice of the embarrassed or insolvent condition of the debtor. The charge as framed and asked does not involve this question, and therefore we need not enter upon the inquiry. The charge should have been given. Reversed and remanded.

(24 Ala. 259)

POLLAK *et al.* v. SEARCY.

(Supreme Court of Alabama. May 2, 1888.)

## 1. SALE—IN CONSIDERATION OF ANTECEDENT DEBT—BONA FIDE PURCHASERS.

Plaintiff claimed to have purchased certain property from his debtors, applying it towards the payment of his debt. Before the property was delivered it was attached by other creditors, and plaintiff sued for its recovery. *Held*, that if the claim of the other creditors was prior to the alleged sale, before any presumption will arise that the alleged sale was *bona fide*, plaintiff must prove affirmatively that the owners were indebted to him, and that the property was sold in payment of such indebtedness at a reasonable value.

## 2. ATTACHMENT—ACTION FOR ILLEGAL LEVY—EVIDENCE.

Where property claimed to have been sold by the owners is subsequently attached as the property of the sellers, an offer by the attaching creditors to return the surplus over and above their claim is admissible in an action by the purchaser against such creditors for making the levy, in case the sale is found fraudulent, to show that they had no intention to make an excessive levy.

## 3. EVIDENCE—BOOKS OF ACCOUNTS—RES GESTÆ.

The books of debtors are competent evidence, as part of the *res gestæ*, to show their indebtedness; but anything suspicious in them is not evidence against the creditor, unless there is proof connecting him with it.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge.

Action by George W. Searcy against I. Pollak and others for illegally levying an attachment on property claimed by plaintiff. Judgment for plaintiff, and defendants appeal.

*Rice & Wiley*, for appellants. *Watts & Son* and *J. C. Richardson*, for appellees.

STONE, C. J. Blake & Searcy conveyed their merchandise, by sale absolute in form, to George W. Searcy, in payment of an alleged debt to him. The real issue in this case is whether or not the alleged debt from Blake & Searcy to George W. Searcy, as claimed, was *bona fide*, and whether or not the sale was absolute, reserving no interest or benefit to the sellers. The amount claimed by George W. Searcy as due to him from Blake & Searcy was \$2,400, and there is no proof that the merchandise claimed to have been conveyed was worth more than that sum. The rules for determining whether or not such sale is valid against an existing creditor have been so often declared by this court that we consider it unnecessary to repeat them. *Crawford v. Kirksey*, 55 Ala. 282; *Sims v. Gaines*, 64 Ala. 392; *Lehman v. Kelly*, 68 Ala. 192; *Seaman v. Nolen*, Id. 463; *Bank v. Brewer*, 71 Ala. 574; *Hodges v. Coleman*, 76 Ala. 103; *Proskauer v. Bank*, 77 Ala. 257; *Shealy v. Edwards*, 78 Ala. 176; *Levy v. Williams*, 79 Ala. 171; *Pritchett v. Pollock*, 82 Ala. 169, 2 South. Rep. 735. Pollak & Co. were creditors of Blake & Searcy before and at the time the latter made the conveyance to George W. Searcy, and, soon after the conveyance was made, they indemnified the sheriff, and attached the goods as the property of Blake & Searcy. The goods had not been removed, but were still in the store-house in which Blake & Searcy had done business. The claim on which the attachment was sued out was a fraction over \$500, while the goods in the store were worth considerably more than that sum. The levy was made late in the afternoon. The sheriff took possession of the store, and proceeded to select and inventory the goods, so as to set apart and take possession of such portion of them as he deemed sufficient to satisfy Pollak's claim. Defendants, Pollak *et al.*, offered to prove, in mitigation of damages, that, on the next day, after completing the selection and inventory, the residue of the goods were tendered back, and Searcy refused to accept them. This testimony was ruled out on the motion of the plaintiff.

The right to make this defense must depend on the question whether or not the sale by Blake & Searcy to George W. Searcy was *bona fide*. If that sale was valid, then the levy of the attachment was a naked trespass, and the tender back, without acceptance, was no defense whatever: *Clark v. Hallock*, 16 Wend. 607; *Hammer v. Wilsey*, 17 Wend. 91. In levying on merchandise, a part of a stock of goods, and, even in perfecting a levy of an entire stock, the officer must have some time to ascertain what goods are required, or what goods there are, and to make an inventory of them. He must obtain control, to make a levy. Murfree, Sher. § 523. And no matter in whose house they may be, if not in a dwelling, he may, after demand and refusal, forcibly enter and levy if the goods are subject to the process in his hands; and he may remain in such house for a reasonably sufficient time to perfect the levy, and remove the goods. Murfree, Sher. § 522; *Perry v. Carr*, 42 Vt. 50; *Rowley v. Rice*, 11 Metc. 337; *Platt v. Brown*, 16 Pick. 553; *Malcom v. Spoor*, 12 Metc. 279; *Messner v. Lewis*, 20 Tex. 221; *Drake*, Attachm. § 246; *Green v. Burke*, 23 Wend. 490. We find no pleas in this record, and must therefore presume that the case was tried on the general issue. *May v. Sharp*, 49 Ala. 140. Under our statutory system of pleading, the general issue merely casts on the plaintiff the burden of proving the allegations of the complaint. All matters of defense which go beyond this must be specially pleaded. *Petty v. Dill*, 53 Ala. 641. Everything relied on in the defense of the present suit required a special plea. If the conveyance from Blake & Searcy to George W. Searcy was fraudulent, then the attachment was a full defense to that part of the action which complains that the defendant broke and entered the store, and carried away the goods, to the extent, and only to the extent, that the goods seized and removed did not exceed in value what would probably be required to make Pollak's debt secure. As to the balance of the goods not required for Pollak's claim, if the justification under process is made good, and if there was no undue delay in perfecting the levy and offering back the sur-

plus, and in vacating the premises, this, under a proper plea, is an answer to what might otherwise be adjudged an excessive levy.

The testimony of the tender back, if there was a proper plea raising the question, should have been received when offered, subject to be charged on as the the jury might find the sale to George W. Searcy to be valid or fraudulent.

Two charges were given at the instance of the plaintiff, but each asserts the same proposition. They were separately excepted to. The language of the instruction is: "That, if the facts relating to the sale of the property in question admit of two constructions, the one rendering it fraudulent, and the other honest and valid, the latter must be accepted and acted upon." This instruction hypothesises nothing as to the relative strength of testimony or belief supporting the opposing alternate constructions. These may be very weak, and still not so weak or worthless as to fall within the asserted rule. "Admit," in the sense here employed, is the synonym of "tolerate." A paraphrase of the sentence would be that, unless the testimony tending to prove the fraud is so clear as to admit of no other conclusion, then the jury must find the conveyance valid. The rule declared is too exacting. This precise question has been many times before this court, and we subjoin the exact language in which the principle has been expressed: "We are not allowed, by the rules of law, any more than by the principles of common charity, to suppose fraud when the facts out of which it is supposed to arise may well consist with honesty and pure intention." *Smith v. Bank*, 21 Ala. 125; *Stiles v. Lightfoot*, 26 Ala. 443. "Courts will not strain to force conclusions of fraud; and, if the circumstances relied on to sustain that allegation are fairly susceptible of an honest intent, that construction should be placed upon them." *Insurance Co. v. Pettway*, 24 Ala. 544. "Fraud will not be imputed when the facts and circumstances from which it is supposed to arise may reasonably consist with honest intentions." *Thames v. Rembert*, 63 Ala. 561; *Pickett v. Pipkin*, 64 Ala. 520; *Cromelin v. McCauley*, 67 Ala. 542. It will be observed that, in the charges excepted to, the qualifying yet expressive words "well," "fairly," and "reasonably," are omitted. In *Adams v. Thornton*, 78 Ala. 489, we reviewed our former decisions, and attempted to lay down a rule by which we proposed to be governed. Speaking of cases in which fraudulent intent is an issue, we said: "The assailing party encounters the presumption of honesty and fair dealing, but it is a disputable presumption, the burden of overcoming which rests on him. When he produces facts and circumstances in evidence which not only cast a suspicion on the transaction, but show a state of facts which are not fairly or reasonably reconcilable with fair dealing and honesty of purpose, then he has overcome the presumption of purity of intention, and is entitled to a judgment of condemnation." The principle we have been considering, although the controlling one in many cases of alleged fraud, is not so in cases like the present one. In this case the real inquiry raised was whether Blake & Searcy were indebted to George W. Searcy, as was claimed, and whether the goods were sold in payment of such indebtedness at their reasonably fair value. The debt to Pollak, if older than the alleged sale of the goods, cast the burden, not to Pollak as to these issues, but on Searcy. There was no presumption of honest intent to be overcome by Pollak until Searcy established the two facts stated above; and if, on the whole proof, the jury were not reasonably convinced of the truth of both of said propositions, then Searcy failed to make a case entitling him to recover. And the relationship between the parties cast on Searcy the duty of making clearer and fuller proof of these facts than if they had not been related to each other. *Gordon v. McIlwain*, 82 Ala. 247, 2 South. Rep. 671, and authorities cited. If these two facts are established to the satisfaction of the jury, and if it be contended, in avoidance of them, that the trade was simulated, that there was a secret trust or benefit reserved to Blake & Searcy,

the burden was then on Pollak to establish this. Should the contestation progress to this point, then as to it, and as to it alone, will the presumption of honest intention, and the measure of proof required to overcome it, become pertinent to this case.

The books of Blake & Searcy were competent *res gestæ* evidence on the inquiry of their indebtedness to George W. Searcy; but anything suspicious about them was not evidence against him, unless there was proof connecting him with it. The charge given on this subject was free from error.

There is nothing in the other questions raised. Reversed and remanded.

(35 Ala. 56)

CAMPBELL v. DAVIS *et al.*

(*Supreme Court of Alabama.* February 23, 1883.)

1. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PARTIES.

Where a judgment debtor joins with the other part owners of a tract of land in a conveyance which, though absolute on its face, is intended only as a mortgage or security for money loaned, and a judgment creditor files a bill in equity to set it aside on the ground of fraud, the other grantors are not necessary or proper defendants to the bill, since the creditor has no rights in, or to, the interest conveyed by them; but their misjoinder is a defense personal to them, and not available as ground of demurrer to the grantee.

2. SAME—DEED INTENDED AS MORTGAGE—SECRET RESERVATION.

A conveyance absolute in terms, but intended only as a mortgage or security for a debt, executed by an insolvent or embarrassed debtor, operates a secret reservation of benefit to him, and is fraudulent in law as against his existing creditors.

3. SAME—INADEQUATE CONSIDERATION—RIGHTS OF GRANTEE.

When a conveyance is held constructively fraudulent, because of the inadequacy of the consideration paid, it will be allowed to stand as security for the actual consideration, if the grantee did not participate in the fraudulent intent of the grantor, but the principle does not apply to a conveyance which is wholly fraudulent, as where it is absolute on its face, but intended to operate only as a mortgage.

4. SAME—ACTION TO REMOVE CLOUD ON TITLE—POSSESSION—ATTORNEYMENT.

To entitle a party to ask the interference of equity to remove a cloud on his title to land, by cancelling a fraudulent conveyance, he must be rightfully in possession. If he wrongfully acquired the possession, by attorneyment of the fraudulent grantor, who was in possession as the tenant of his grantee, such possession does not entitle him to the assistance of the court; but if the fraudulent grantor was actually holding in his own right, the renting being nominal, simulated, and fictitious, attorneyment by him is effectual, and the plaintiff thereby acquires a rightful possession.<sup>1</sup>

Appeal from chancery court, Lawrence county; THOMAS COBBS, Judge.

Bill in equity, filed by Hiram W. Davis and Margaret K. Hayes against Lucian D. Campbell, to set aside a fraudulent conveyance as a cloud on title.

James Jackson and J. B. Moore, for appellant. Ward, Chitwood, Walker & Shelby, for appellees.

CLOPTON, J. The land in controversy was sold by the sheriff under executions, issued on three several judgments, rendered against Henry C. Montgomery in favor of appellees and E. B. Ryan & Co., respectively. The appellees became the purchasers at the sale, to whom the sheriff executed a conveyance. J. F. Montgomery, the father of H. C. Montgomery, owned and possessed the land at the time of his death, which on his death descended to his seven heirs at law. In February and March, 1886, before the rendition of the judgments, but after the debts of the judgment creditors were contracted, all the heirs except one conveyed the land to appellant upon a recited consideration of \$6,000 paid, the judgment debtor being one of the grantors. The bill is filed by appellees, as such purchasers, to have the conveyance by the judgment debtor declared fraudulent and void as to them, and to remove

<sup>1</sup> Concerning the necessity of the possession of plaintiff to maintain an action to quiet title, see *Gage v. Curtis*, (Ill.) 14 N. E. Rep. 30, and note.

it as cloud on their title. It alleges that the \$6,000, recited as the consideration price, was in fact a loan, and that the conveyance, though absolute in form, was intended as security for the loan. The exhibits to the bill show that the judgment debtor owned only one-seventh interest in the land. This is the *quantum* of interest acquired by complainants. None but creditors or purchasers, whose rights are offended, can complain of a fraudulent conveyance. It is valid as between the parties and as against all other persons. However fraudulent may be the conveyance as to the interest of the other tenants in common, the complainants have no right to assail it and have it set aside, as fraudulent. The other heirs at law were unnecessary parties, and were improperly joined; but the right to make this objection is personal to them; a co-defendant cannot take advantage of the misjoinder. *Ware v. Curry*, 67 Ala. 274.

It has been the established doctrine in this state too long to be considered within the pale of controversy, that an absolute conveyance of land made by an embarrassed or insolvent debtor intended to operate as a security for a debt, antecedent or coterminously contracted, is fraudulent and void against the existing creditors of the grantor. Actual fraud,—an intent to delay, hinder, or defraud creditors,—is not essential. The fraud is deduced by the law from the fact that such conveyance operates a secret reservation of a benefit,—the equity of redemption,—for an embarrassed debtor. The parties will not be heard to deny or rebut the conclusion. Though the bill alleges that the deed was made absolute in form for the purpose of concealing the true character of the transaction and to cover up the property of the debtor so that it could not be reached and subjected to the payment of his debts,—fraud in fact,—no other facts showing fraud need be averred than that the conveyance is absolute in form, was intended as security for a debt, and was made by an embarrassed debtor. *Bryant v. Young*, 21 Ala. 264; *Hartshorn v. Williams*, 81 Ala. 149; *Sims v. Gaines*, 64 Ala. 392; *Hill v. Rutledge*, ante, 185.

The allegations that the debts of the creditors were contracted in 1885, that one of the judgments was rendered in April, 1886, and that an execution issued thereon was returned "no property" to the succeeding term of the court, at which term the other judgments were rendered, are averments of fact sufficient to show *prima facie* the embarrassed or insolvent condition of the judgment debtor. The complainants are not required to offer to pay the money loaned. When a conveyance is constructively fraudulent because of inadequacy of consideration, it may be permitted, the grantee not participating in any fraudulent intent of the grantor, to stand as security for the consideration actually paid; but when it is wholly fraudulent, either in fact or in law, it will not be allowed to stand for the purpose of reimbursement. *Caldwell v. King*, 76 Ala. 149.

As a general rule a tenant is estopped to deny the title of his landlord either during the continuance or after the expiration of the term. Before the tenant will be heard to assert an outstanding title in himself or a stranger, he must surrender the possession to his landlord, unless his title has expired or been extinguished, or the reversion has passed by a valid alienation to the tenant or a third person since the commencement of the tenancy. The attornment of the tenant to a stranger does not of itself destroy the possession of the landlord. *Rogers v. Boynton*, 57 Ala. 501. Also, when possession of the rented land is tortiously gained from the tenant, or otherwise, so as to entitle the landlord to maintain an action of forcible entry and detainer, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor to remove a cloud from his title to the land. *Turnley v. Hanna*, 67 Ala. 101. Equity will not extend aid to protect a possession acquired by unfair or unlawful means. The possession which gives jurisdiction in such cases must be rightful. But the allegations of the bill are that

though Montgomery is in possession nominally as tenant, under a contract of lease, the renting was simulated and fictitious, a device contrived to deceive and divert, and to hinder, delay, and defraud his creditors,—part and parcel of the fraudulent transaction,—and that he was never really tenant, but remained in possession of the land as his own. If these be the facts, and we must assume their truth on demurrer, the tenancy is fraudulent, and there is no tenancy as against the complainants; and if Montgomery, being the execution debtor, attorned to them, under such circumstances, they acquired rightful possession, to protect which a court of equity will entertain a bill to remove a cloud from their title. If not proved, the equity of the bill must fail. Affirmed.

(84 Ala. 141)

**SOUTH & NORTH ALA. R. CO. v. DONOVAN.**

(*Supreme Court of Alabama.* April 30, 1883.)

**1. RAILROAD COMPANIES—WITHIN LIMITS OF MUNICIPAL CORPORATION—INJURY TO PERSONS ON TRACK.**

It is the duty of the employees of a railroad company running a train within the corporate limits of a city or town, where necessity may compel or usage sanction walking upon the track at places other than at public crossings, to keep a vigilant outlook, even for trespassers, and a failure to do so would be negligence for which the company would be liable.<sup>1</sup>

**2. SAME—WHAT CONSTITUTES NEGLIGENCE—RATE OF SPEED WITHIN LIMITS OF MUNICIPAL CORPORATIONS.**

Running a railroad train through the corporate limits of a city at a greater rate of speed than that prescribed by the city ordinance, where the ordinance is not shown to be unreasonable, is *per se* culpable negligence.

**3. PARENT AND CHILD—ACTION BY PARENT FOR INJURY TO CHILD—FORMER RECOVERY BY CHILD.**

A recovery for the benefit of an infant by his next friend against a railroad company for personal injury was not, (prior to act Ala. Jan. 23, 1885, providing that a suit by the father or mother is a bar to a suit by the personal representatives of a minor for a personal injury to such minor,) a bar to an action for the same injury by the father for his own benefit.

**4. SAME—INJURIES TO PERSONS ON TRACK—PROXIMATE AND REMOTE CAUSE OF INJURY.**

In an action against a railroad company for personal injury to plaintiff's minor child while trespassing on defendant's track, where there was evidence that, when the child went on the track, he looked both ways, and saw no trains approaching, it is for the jury to determine whether the father's negligence in allowing the child to go on the track was the proximate or remote cause of the injury, and an instruction making it negligence *per se* is properly refused.

Appeal from circuit court, Jefferson county; LEROY F. BOX, Judge.

This was an action against the South & North Alabama Railroad Company, by James Donovan, father of William Donovan, for personal injuries to the said William, who was run over by a train of cars in the corporate limits of the city of Birmingham. The child was under 10 years of age; was in the habit of crossing the railroad track at the place where he was injured as he went to and from to carry his father's dinner to him; was on the track when struck by the train, and looking in the opposite direction from the train of cars, which consisted of coal cars and a locomotive, and the locomotive was in the rear of the cars, and pushing them backwards at a greater rate of speed than four miles per hour. An ordinance of the city of Birmingham prohibited, under penalties, the running of locomotive engines, within the corporate limits, at a greater rate of speed than eight miles per hour when running forward, and four miles per hour when running backward, and required the usual signals to be given continuously by ringing the bell or otherwise, when locomotives or trains were running through the city. The place where the injury occurred was not a public crossing, but the evidence showed that many

<sup>1</sup> See, also, *Byrne v. Railroad Co.*, (N. Y.) 10 N. E. Rep. 539; *Nichols' Adm'r v. Railroad Co.*, (Va.) 5 S. E. Rep. 171. On the general subject of the duty of railroad companies at crossings, see *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 374, and note.

people walked on and about the railroad track there and elsewhere. Evidence as to giving of signals by the approaching train was conflicting; as also was the evidence as to how long the boy had been standing on the track when struck,—defendant's testimony being that the boy was walking along by the side of the track, and stepped thereon when the train was only about 30 feet behind him. Act Ala. Jan. 23, 1885, (Code 1886, § 2588,) provides that a suit by the father or mother is a bar to a suit by the representatives of a minor for a personal injury to such minor. Defendant appeals from the rulings, and judgment for plaintiff.

*Hewitt, Walker & Porter*, and *Jones & Falkner*, for appellant. *James Weatherly*, for appellee.

SOMERVILLE, J. The plea of the defendant numbered 1 was defective, in failing to aver that the employes in charge of the train used proper diligence in keeping a lookout for obstructions on the track, including, in this case, the plaintiff's son, for whose injury the father brings the present action. The plea avers that the infant son was trespassing upon the track at a point where there was no public crossing, to which the defendant company had the exclusive right, and that so soon as its employes discovered the boy all available preventive measures were adopted to avert the injury. This plea admits the averments of the complaint that the alleged trespass occurred within the corporate limits of the city of Birmingham, and that the train was running at a rate of speed in excess of that prohibited by an ordinance of the city. It rests, therefore, upon the idea that there is no duty devolving on a railroad company, under these circumstances, to keep any lookout for trespassers who walk upon or across its track at any other place than public crossings, even within the corporate limits of a city,—it may be a populous city,—and within the business portion of it, where necessity may often compel this kind of trespassing, or common usage give color of sanction to it under the form of an implied license. Railroad companies, operated by steam-power, are required to use very great care; and this care must be graduated to suit the exigency of increased danger whether to employes, passengers, or the public. We cannot say that it was not the duty of the persons who were managing the train, under the circumstances, to keep a vigilant outlook even for trespassers, and that a failure to do so would not be negligence. The decisions of this court support the contrary conclusion, at least where the injury occurs in the streets of a city, town, or village. What the rule would be where a naked trespasser on the track is injured in the open country, or elsewhere, by the failure of the railroad engineer to keep a vigilant lookout, is an open question in this state, upon which we now express no opinion. Code 1886, § 1144; *Railroad Co. v. Shearer*, 58 Ala. 672, 678; *Railroad Co. v. Sullivan*, 59 Ala. 272; *Frazer v. Railroad Co.*, 81 Ala. 185, 1 South. Rep. 85; *Freer v. Cameron*, 55 Amer. Dec. 674, note. The demurrer to this plea was sufficient to raise the point, and it was properly sustained. And, for like reason, the first charge given by the court at the request of the plaintiff was free from error.

2. When the present action was commenced, in January, 1884, prior to the act of January 23, 1885, (Code 1886, § 2588,) two separate and distinct suits would lie for the injury alleged in the complaint; the one for the benefit of the infant himself, which could be brought by his next friend, and the other for the benefit of the father, based on the loss of the infant's services, and such other special damages as may have resulted from the injury inflicted. *Iron Co. v. Brawley*, 83 Ala. —, 3 South. Rep. 555; *Propst v. Railway Co.*, 83 Ala. —, 3 South. Rep. 764. The recovery of the infant, therefore, in the suit brought in his name by the plaintiff as his next friend, which is set up in the second plea as a bar to the action, was no defense to this action, brought by the father for the same injury, but for his own benefit. The court ruled correctly in sustaining the demurrer to this plea.

3. The court correctly charged the jury that the running of a railroad train, operated by steam-power, and running through the corporate limits of a city, at a greater rate of speed than that prescribed by the city ordinance, which was in evidence, would be negligence. The precise question was decided in *Gothard v. Railroad Co.*, 67 Ala. 115, and that decision is sustained by an overwhelming weight of authority; it being held generally that a failure to comply with any regulation imposed by a city ordinance, and not shown to be unreasonable, is *per se* culpable negligence on the part of a railroad company. The rule is as applicable to trespassers as to others, being in the nature of a police regulation favorable to the preservation of life and limb, and based on a duty to the public, who have a right to act upon the belief that such an ordinance will be observed by railroads generally. It cannot be said that railroad companies are under no obligations to take precautions to prevent injuries to intruders, especially when these precautions are required by law for the benefit of the public generally. *Meeks v. Railroad Co.*, 38 Amer. Rep. 67, 70; *Freer v. Cameron*, 55 Amer. Dec. 674, note; *Thomp. Neg.* 419, 1232; *Shear. & B. Neg.* §§ 484, 485; *Pennsylvania Co. v. Henstl*, 70 Ind. 569, 36 Amer. Rep. 191; *Correll v. Railroad Co.*, 38 Iowa, 120, 18 Amer. Rep. 22.

4. The first charge requested by the defendant was properly refused, for two reasons: (1) It withdrew from the consideration of the jury all inquiry as to whether or not the employes of the defendant, in the management of the train, could, by the exercise of reasonable care and prudence, have averted the injury, either by keeping a vigilant outlook, giving the proper signals required by law, or by conforming to the requirement of the city ordinance regulating the speed of the train. (2) It pronounced the conduct of the plaintiff, in allowing his son to go on the track, negligence *per se*, in any aspect of the evidence, and without regard to any inquiry as to the remoteness of the danger on the one hand, or its imminency on the other. To disentitle the plaintiff to recover, the negligence which on his part contributes to the injury must be proximate and not remote. *Meeks v. Railroad Co.*, 56 Cal. 513, 38 Amer. Rep. 67, 70; *Frazer v. Railroad Co.*, 81 Ala. 185, 1 South. Rep. 85. In the plaintiff's aspect of the case, this was a question properly for the consideration of the jury; the plaintiff's evidence tending to show that, when the boy went on the track, he observed no trains approaching after looking in both directions. The charge is not so broad as the averments of the fourth and fifth pleas, upon which the plaintiff took issue.

5. The second charge was liable to the same objections the first plea was, to which, as we have seen, a demurrer was properly sustained. These objections we need not repeat.

The third and fourth charges were properly refused, being faulty in the particulars above suggested as rendering the first charge erroneous.

The rulings of the court are, in our opinion, free from error, and the judgment is affirmed.

CLOPTON, J., not sitting.

(84 Ala. 325)

MAY *et al.* v. COLEMAN.

(Supreme Court of Alabama. May 8, 1888.)

1. PLEADING—SUPPLEMENTAL ANSWER—SETTING UP COMPROMISE.

Where application was made in an equitable action for leave to file a supplemental answer, alleging settlement of the matter in litigation, and the record disclosed no reason for refusing the same, the ruling of the court denying such application will be reversed.

2. LIMITATIONS OF ACTIONS—DISABILITIES AND EXCEPTIONS—TRUST FUND.

An allegation that a fund was devised to W., as trustee; that during his life he continued to act as such, and upon his death M., an only child, took possession of such trust fund, and became the trustee of the same, paying the amount due on account thereof for a series of years,—does not show that the trust fund was received

by M., or that she became trustee, or that the estate of W. was charged with a trust, and discloses only an ordinary debt; and the limitation will begin to run from the time of the last payment by M.

Appeal from chancery court, Hale county; THOMAS COBBS, Chancellor.

Bill was filed by E. W. Coleman, as trustee of S. A. Connor, alleging that one Rachael Wedgworth, by will, bequeathed to said S. A. Connor \$200, which legacy was placed, by the terms of the will, in the hands of one Stephen Wedgworth, as trustee; that up to his death said Stephen Wedgworth discharged his duties as such trustee; and that, upon the death of said Stephen, an only surviving child, Ann E. Wedgworth, who afterwards married John May, "took possession of and administered upon the estate of her father, consisting of land, mules, cattle, and other things, collecting all the assets, and paying all the debts, of said estate, except the legacy due the said S. A. Connor." The bill further alleges that the said Ann E. "took possession of all the property of her father, and of her own wrong, and also took possession of the trust fund belonging to the said S. A. Connor, of which her father was trustee, and became herself the trustee of said fund, paying annually the annuity due the said S. A. Connor for a series of years;" and that afterwards said Ann E. refused to make any settlement of her trusteeship. There was a decree for plaintiff, and defendants, Ann E. May and her husband, John May, appealed.

*Coleman & Coleman and E. W. De Graffenried, for appellants. Jas. E. Webb, for appellee.*

CLOPTON, J. Three years after the bill and answer thereto were filed, the defendants applied to the court to file a supplemental answer, in which they alleged that the matter of litigation had been compromised by the payment to the solicitors of complainant of one-half of the amount claimed, with the accrued interest, and to the register of the court of one-half of the costs of the suit, and that it was understood and agreed that on such payments being made the cause was settled, and the bill should be dismissed. The chancellor refused the application, on the objection of the complainant. Neither the grounds of the objection nor the reasons of the chancellor are disclosed by the record, nor are any presented by the counsel in argument. Evidently the parties had the right to compromise the suit, and such compromises of litigation are favored by the law. When a pending suit is compromised, unless it is brought to the attention of the court before a final decree, the parties will be concluded and estopped from setting up the compromise thereafter. A supplemental answer in the nature of a plea *puis d'arien continuance* at law is the proper mode to bring the compromise and settlement before the court, on which to try the issue thus presented. There may have been sufficient reasons for refusing the application, but, if so, they are not made known by the record, and we must determine the matter as presented before us. The chancellor should have allowed the defendants an opportunity to set up the compromise and settlement against the further maintenance of the suit, and should have tried the issue, and determined whether the compromise was such on the part of the trustee as the court would approve before hearing the case on the merits.

As the decree must be reversed for this reason, we will not consider the merits of the controversy except to remark that the allegations of the bill are insufficient to show that the trust fund was received by the defendant Ann May, or that she became trustee, or that the property belonging to the estate of Stephen Wedgworth was charged with the trust. The bill fails to show that any liability was imposed on the defendants other than was imposed by any other debt which Stephen Wedgworth owed at the time of his death. If six years elapsed since the last payment by the defendants, or either of them, before the commencement of the suit, the claim is barred by the statute of limitations. *Cameron v. Cameron*, 82 Ala. 393, 8 South. Rep. 148; *Lee v. Downey*, 68 Ala. 98. Reversed and remanded.

v. 4so. no. 5—10

(84 Ala. 133)

**MOBILE & B. RY. CO. v. HOLBORN.***(Supreme Court of Alabama. May 2, 1888.)***1. MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYE—BURDEN OF PROOF—ACT ALA. FEB. 28, 1887.**

Act Ala. Feb. 28, 1887, providing that when any person is injured by a locomotive or cars of a railroad the burden of proof is on the railroad company to show that the engineer had blown the whistle at certain times and places, stopped the train for obstructions on the track, etc., does not apply to a case where an employee has been injured while engaged in his regular duty of moving cars, and the burden of proving that the company was guilty of negligence is on such employee.

**2. SAME—DEFECTIVE APPLIANCES—KNOWLEDGE OF MASTER—WAIVER BY SERVANT OF RIGHT OF ACTION.**

Under Code Ala. § 2590, subd. 3, providing that an employer is not liable to an employee for injuries received by the latter when he knew of the defect or negligence causing the injury, and failed to notify the employer, an employer, knowing of such defect or negligence, cannot set up that the employee, by continuing in the work, has thereby waived his right to sue for injuries received in such employment.

**3. SAME—CONTRIBUTORY NEGLIGENCE—PROOF OF.**

The mere fact that an employee has performed work, knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he performed that which was dangerous in a negligent manner.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

Action for personal injuries by George Holborn against the Mobile & Birmingham Railway Company. Judgment for plaintiff, and defendant appeals.

*Gaylord B. Clarke, F. R. Clarke, Jr., and Le Vert Clarke, for appellant. G. L. & H. T. Smith, for appellee.*

CLOPTON, J. This case brings for construction the act of February 12, 1885, entitled "An act to define the liabilities of employers of workmen for injuries received by the workman, while in the service of the employer," which, with some alterations in verbiage, is incorporated in section 2590 of the Code of 1886. Being in derogation of the common law, the inference is that the terms of the act clearly import the changes intended, and their operation will not be enlarged by construction further than may be necessary to effectuate the manifest ends. Notwithstanding, a narrow and restrictive view of the act should not be taken. In its construction the court should consider its objects, have regard to the intentions of the legislature, and take a broad view of its provisions, commensurate with the proposed purposes. The doctrine that prevailed prior to its passage had been carried to an extent which met with disfavor; and the tendency of the legislation has been in many of the states to abrogate as to particular corporations, or to modify as to all masters or employers, the rules which had governed their non-liability. Our statute, as far as it goes, is a substantial copy of the English act, entitled the "Employers' Liability Act;" some of the provisions of which had previously received a judicial construction. Its enactment by the legislature in substantially the same language is persuasive of a legislative adoption of that construction. The act provides: "When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment,"—in five specified classes of cases. The primary and general purpose of the statute is to abolish, in the specified cases, the rule which exempted employers from liability to answer in damages for an injury suffered by the negligence of a co-employee. When the employee who is injured and the employee whose negligence causes the injury are of the same grade, and as to all employees who do not come within either of the specified classes, the common-law rules still apply. *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357. The statute gives the employee a right of

action in the enumerated cases as if he were one of the public suing, not a passenger, but rightfully and lawfully on the premises of the employer, and takes away the defense of common employment, which he previously had. The only qualification of the general liability imposed by the first clause, under the second and third subdivisions, is that provided by the subsequent provision, as follows: "But the master or employer is not liable under this section, if the servant or employe knew of the defect or negligence causing the injury, and failed within a reasonable time to give information thereof to the master or employer, or to some person superior to him engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence." This provision gives to the employer the defense that the employe knew of the defect or negligence, and failed to communicate the fact, which the employe can avoid only by showing that he was aware that the employer, or a superior in the employment, already knew of the defect or negligence. Proof of the latter fact is a full answer to the special defense thus given to the employer, who is not permitted to rejoin the employe's continuance in service after failure to remedy the defect or negligence in a reasonable time. If the master or employer is aware of the defect or negligence, he is answerable in damages. The effect is to take from the employer the defense that the employe impliedly contracted to assume the known and ordinary risks incident to the employment, and to give in lieu thereof, as a special defense, that the employe had knowledge of the defect or negligence, of which the employer is ignorant, and failed to give information thereof. But no liability arises under the statute for injuries caused by the known and ordinary risks of the employment, without negligence on the part of the employer, or of some person intrusted by him with superintendence or with authority to give orders or directions. If it was intended, in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, to apply the maxim *volenti non fit injuria* to the case of a defect of which the employer was aware and negligently failed to remedy, we are not willing to adopt such construction of the statute. The further result is to abolish entirely the rule, as held in *Eureka Co. v. Bass*, 81 Ala. 200, that the employe's continuance in service, after objection and notice, and the failure of the employer to remedy the defect or negligence, is a waiver, and in such case assumption of the known risks, as increased by the defect or negligence. The intention is to prevent injustice to the employer, which would ensue from holding him responsible for the result of a defect or negligence, unknown to him, but known to the employe, and to remedy the injustice to the employe, of requiring him to abandon his employment, in consequence of the employer's willful or negligent omission to remedy the defect or negligence in a reasonable time after notice thereof. The expression "as if he were a stranger" is inapt, and literally interpreted would put the employe in the position of a trespasser or mere licensee; but it is apparent that such is not the intention shown by the succeeding words, "and not engaged in such service or employment." The purpose of the statute is to protect the employe against the special defenses growing out of and incidental to the relation of employer and employe; and the result is to take from the employer such special defenses, but to leave him all the defenses which he has by the common law against one of the public, not a trespasser, nor a bare licensee. Under the statute the defense of contributory negligence is open to the employer. *Weblin v. Bullard*, 17 Q. B. Div. 122. The general charge of the court is in accord with these views.

The first count of the complaint is not framed under the statute. The second count is framed under the second subdivision of the section, which is: "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, while in the exercise of such superintendence." And the third count is framed under the third subdivision, which reads as follows:

"When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from having so conformed." These counts allege that the plaintiff, at the time of the injury, was engaged as an employe of defendant in pushing some cars over the track of the road for the purpose of loading them, while other cars, used in the same business and for the same purpose, were being pushed in the rear, under the orders or directions of another employe of defendant, to whom the superintendence of moving and loading the cars had been intrusted, and to whose orders the plaintiff was bound to conform. In answer to the complaint the defendant set up specifically that the plaintiff knew the manner in which the cars were being operated, and the orders and directions of the employe, to whom the superintendence was intrusted, a sufficient time before the occurrence of the injury to permit him to withdraw from the service, and that the dangers incident thereto and likely to grow out of conformity to such orders or directions were obviously manifest to plaintiff, who continued in the employment, and to perform the service. The proposition of the plea is that an employe, who engages to do service which is obviously dangerous, and continues in such service, either impliedly contracts to assume the manifest or incidental risks, or is guilty of contributory negligence. The first defense, as we have shown, cannot be set up under the statute; and, as is said substantially in *Weblin v. Ballard*, *supra*: "The mere fact that the plaintiff knew that the work was manifestly dangerous of itself does not constitute contributory negligence. If it is shown that he used that which was dangerous in a negligent manner this would be contributory negligence." There is evidence tending to show that the plaintiff selected a dangerous way to push the cars, when there was a safe way to do the work. If this evidence is believed, plaintiff's own negligence contributed to his injury, and constitutes a full defense to the action. The second, third, and fourth charges, given at the instance of the plaintiff, ignore the defense of contributory negligence, and withdrew from the consideration of the jury the evidence tending to prove it. A charge which asserts the right of the plaintiff to recover on facts hypothetically stated, but ignoring other facts, of which there is some evidence, and which, if found by the jury, show the correctness of the legal conclusion asserted in the charge, is erroneous. *Thompson v. Duncan*, 76 Ala. 334. In *Railroad Co. v. Allen*, 78 Ala. 494, it was held that where an employe sues, the burden of proof is on the plaintiff to prove negligence. It is not controverted that this was the rule, but it is insisted that the act of February 28, 1887, amending section 1700 of the Code of 1876, changes the rule. The amendatory act provides: "When any person or stock is killed or injured, or other property damaged or destroyed by the locomotive or cars of any railroad, the burden of proof is on the railroad company to show that the requirements of the preceding sections were complied with at the time and place when and where the injury was done." Acts 1886-87, p. 146. The preceding sections referred to require the engineer to blow the whistle or ring the bell at certain times and places, and to stop the train on perceiving any obstruction on the track, or where two roads cross each other, and require the company to put up signal boards at public crossings. The amendatory act has no application to cases like the present. The enlarged rights of action of an employe is conferred by statute. To entitle him to recover by virtue of the statute, he must aver and prove a case within its provisions and operation. He holds the affirmative of each of the statutory propositions, on which his right of recovery depends; and the general rule applies that the burden of proof is on the party holding the affirmative.

The court erred in refusing to give the charge requested by the defendant in respect to the burden of proof. Reversed and remanded.

(34 Ala. 374)

**WEDGWORTH et ux. v. WEDGWORTH.***(Supreme Court of Alabama. May 3, 1888.)***1. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PLEADING—MULTIFARIOSUSNESS.**

A bill which seeks to set aside a conveyance fraudulent as to creditors, and to subject the land conveyed to the payment of a particular debt, is not multifarious.

**2. SAME—BETWEEN HUSBAND AND WIFE—BURDEN OF PROOF.**

When a conveyance from a husband to the wife is attacked as fraudulent by a creditor whose claim existed at the date of such conveyance, the burden of proving a consideration proportionate to the value of the land conveyed is upon such grantee, and clearer and fuller proof is required than in case of a transaction between strangers.<sup>1</sup>

**3. SAME—EVIDENCE—WEIGHT AND SUFFICIENCY.**

On the trial of an issue as to whether a conveyance made by a husband to his wife was fraudulent as to creditors, it appeared that the wife, about 25 years before, had secured, as her portion from her father's estate, four slaves and \$1,443.12; that, on the death of a former husband, his entire estate was consumed in administration, except two slaves and property valued at \$270. The wife, her husband, mother, and two brothers, testified that on her marriage with her present husband, about 20 years before, she held 18 notes, each being described, amounting to \$6,875, and that her husband collected and used the proceeds of the same. This was claimed as the consideration for the conveyance; the nominal consideration being \$10,000. Each witness made the same mistake as to the amount of the notes described, and as to the number of slaves described. *Held*, that a finding that such conveyance was fraudulent as to creditors would not be disturbed.

Appeal from chancery court, Hale county; THOMAS COBBS, Chancellor.

Bill by Middleton Wedgworth, a judgment creditor, to set aside as fraudulent a conveyance made by John M. Wedgworth to his wife, Nancy A. Wedgworth, and to subject the land conveyed to the payment of the judgment. From a decree setting aside the conveyance, and ordering the land to be sold, John M. Wedgworth and his wife, Nancy A., appealed.

*Coleman & Coleman and Wats & Son*, for appellants. *Jas. E. Webb*, for appellee.

STONE, C. J. There was an answer to this bill on the ground of multifariousness, in this: that the bill seeks to set aside a conveyance from John M. Wedgworth to his wife as fraudulent, and, in one and the same suit, seeks to condemn the land conveyed to the payment of John's debt. The former branch of relief is only an incident—a necessary incident—to the latter. There is not only no incompatibility in the two elements constituting the relief prayed, but, filed as this bill was by a creditor, the one is the indispensable complement of the other. Only a creditor can complain of such fraud as an obstacle to the enforcement of a just demand, and he has no right to interfere save as a creditor prosecuting a valid and lawful claim. The facts averred do not furnish material for two suits. *Stone v. Insurance Co.*, 52 Ala. 589; *Wilkinson v. Bradley*, 54 Ala. 677; *Johnston v. Smith*, 70 Ala. 108; 3 Brick. Dig. 389, § 359.

There is in this case no denial of the fact that John M. Wedgworth was and is indebted to the complainant in the sum for which the latter recovered judgment; nor is it denied that this indebtedness existed before and at the time John M. Wedgworth conveyed the land to his wife. These undisputed facts placed on Mrs. Wedgworth the burden of proving a consideration for the deed not materially disproportionate to the value of the land conveyed to her; and, the conveyance being from the husband, a clearer and fuller measure of proof was required than if the transaction had been between strangers. In *Pollak*

<sup>1</sup>Transactions between father and child, brother and sister, husband and wife, and others, between whom there exists a natural and strong motive to provide for a defendant at the expense of honest creditors, may shown to be fraudulent by less proof, and the party claiming the benefit of such transaction is held to a fuller and stricter proof of its justice and fairness, than would be required if the transaction was between strangers. *Burt v. Timmons*, (W. Va.) 2 S. E. Rep. 780, and note.

v. *Searcy, ante*, 187, (at the present term,) we stated this principle very distinctly, and cited the authorities in support of it. We need not repeat what we there said. Has Mrs. Wedgworth proved the consideration of the deed to her with that measure of proof which is required in such cases? Her witnesses are herself, Nancy Wedgworth, her husband, John M. Wedgworth, her mother, Jane Gewin, and her two brothers, John and Noah Gewin. They testified to transactions which occurred from 20 to 30 years before they were examined as witnesses. The subjects about which they testified are the number of slaves and quantity of money Mrs. Nancy Wedgworth received from the estate of her father, Christopher C. Gewin, the property she acquired from her first husband, Logan, the number of slaves she owned at her marriage with Wedgworth, the notes she held at that time, the names of the makers, the amount each note called for, and the total amount represented by the notes. All of these witnesses testify exactly alike, except John Gewin, who does not give a full list of the notes, nor their gross amount. In other respects he testified like the others, with the additional exception that, in giving the amount of money received by Mrs. Wedgworth from her father's estate, he said it was "about \$1,600." The other stated positively that she received \$1,600. They give the amount of the notes held by her at her second marriage at \$6,875. In each of these respects, each witness is positive, except John Gewin, as stated above. The transcript contains that part of the record of the administration of C. C. Gewin's estate which shows the division and distribution. It also contains the record of Mrs. Wedgworth's administration of the estate of her first husband, Logan. The Gewin estate was settled and distributed about 1852 or '3. Mrs. Nancy Wedgworth, then Nancy Gewin, received four slaves, valued at \$2,400, and in money \$702.93. In February, 1855, Nancy intermarried with Logan, and in March afterwards her guardian, Harris, made his final settlement. There was decreed to her, as balance due, \$1,443.12, which, together with the slaves, was then and there receipted for by her and her husband, Logan. Logan died in September, 1855, and his widow, the said Nancy, administered on his estate. He had five slaves, a horse and buggy, and gold watch. The horse and buggy and watch were appraised at \$270. Three of the slaves were sold, under order of the court, for the payment of debts against Logan's estate, and were bought by Mrs. Logan, widow, for \$1,310. This sum she accounted for as assets in her settlement in 1858. She also accounted for \$300 for hire of negroes for 1855, charged to her as assets. There was allowed as a credit amount due Nancy Logan, voucher 26, \$358.91. Whether or not this was herself we are not informed. On her settlement there was ascertained to be due her, excess of disbursements, \$238.67; and she had exhausted, in the administration, the entire assets of her husband's estate, except two slaves, the horse and buggy, and watch. She had done more. She had exhausted her own money, \$1,443.12, in the purchase of slaves, and in the excess of disbursements over assets found in her settlement. Mrs. Logan intermarried with John M. Wedgworth in November, 1858, and the lands embraced in this suit were conveyed directly from him to her in 1881 on the recited consideration of \$10,000. The testimony offered in support of this alleged consideration is that of the five witnesses mentioned above. Four of them, John M. Wedgworth, Nancy Wedgworth, Jane Gewin, and Noah Gewin, swear that, when Mrs. Logan intermarried with Wedgworth, she held notes payable to herself amounting to \$6,875; that in 1859 she lent these notes to her husband, Wedgworth; and that he collected and used the money. They give the number of the notes, 13; give the names of the makers, and the amount secured by each, and the gross amount, \$6,875, each of them precisely alike. It is out of the routine of ordinary affairs that these four witnesses should each have ever known all these facts. It is still stranger that they should all remember them after a lapse of 25 years, and stranger still that their recollections should exactly cor-

respond in every particular. Yet, stranger than all, the sum of the several notes, as described by each of these witnesses, is \$6,825; showing that each of them made the same mistake of \$50 in the addition. From what source did she derive so large an amount of solvent notes? She had four slaves of her own, two men and two young women, one of them with an infant. She had the hires of those for four years,—1855 to 1858, inclusive. She acquired from Logan's estate five slaves,—two men, which came to her under his will; and three by purchase, an elderly woman and two boys. The Logan negroes hired for \$300 for the year 1855. This went to Logan's debts. She then had the hires of these slaves for three years, 1856 to 1858, inclusive. It is not shown from what source she derived her support during these three years. She was again married in 1858, and marriages usually entail expense. It required very liberal arithmetic to swell these hires to anything approximating the sum claimed. The five witnesses whose testimony we are considering all testify that, when Mrs. Logan intermarried with Wedgworth, she owned fourteen slaves. Being asked to describe them, each specifies the five by name which came from the Logan estate. These had no increase. Each then specifies by name the four which came to Mrs. Wedgworth in the division of her father's slaves, and each adds, "and four children." Now, while the numbers given by each witness foots up thirteen, each falls into the same error of saying there were fourteen. There are other features of the testimony we might comment on, but we forbear. We do not think the consideration of the deed is sufficiently established. Affirmed.

(84 Ala. 256)

CARTER *et al.* v. COLEMAN *et al.*

(Supreme Court of Alabama. May 4, 1888.)

## FRAUDULENT CONVEYANCES—SALE IN HASTE TO CREDITOR.

A failing debtor refused a fair offer for his stock of goods because it required that the purchase money be placed with a trustee for the benefit of his creditors, but thereafter made haste to sell it, for the price he had just refused, to a creditor having notice of his failing condition. The consideration was paid partly by extinguishing that creditor's claim, and partly in cash, with which the debtor paid certain other creditors. *Held*, that no presumption of fraud arises from the haste with which the sale was effected, and that, being upon sufficient consideration, with no advantage reserved to the debtor, the sale is lawful and valid.

Appeal from chancery court, Hale county; THOMAS W. COLEMAN, Judge.

Bill in equity to set aside a sale of goods on the ground of fraud. This case was before the court on former appeal on demurrer to the original bill, with exhibits and amendment. 82 Ala. 177, 2 South. Rep. 354. Coleman, a merchant, made a sale of his stock of goods to Lawson, his brother-in-law, the consideration of which was an antecedent debt of \$1,400, evidenced by two promissory notes, one for \$1,000, and one for \$400; the notes having been discounted by Lawson, who was a private banker, at 1 per cent. per month, and the balance in cash. The terms of sale showed that this balance was to be used in paying other creditors, and it was so used. Lawson knew, or was put upon inquiry so that he might know, the insolvent condition of Coleman. A sale of the same goods from Coleman to one Hafner was in contemplation, and Lawson was to furnish Hafner the purchase money. The inventory of the stock of goods had been completed about 12 o'clock at night, and Hafner wished the purchase money placed in the hands of a trustee, to be paid to the creditors. Coleman refused to consent to this, and went to Lawson's house, and notified him that the sale to Hafner had fallen through, and offered to sell the goods to him, according to the inventory made to Hafner, with a discount of 15 per cent. from the cost price, the same terms offered to Hafner. This sale to Lawson was consummated the next day. The amount paid for the goods was shown to be fair and reasonable. Some of the debts discharged out of the money paid by Lawson had not matured, but were owed by Cole-

man to *bona fide* creditors. The date of the consummation of the sale to Lawson was March 21, 1885. Complainants, Carter Bros. & Co., and other creditors, filed this their bill for the purpose of setting aside the said sale from Coleman to Lawson on the ground of fraud, alleging that the said sale was made with the intent to hinder, delay, or defraud the creditors of Coleman, which intent was known to Lawson, and in which he participated; and on this allegation of fraud the complainants prayed that the goods or their proceeds be subjected to the payment of debts due the complainants, as creditors of the said Coleman. The complainants also contended that Lawson had no valid claim against Coleman, because the notes he held against him had been discounted by Lawson at a higher rate of interest than 8 per cent., and, he being an individual banker, this violated section 4435 of the Code of 1886, and hence made the transaction between him and Coleman void and non-existing. The chancellor dismissed the bill on final decree, and from this decree the complainants appealed, and assigned the same as error.

*P. A. Tutwiler and Watts & Son*, for appellants. *E. W. De Graffenried*, for appellees.

STONE, C. J., (*after stating the facts as above.*) The law condemns motives and intents only when they are carried into an act which is itself illegal. If the end accomplished be lawful, it is immaterial what may have prompted it, provided the intent itself indict no personal or pecuniary wrong, and does not aggravate the result. Hence it is that the prosecution and conviction of a guilty person, no matter how malicious or selfish the motive, furnishes no ground for a malicious prosecution. Hence it is that the attempt to commit the highest crime—for instance, murder by poisoning, made by administering an ingredient that is perfectly harmless,—is not a crime which human laws can punish. It is settled by numerous rulings of this court that an insolvent or failing debtor, owing more than he has means to pay, may select and prefer a part of his creditors, pay them in full, exhaust his resources, and thus leave himself without means to pay anything to his other creditors. And if in so doing he part with his property absolutely, at a reasonably fair price, reserve to himself no benefit growing out of the transaction, and there be no secret trust in his favor, or by which he is benefited, the transaction will be upheld. *Crawford v. Kirksey*, 55 Ala. 282; *Hodges v. Coleman*, 76 Ala. 103; *Carter v. Coleman*, 82 Ala. 177, 2 South. Rep. 354. Can it, in such case, make any difference if the debtor intend to deprive his non-preferred creditors of all means for the collection of their claims? All men are presumed to intend the necessary or natural consequences of their conduct. The maxim extends further. If injury results, which, at the doing of the act complained of, was likely to follow in the ordinary course of events, the actor is responsible either civilly or criminally, as the injury inflicted may be a tort or a crime. Can an appreciable distinction be drawn between a conclusion of fact, which the law conclusively draws from incontestable premises and direct proof of the same facts? Fraud without injury gives no right of action; and, as we have said, there is no room for fraud in such transaction as we have been considering. It is urged against the *bona fides* of this contract that there was undue haste in its inception and consummation; that the inventory was completed about midnight; that at 1 o'clock A. M. the offer to sell was made by Coleman to Lawson; that Lawson had no inventory of the goods made, but acted on an inventory taken with reference to a sale to another; and that the trade was closed about 8 or 9 o'clock A. M. This was certainly a hasty consummation of a trade of such magnitude, and, if the sale had been an ordinary one for money, it would be difficult to resist the conclusion that Coleman's intention was fraudulent, and that Lawson was chargeable with notice of such intention. A sale in payment of debts stands on principles entirely different. So long as the law allows a failing debtor to prefer

some of his creditors at the expense of others, it permits, if it does not invite, a race of diligence. The points of inquiry in such transaction are the *bona fides* and sufficiency of the consideration, and the question of benefit, open or secret, reserved or secured to the paying debtor. If the contract be unassailable at these points of attack, it is impregnable. *Crawford v. Kirksey, supra*; *Carter v. Coleman*, 82 Ala. 177, 2 South. Rep. 354. It is contended for appellant that Lawson, being an individual banker, had no valid claim against Coleman of which he could claim payment. The particular ground urged is based on section 4435 of the Code of 1876, which prohibits an individual banker from discounting "any note, bill of exchange, or draft at a higher rate of interest than 8 per cent. per annum," and declares a violation of its provisions to be a misdemeanor. We need not determine whether this statute in its phraseology embraced the case we have in hand. As it was then framed it was unconstitutional. *Smith v. Railroad Co.*, 75 Ala. 449; *Railroad Co. v. Morris*, 65 Ala. 193. The statute has been since changed, (Code 1886, § 4140;) with what effect we need not inquire. The present case is not in any respect distinguishable from *Rankin v. Vandiver*, 78 Ala. 562, and the decree of the chancellor is free from error. Affirmed.

(84 Ala. 215)

## FORNEY v. CALHOUN COUNTY.

(Supreme Court of Alabama. May 4, 1888.)

## 1. DEDICATION—ESTOPPEL—IN PAIS.

Defendant, by parol declarations, dedicated his undivided interest in certain land to public use as a site for a court-house. Complainant accepted the dedication, and on faith thereof proceeded, with defendant's knowledge and acquiescence, to erect a court-house on the premises. Held, that defendant was estopped to deny the validity of the dedication by reason of its resting in parol, and that tenancy in common with complainant did not relieve him from the duty of objecting to the improvements in progress.<sup>1</sup>

## 2. SAME—ON CONDITION—WAIVER.

Defendant dedicated his interest in certain land to public use as a site for a court-house, on condition that the building should be erected in the center of the block. Complainant erected the building on the east side thereof, with knowledge of and without objection from defendant. Held, that defendant's silence was a waiver of the condition.

## 3. INJUNCTION—DISSOLUTION—DEFECTIVE AFFIDAVITS.

A defect in an affidavit to a bill for injunction is no reason for dissolving the injunction on motion, unless complainant fails, when required by the court, to supply a sufficient verification.

Appeal from chancery court, Calhoun county; S. K. McSPADDEN, Judge.

Bill in equity against John H. Forney to enjoin an action of ejectment. Demurrer and motion to dissolve the injunction overruled. Decree for complainant. Defendant appealed.

*Kelly & Smith*, for appellant. *Brothers, Willett & Willett*, for appellees.

SOMERVILLE, J. A dedication of land may be defined to be an act by which the owner of the fee appropriates to some public use an easement in the land. This may be done by writing, or it may be done verbally, without any writing. It may be express, or it may be implied. It may be by a single act, or by a series of acts properly indicative of the owner's intention. The act of dedication, especially if verbal and single, must be clear and unequivocal and satisfactorily proved. The most frequent mode of proving the intention to

<sup>1</sup> Respecting the subject of estoppel by conduct, see *Johnson v. Insurance Co.*, (Ky.) 2 S. W. Rep. 154, and note; *City of Chicago v. Cameron*, (Ill.) 11 N. E. Rep. 899; *Kelley v. Fisk*, (Ind.) Id. 453; *Conkey v. Hawthorne*, (Wis.) 33 N. W. Rep. 435; *Hubbard v. Hart*, (Iowa.) Id. 283; *Reid v. Ladue*, (Mich.) 32 N. W. Rep. 916; *Crans' Appeal*, (Pa.) 9 Atl. Rep. 382; *Perry v. Dow*, (Vt.) Id. 12; *Wise v. Williams*, (Cal.) 14 Pac. Rep. 204; *Reichert v. Voss*, (Ga.) 2 S. E. Rep. 558; *Insurance Co. v. Slee*, (Ill.) 12 N. E. Rep. 543; *Synum v. Preston*, (Tex.) 6 S. W. Rep. 498.

dedicate is by the declarations of the owner. A single clear and unequivocal declaration may be sufficient for this purpose. But a presumption of dedication will not follow from mere user, without more, for any period short of 20 years. To be effective and valid, a dedication must be accepted; and such acceptance may be shown either by some positive conduct of the proper public officers evincing their consent in behalf of the public, or may be inferred from official acts of implied recognition on their part, or by long public use, or from the beneficial nature of the dedication. When once accepted, an easement becomes vested in the public, which is irrevocable, although the dedication, as originally made, was voluntary, in the sense of being made without any valuable consideration. These conclusions are familiar principles of law, fully supported by the authorities. *Steel v. Sullivan*, 70 Ala. 589, and cases there cited; *Boone*, Real Prop. § 139, and cases cited in notes; *Tied*, Real Prop. § 611; *Buchanan v. Curtis*, 8 Amer. Rep. 23; *City of Cincinnati v. White*, 6 Pet. 431; *Smith v. Inge*, 80 Ala. 284; *Railroad Co. v. Jones*, 68 Ala. 48. The public uses to which property may be dedicated are various. It may be for a street, avenue, or other public highway; for a public square, or public commons; for pleasure grounds or for a grave-yard; for water-works or a wharf; for a market-house or for a court-house, as in the present case; or other uses of a public nature. *City of Morrison v. Hinkson*, 87 Ill. 587, 29 Amer. Rep. 77; *Mankato v. Willard*, 13 Minn. 18, (Gil. 1:); *McKinney v. Griggs*, 5 Bush, 401, 96 Amer. Dec. 360, note, 367; *Trustees v. Cowen*, 4 Paige, 510; *Hunter v. Sandy Hill*, 6 Hill, 407; *Child v. Chappell*, 9 N. Y. 246; *Abbott v. Mills*, 3 Vt. 521, 23 Amer. Dec. 222. And it may be said, in general terms, that "all sorts of easements and rights to the enjoyment of land, whether of use or of pleasure, which may be acquired by an individual by grant or prescription, may also be acquired by the public by actual dedication." *Boone*, Real Prop. § 139. The doctrine of equitable estoppel applies with peculiar force to cases of this kind. Where the owner of land intentionally, or by culpable negligence, leads the public to believe that he has dedicated it to a public use, he will, upon every principle of fair and conscientious dealing, be estopped from denying the fact of such dedication to the prejudice of those whom he has thus misled. The fee, or legal title of the land, may remain vested in the owner; but the principle of estoppel will operate to preclude his claim of any exclusive right of possession, such as would interfere with the easement created in the public by his act of dedication. As said by DENIO, J., in *Child v. Chappell*, 9 N. Y. 256, such dedication "operates in the nature of an estoppel, upon the principle that to retract the promise implied by such conduct, and upon which the purchaser [of an adjacent lot] acted, would disappoint his just expectations." And a court of chancery will intervene to protect the public in the enjoyment of this easement against any interference of the owner of the legal title, bringing to their assistance the prompt aid of its injunctive relief. *City of Cincinnati v. White*, 6 Pet. 442; *Boyce v. Kalbaugh*, 47 Md. 334, 28 Amer. Rep. 464; *Hobbs v. Lowell*, 19 Pick. 405, 31 Amer. Dec. 145; 1 Greenl. Ev. § 207; *Boone*, Real Prop. §§ 139, 253; *Beatty v. Kurtz*, 2 Pet. 566.

The bill alleges, with sufficient clearness, conduct and declarations on the part of the defendant, Forney, which operated as a dedication of his undivided interest in the land in controversy to the public use, as a site for the court-house of Calhoun county. The fact is averred that this dedication was accepted by the court of county commissioners; and that, acting upon the faith of it, they had proceeded, with the knowledge and acquiescence of the defendant, to construct a court-house upon the premises at a cost to the county of some \$14,000. Under this state of facts, the defendant was estopped to contradict the validity of such dedication, or its binding force upon him, by reason of its resting in parol, instead of grant by deed.

Apart from the feature of dedication to public uses, which, as we have

said, may be affected by parol declarations, or otherwise by conduct *in pais*, the bill would, in my opinion, probably have equity on another ground as a bill for specific performance. It alleges, in this aspect, a parol promise to make a gift of lands to the county, upon the faith of which the commissioners took actual possession, and were induced to make valuable improvements. Would it not be a fraud on the donee in such a case to permit him to be ejected on the strength of the donor's legal title, in view of a promise by him to make a conveyance? There are well-considered decisions which hold that the statute of frauds has no bearing on a case of this kind, by reason of the fraud of the donor operating to create an equitable estoppel. We prefer to put our decision, however, upon the ground first stated, contenting ourselves by referring to the authorities bearing on the last point. *Forward v. Armistead*, 12 Ala. 124, 46 Amer. Dec. 246; *Hardesty v. Richardson*, 44 Md. 617, 22 Amer. Rep. 57; *Freeman v. Freeman*, 43 N. Y. 84, 3 Amer. Rep. 657; *Lobdell v. Lobdell*, 38 How. Pr. 347; *Crosbie v. McDoual*, 13 Ves. 148. These two aspects of the case do not, in our opinion, render the bill multifarious; each entitling the complainant to the same kind of relief, differing only in the mode and degree. The relief severally asked in the two aspects of the case is not repugnant. In each the action of ejectment is perpetually enjoined, so as to protect the possession of the complainant. In the one, it is true, the defendant is decreed to hold the legal title in trust for the complainant and the public; and in the other, he is decreed to convey it to the complainant, to be held in trust for the use contemplated by the dedication; but each of these phases is incident to the general relief prayed, which is to create an equitable estoppel on the defendant, whereby he is precluded from asserting his legal title to the prejudice of the complainant.

The court refused to dissolve the injunction on the denials of the answer, which are equivocal and evasive in their nature. The defendant's conduct is significant, in peremptorily declining to answer the interrogatories to the bill which seek to sift his conscience as to his alleged silence when standing by and witnessing the construction of the court-house building upon the land, which he admits in his answer he had consented to dedicate to such uses upon a condition which was of a nature easily to be waived by such silence. It must be presumed that his answers, if unequivocally made, would have been conclusive against him as to this matter of estoppel so clearly charged in the bill. We repeat that the answer admits, in effect, an agreement to dedicate the land upon the condition that a court-house building was located in the center of the lots or block, but it is alleged that this condition was not observed inasmuch as the building was constructed on the east side, and not the center of the land. It is not denied, however, and must therefore be taken as admitted, that the defendant was fully cognizant of the fact that this variation as to the locality of the structure was being made, and, with every opportunity to object, he was silent, and said nothing; and, by reason of his culpable silence, he permitted the complainant to be misled into making large and valuable improvements upon the premises. This was a waiver of the alleged condition as to the particular spot on the land designated for the location of the building. It was therefore a consent to the act of its location on the east side of the lots.

There is no force, under the facts of this case, in the suggestion that the defendant, Forney, was a tenant in common with the complainant in the lands in controversy, and was relieved, on this account, of the duty of objecting to the improvements in process of erection. He could not fail to know that a costly building of this nature was not intended, by prudent officials, to be constructed on ground belonging to a private individual, and that the court of county commissioners manifestly were acting with reference to his acts and promises bearing on the question of a dedication. The other denials of the answer are denials of legal conclusions, and not of facts stated in

the bill, and can avail nothing. *Railway Co. v. Witherow*, 82 Ala. 190, 8 South. Rep. 23.

Conceding the affidavit to the bill to be defective, this was no reason for dissolving the injunction on motion, unless the complainant failed, when required by the court, to perfect this defect by a sufficient verification of the bill. *Jacoby v. Goetter*, 74 Ala. 427.

The demurrer to the bill was properly overruled, as also the motion to dissolve the injunction, and the decree of the chancellor is affirmed.

(84 Ala. 379)

UNION NAT. BANK v. HARTWELL *et al.*

(*Supreme Court of Alabama. May 1, 1888.*)

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE IN ANOTHER JURISDICTION—POWER TO CONTRACT IN REFERENCE TO—CONFLICT OF LAWS.

The right of a married woman to authorize her husband to pledge, as security for his own debt, stocks issued by a foreign corporation, and belonging to the wife, the contract by which such authority was given being made in the state where the husband and wife were domiciled, should be determined by the laws of that state, and not by the laws of the state governing the corporation.

2. SAME—WIFE'S SEPARATE ESTATE—POWER TO CHARGE.

Under Louisiana statutes, providing that a married woman may contract debts, may mortgage and give securities affecting her separate estate, provided the judge of the district or parish, upon examination, shall sanction it, which he can only do when satisfied that the debt is for the wife's sole benefit, and not for that of the husband or the community, a married woman cannot grant to her husband the right to pledge as security for his own debt stocks belonging to her.

3. CONTRACT—CONSIDERATION—PRECEDENT VOID CONTRACT.

Where an act or obligation is void because prohibited by law, a ratification is not binding unless supported by some new consideration, other than the original act or obligation.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge.

The bill was filed by the appellant, the Union National Bank, of New Orleans, La., against Julia Hartwell, a resident of the city of New Orleans, the Mobile Mutual Insurance Company, of Mobile, the Citizens' Mutual Insurance Company, and the assignee of the said last-named insurance company. The purpose of the bill was to have certain pledges of stock foreclosed, which were described as 50 shares of the capital stock of the Mobile Insurance Company and certain other shares of the capital stock of the Citizens' Mutual Insurance Company. These corporations have their principal place of business in Mobile, and were chartered under the laws of the state of Alabama. The pledges, or shares of stock, were the property of Julia Hartwell, by gift or sale from her husband, William Hartwell, now deceased, and which sale or gift was made to her after their removal from Alabama to Louisiana, according to the testimony, although the bill alleged that it was made prior to their removal. The pledge was made to the complainant by the husband, William Hartwell, under a power of attorney signed by his wife, and to secure to the complainant the husband's debt for money borrowed by him from complainant. The transactions connected with the borrowing and pledging took place in New Orleans. The stock, after being pledged, had not been transferred on the books of the companies. The prayer of the bill was that the pledges of the stock be foreclosed; that the stock be sold for the payment of the debt to the complainant; that the insurance companies be required to make proper entries and transfers on their books; and for general relief. On the hearing the cause was submitted on pleadings and proof, and the chancellor dismissed the bill, and this decree of the chancellor is here assigned as error.

*Hannis Taylor*, for appellant. *G. B. Clarke* and *F. B. Clarke*, for respondents.

CLOPTON, J. The validity of the pledge of the stock in controversy depends on the capacity of Mrs. Hartwell, while a married woman, to give her

husband a power of attorney to pledge the same under the circumstances of this case. The first question for decision is, what law—whether the law of Alabama, in which state the stock has a *situs*, or the law of Louisiana, where was the domicile of her husband, and where the contract was made—fixes and determines her rights to the stock, and governs her capacity to give the power of attorney. The evidence shows that it was not transferred to her by her husband until after they had removed from Alabama, and had acquired a domicile in Louisiana, disproving the allegation of the bill in respect to the time of the transfer. The power of attorney was executed, and the pledge was made and completed by the delivery of the certificates in the latter state. The statutes of this state declare stock in an incorporated company to be personal property, except so far as it is otherwise controlled by the local regulations. Wherefore it is only necessary to state the general rules applicable, and which govern the capacity of a married woman to make contracts in respect to her separate personal property, when it is situated in a country other than that of the domicile of her husband. The general rule is that in such case the law of the domicile of the husband governs, unless the property, from its peculiar nature, necessarily has an implied locality, or unless the contract is made in the country where the property is situate. If a married woman has capacity, by the law of the domicile, to make contracts, her contracts so made will be valid in every other country; and if by the law of the domicile she is deprived of such capacity, her incapacity exists in relation to all her contracts, when made at the place of the domicile, though in reference to property in another country. Story, Conf. Law, §§ 66, 66a. It is insisted that stock in an incorporated company necessarily has an implied locality, and is an exception to the general rule, and that no valid transfer of such property can be made, except in the manner prescribed by the *lex rei sitæ*. The statutes of this state make such stock transferrable on the books of the company, and any transfer not so made is void as to creditors and purchasers without notice. Code 1886, §§ 2041, 2044. It is not intended to prohibit or render invalid as between the parties, all other modes of transfer, but to protect innocent creditors and purchasers against secret transfers, by providing a mode which operates as notice to them. To this end, and for this purpose, the transfer must conform to the mode prescribed. While a transfer in such manner is essential to pass the legal title, and to operate as notice, a purchaser of stock, though a transfer is not made on the books of the company, may acquire such right thereto as a court of equity will enforce, and compel a transfer, if necessary, according to the local law. Parties having capacity, may make valid contracts in reference to such property, though having its *situs* in a different country, and though the mode of transfer requisite to protection against the claims of creditors and purchasers is not observed. The mode of transfer and the capacity to contract in respect to such stocks are distinct and independent matters. *Burr v. Sherwood*, 3 Bradf. Surr. 85. But in this case it is unnecessary to decide whether the law of the domicile or the *lex loci contractus* governs the transaction. In either event it is governed by the law of Louisiana, which is both the place of the domicile and the place of the contract. And even if the contention of the complainant were well founded, it would not avail, as the transfer was not made in conformity with the statutes of this state.

As the capacity of Mrs. Hartwell to give her husband a power of attorney to pledge her stock is governed by the law of Louisiana, the next question is whether such capacity is conferred, or such pledge is prohibited, by the laws of that state. As relating to the transaction, several articles of the Revised Statutes, 1870, were introduced in evidence, in respect to which we shall be governed by the construction placed on them by the supreme court of the state. Under these articles a married woman may, by and with the authorization of her husband, and with the sanction of the judge, borrow money, or

contract debts for her separate benefit and advantage, and to secure the same grant mortgages or other security affecting her separate estate, paraphernal or dotal. In executing the power, the wife, in order to bind herself or her property, must, according to the amount involved, be examined at chambers by the judge of the district or parish, separate and apart from her husband, touching the object for which the money is to be borrowed or debt contracted; and if he shall ascertain that either the one or the other is for the husband's debt, or for his separate benefit or advantage, or for the benefit of his separate estate, or of the community, the judge shall not give his sanction authorizing the wife to perform the acts or to incur the liabilities; and, whether separated in property or not separated, the wife cannot bind herself for her husband, nor conjointly with him for debts contracted by him before or during the marriage. Arts. 126, 127, 2398. These articles have been construed as prohibiting the wife from making a contract by which she binds herself, or her separate property, for the debts of her husband, and as casting the burden on creditors seeking to subject the property to show that the debt contracted incurred to her use. *Taylor v. Carile*, 2 La. Ann. 579; *Erwin v. McCalop*, 5 La. Ann. 178; *Mouster v. Zunts*, 14 La. Ann. 15; *Hall v. Wyche*, 31 La. Ann. 784. The evidence clearly shows that the debt for which the stock was pledged was the debt of the husband of Mrs. Hartwell, and it is manifest from the foregoing authorities that by the laws of Louisiana the wife cannot constitute her husband her attorney, and empower him to dispose of her separate property, or to bind it for his own benefit, or for the benefit of his separate estate. The pledge of the stock was unauthorized, and is void. It is further insisted that Mrs. Hartwell ratified the pledge after the death of her husband by giving the complainant an order to receive the dividends. Ratification is in the nature of an agreement, which must be supported by an adequate consideration. A previous express promise, which creates a moral obligation, and which could have been enforced by action, but for some positive rule of law, or have been made available in a defense, may constitute a sufficient consideration; but when the original act or contract is void because prohibited by law it cannot be regarded as a sufficient consideration to support a ratification. In such case there must be some new consideration, which is wanting in this case. *Vance v. Wells*, 6 Ala. 737; 1 Pars. Cont. 465; *Doss v. Peterson*, 82 Ala. 253, 2 South. Rep. 644. Affirmed.

(34 Ala. 186)

O'BRIEN v. TATUM.

(Supreme Court of Alabama. May 4, 1883.)

1. NEGLIGENCE—DANGEROUS PREMISES—ELEVATORS.

Plaintiff, being conducted through defendant's store by a clerk, when near an exposed elevator opening, misunderstood a warning from defendant's porter to the clerk, "Look out, Mr. H., the elevator is up;" and, stepping aside to avoid the porter's truck, as he supposed he was directed, fell through the opening, and was injured. The opening was protected except upon one side, where there was a passageway for the use of defendant's employees, which was seldom used by customers. Held, that whether the manner of constructing the opening, and the fact of leaving it exposed, constituted negligence *per se*, was a question for the jury; and that an instruction that if, from the evidence, the jury find defendant not negligent in leaving the opening exposed, or that, defendant being negligent, the plaintiff either knew of the existence of the elevator, or, being ignorant thereof, was seasonably warned of the danger, and did not use ordinary care, they must find for the defendant, was proper.

2. SAME—EVIDENCE.

In an action for personal injuries caused by falling into an elevator opening in defendant's store, it is competent for defendant to prove that he had been ordered by the city authorities to close his cellar-door on the sidewalk, as tending to show the necessity of an elevator in the store, and as bearing on the issue of negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

It is error to charge the jury that if, under all the circumstances of the case and the actions of the parties, they cannot say that defendant's negligence, "without a

want of ordinary care upon the part of the plaintiff," directly contributed to the injuries sustained, they must find for the defendant; the burden of proof of plaintiff's contributory negligence being upon the defendant.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Action for personal injuries by R. E. O'Brien against Berry Tatum. Judgment for defendant, and plaintiff appeals.

*Rice & Wiley*, for appellant. *Troy, Tompkins & London*, for appellee.

CLOPTON, J. The action is brought by appellant to recover for injuries sustained from having fallen into an opening in the floor of defendant's store, which was used for operating an elevator. In the first two counts of the complaint the negligence of the defendant is charged to consist in having caused the opening to be made, and leaving it exposed and unprotected, so as not to guard and secure the public against injury; and the third count avers, in addition to this act of negligence, that the defendant, knowing the existence of the opening, and that it was dangerous, failed to notify the plaintiff, who was ignorant of the same. The general rules of law governing the duty and liability of defendant, and the correlative duty of the plaintiff, are so well settled that a general statement, without elaboration or citation of authorities, and an application of them to the tendencies of the evidence, will suffice for the purposes of this case. Being the owner and proprietor of a public store on one of the streets of the city of Montgomery, to which the public generally are invited to come and trade, or on other business, the law imposes upon the defendant the obligation to use proper care and diligence to keep the premises, and the pass-ways thereto and therein, reasonably safe for persons visiting the place by his invitation, express or implied. This duty extends to all the passage-ways in the store which visitors on business may ordinarily have to use in its transaction, or may use by the invitation or permission of defendant; and if there be any defect in such places, which renders them dangerous, known to the defendant, and unknown to such visitors, it is the duty of the defendant to give them warning or notice thereof, in order to enable them, with ordinary care, to avoid the danger. The principle is clearly and succinctly stated by GRAY, J., as follows: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for any injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has suffered negligently to exist, and has given them no notice of." *Carleton v. Steel Co.*, 99 Mass. 216.

The elevator was on the south side of the store, about midway between the front and rear. The opening was about five feet square, three sides of which were protected from approach by boxes and barrels, but the side next to the southern wall was unprotected. At the south-east corner there were ropes extending about 18 inches beyond the opening, with which persons passing in the direction plaintiff was going would come in contact if walking too near the opening. The pass-way was between the opening and the south wall, and was principally intended for the use of the employees of the defendant, but was sometimes used by customers, but not often, as the business was mainly carried on in the front part of the store. The elevator was constructed and used for the purpose of transporting goods to and from the basement and the upper and first floors of the store. The opening was covered and protected by the platform of the elevator when not in use. Under the circumstances, the law does not declare the manner of construction, and the leaving of one side exposed, to be negligence *per se*. It was a question for the decision of the jury, and was properly submitted to them by the court. But if it should be found that the defendant negligently suffered one side of the opening to be and remain unprotected, such negligence did not relieve the plaintiff from the use

of ordinary care in going from the front to the rear of the store; and, if his injury proximately resulted from his failure to do so, the defendant is not liable for damages therefor. There is evidence tending to show that the plaintiff knew that the elevator was used in the store, and that he was fully acquainted with elevators and their purposes, and used one in his own business. If, with such knowledge, he attempted to pass by the opening without sufficient light to discover the danger, the presumption of contributory negligence arises, which it is incumbent on him to rebut by showing that he used ordinary care; and, though the plaintiff may have been ignorant of either the elevator or opening, if he was notified of danger in time to avoid injury by the use of ordinary care, the defendant is not guilty of any neglect of duty to the plaintiff for which he is liable in damages. The evidence tends to show that the clerk of defendant, who was going with plaintiff to the rear of the store, directed the plaintiff to follow him. When the clerk had passed the south-east corner of the opening, and before plaintiff, who was immediately behind him, had reached it, the porter of defendant, who was loading a truck with meat near to and on the south-west of the opening, called to the clerk, "Look out, Mr. Haywood, the elevator is up," or words to that effect; whereupon the clerk stopped, and spoke some words to the porter, but the plaintiff stepped to the right, and fell in the opening. The plaintiff testifies that he heard the porter say, "Look out," but thought it a warning to get out of the way of the truck, which was headed towards the front of the store. The plaintiff did not act from a sudden impulse of fear, but from a misunderstanding of the warning. An ordinarily prudent man would have stopped, in order to ascertain the cause, when the clerk stopped, who was in advance, and whom he had been directed to follow. The notice was sufficient to caution him of the proximity of danger, and upon it he should have acted according to its fair and reasonable import. If, from the evidence, the jury should find that the defendant was not negligent in leaving one side of the opening exposed; or, if negligent in this regard, that the plaintiff had knowledge of the existence of the elevator; or, if ignorant of its existence, that he was notified of the danger in time to avoid the injury, and did not use ordinary care,—in either event, he is not entitled to recover. The charges of the court, based, respectively, on these hypotheses, are free from error. The charges requested by the plaintiff are not in accord with these views, ignore the defense of contributory negligence, were calculated to mislead, and were properly refused.

We discover no error in the rulings of the court on the admissibility of evidence. It was competent for the defendant to prove that he had been ordered by the city authorities to close his cellar-door on the sidewalk, as tending to show the necessity of an elevator in the store, and as bearing on the issue of negligence *vel non*. The other evidence objected to was elicited on cross-examination, and was relevant to the question of the actual damages which the plaintiff testified he had suffered from the injury.

But the court instructed the jury: "If, under all the circumstances of the case, the position of the parties, the location of the hole, and the manner in which the parties acted, the jury are unable to say that the injury was caused by a want of ordinary care on the part of the defendant, without a want of ordinary care on the part of the plaintiff directly contributing thereto, they must find for the defendant." By the settled rule in this state the burden of proving contributing negligence is on the defendant. The effect of the charge is to instruct the jury that the *onus* is on the plaintiff to prove that the injury was caused without a want of ordinary care on his part, and thus misplaces the burden of proof. For this error the judgment must be reversed. Reversed and remanded.

(40 La. Ann. 480)

## STATE v. WIMBERLY.

*(Supreme Court of Louisiana. May 7, 1888.)*

## 1. PERJURY—WHAT CONSTITUTES—JURISDICTION OF COURT.

To constitute perjury it is essential that the false swearing should have been committed with respect to some matter over which the court had jurisdiction.<sup>1</sup>

## 2. SAME—ON PROSECUTION FOR BURGLARY BEFORE A JUSTICE—SUBORNATION OF PERJURY.

So, when the alleged false oath was taken before a justice of the peace, and the oath administered by him in an examination by or before such justice in a prosecution for burglary, such false swearing could not be perjury, because for such a crime, and others punishable with death or imprisonment at hard labor, a justice of the peace in the country parishes is without jurisdiction to conduct such examination. This proceeding is exclusively committed by law to the district judge, and he cannot delegate his authority to a justice of the peace. Where the false swearing is not perjury, a charge of subornation of perjury cannot be based upon it.

*(Syllabus by the Court.)*

Appeal from district court, parish of Bienville.

Prosecution by the state of Louisiana against John Wimberly for subornation of perjury. The state appeals from a ruling sustaining a motion in arrest of judgment.

*M. J. Cunningham*, Atty. Gen., for appellant. *Patterson & Dorman*, for appellee.

TODD, J. The defendant, Wimberly, charged by information with subornation of perjury, was tried and convicted. He presented a motion in arrest of judgment which was sustained, and the state, through the district attorney, appeals. The material facts relating to this prosecution are these: Wimberly, the defendant, and one Mag Hatchet, were arrested on a charge of burglary, and taken before one SAM BARKSDALE, a justice of the peace of said parish. The justice proceeded to take and to reduce to writing the testimony of witnesses appearing before him in relation to the commission of the crime charged. Among the witnesses so appearing and testifying was one John Henderson, who is charged to have given testimony on a material point in favor of Wimberly, and in doing so to have committed willful perjury by the inducement and procurement of Wimberly; and that Wimberly was thereby guilty of subornation of perjury, which is the charge contained in the information before us, and on which he was tried and convicted, as above stated. The motion in arrest, under which sentence was arrested, as above stated, was substantially on the ground that the justice of the peace who administered the oath to the witness Henderson, (charged to have sworn falsely,) and before whom the investigation was had touching the charge of burglary preferred, was without jurisdiction over the subject-matter of the inquiry before him, and consequently without legal authority or capacity to administer the oath, and that no prosecution for perjury or subornation of perjury could be grounded on an oath thus administered by incompetent authority, and touching a matter over which the court, or the judge or justice therein presiding, had no jurisdiction *ratione materiae*. Article 126 of the state constitution provides: "They [justices of the peace] shall have criminal jurisdiction as committing

<sup>1</sup>An indictment for perjury cannot be sustained unless the court or officer had authority to administer the oath. *State v. McCone*, (Vt.) 7 Atl. Rep. 406, and note; *People v. Greenwell*, (Utah,) 18 Pac. Rep. 89, and note; *Davidson v. State*, (Tex.) 8 S. W. Rep. 663; *State v. Jenkins*, (S. C.) 1 S. E. Rep. 487. As to what constitutes perjury, see, also, *Partain v. State*, (Tex.) 2 S. W. Rep. 854, and note; *U. S. v. Robinson*, (Dak.) 28 N. W. Rep. 90; *Beecher v. Anderson*, (Mich.) 8 N. W. Rep. 539; *Mackin v. People*, (Ill.) 3 N. E. Rep. 222; *Byrnes v. Byrnes*, (N. Y.) 5 N. E. Rep. 776; *U. S. v. Evans*, 19 Fed. Rep. 912; *Ralph v. U. S.*, 9 Fed. Rep. 698; *U. S. v. Bartow*, 10 Fed. Rep. 873; *U. S. v. Neale*, 14 Fed. Rep. 767; *State v. Morse*, (Mo.) 2 S. W. Rep. 137; *Washington v. State*, (Tex.) 8 S. W. Rep. 238; *People v. Greenwell*, (Utah,) 18 Pac. Rep. 89; *State v. Lawson*, (N. C.) 4 S. E. Rep. 124; *Gandy v. State*, (Neb.) 86 N. W. Rep. 617; *Anderson v. State*, (Tex.) 7 S. W. Rep. 40.

magistrates, and shall have power to bail or discharge in cases not capital or necessarily punishable at hard labor." Section 1010, Rev. St., makes it the duty of a justice of the peace, when an accusation is made on the oath of a credible witness, to cause the accused to be arrested. When arrested, if the offense charged be one that may subject the accused to capital punishment or imprisonment at hard labor, he must "be brought before the district judge of the parish in which the offense may be charged to have been committed, and be proceeded on and examined according to law." If not so punishable, then it is the duty of the justice "to examine on oath the witnesses, and reduce their depositions to writing." Section 2058, Rev. St., contains similar provisions. It is plainly inferable from these constitutional and statutory provisions that the power of a justice of the peace to hold and conduct preliminary examinations in criminal prosecutions is limited to cases where the offense charged is not capital, and not punishable with imprisonment at hard labor. Proceedings before such officers which relate to such crime or crimes so punishable, and testimony taken and oaths administered, must be viewed as *coram non iudice*, and consequently without legal effect or significance.

It is, however, urged by counsel for the state that this examination before the justice, in the prosecution for burglary referred to, was authorized by act No. 45 of 1886. This act is entitled "An act to re-enact sections 1065, 2063, and 3951 of the Revised Statutes, to provide for the appointment of a property clerk," etc. Section 1065, Rev. St., provides, in substance, that when a party charged with an offense is brought before a justice of the peace, that this officer shall take the depositions of material witnesses on the part of the state, and also take the recognizances or bonds of the witnesses for their appearances before the district court. If the section could be construed as relating to or warranting preliminary examinations before justices of the peace, it must be construed in connection with the article of the constitution, and the sections of Revised Statutes cited above, limiting their authority, in such proceedings, to cases not capital and not punishable by hard labor. Section 2063, Rev. St., is but a repetition of section 1015, with the further provision, requiring the justice to deliver to the clerk of the court any stolen property or weapons taken from parties accused, or forged bills or notes, etc., produced on their trial. Section 3951 is but a reproduction, *ipsisimis verbis*, of section 2063, Rev. St. Act 45 of 1886 is merely a re-enactment of the three sections above enumerated, and a consolidation of their several provisions into one act, with no enlargement whatever of the powers of justices or committing magistrates over those expressed in the said sections. In other words, the act gives no sanction whatever to the counsel's contention, that by its terms the restrictions imposed by the statutes first above cited on the jurisdiction or power of justices of the peace touching preliminary examination had been removed, and that such officers now had authority to extend such examinations to all and the gravest offenses.

Finally, it is contended that the examination or proceeding before the justice of the peace in which this perjury and subornation of perjury were alleged to have been committed, was conducted by the order or direction of the district judge, and was thus legalized. It is hardly necessary to say that, if the law did not vest the justice of the peace with power to conduct such preliminary examinations, the judge could confer no such warrant. Besides, the law imposed this duty, as relates to the investigation and prosecution of felonies or the graver offenses, on the judge himself exclusively; and authority to perform such duty was denied or withheld from inferior judicial officers, such as justices of the peace in the country parishes. This shows that the order or direction of the judge in this instance was not only without authority, but in contravention of law. Holding these views, we think the trial judge was right in arresting the judgment in the prosecution under review, and the judgment appealed from is therefore affirmed.

(40 La. Ann. 373)

JOHNSON *et al.* v. BOICE *et al.*FRELLSEN v. WITKOWSKI *et al.*

(Supreme Court of Louisiana. March 26, 1893.)

1. **WITNESS—COMPETENCY—HUSBAND AND WIFE.**  
A husband cannot testify in a case in which his wife has an interest involved.<sup>1</sup>
2. **JUDGMENT—ASSIGNMENT—LIABILITY OF ASSIGNOR.**  
The transferor of a judgment, who sells all his rights to it, and to all suits growing out of it, warrants the existence of the debt at the time.
3. **SAME.**  
If the judgment has been previously extinguished, and was not in existence as a claim, at the date of the sale, the vendor is bound to restore the price to the purchaser.
4. **SAME—RIGHTS OF DEBTOR.**  
The transfer of a judgment does not bind the judgment debtor, unless it has been notified to him, or it is clearly shown that he had knowledge of it.
5. **SAME—WHAT CONSTITUTES NOTICE.**  
The mere filing or placing the transfer among the papers of the suit, and the recording of it in the books of the parish recorder, are not equivalent to the notice required by law, which must bring home to the debtor knowledge of the fact.
6. **SAME—PAYMENT BEFORE NOTICE OF ASSIGNMENT.**  
A debtor who settles with his creditor previous to notification or knowledge of the transfer is discharged from the debt.

(Syllabus by the Court.)

Appeal from district court, parish of East Carroll; E. J. DELONEY, Judge. In the first of these consolidated cases (*Chas. F. Johnson & Co., Mrs. A. V. Witkowski, Subrogee, vs. Boice & Frellsen*) the subrogee seeks to obtain the revival of a certain judgment; and in the second case Joseph W. Frellsen sues out an injunction to restrain the sale of the property seized under said judgment. This appeal is prosecuted from an adverse judgment.

*W. G. Wylie*, for appellants. *J. M. Kennedy* and *C. J. & S. J. Boatner*, for appellees.

**BERMUDEZ, C. J.** The object of the first suit is to revive a judgment, and that of the second is to suspend the execution of that judgment meanwhile. The ground of resistance by the defendant is that the judgment has been extinguished. From a judgment refusing to revive and perpetuate the injunction, this appeal is taken. It appears that the judgment sought to be revived, was rendered on notes in favor of C. F. Johnson & Co. It is claimed that subsequently it was transferred by that firm in liquidation, by one of its members, to Mrs. Witkowski, who, it is alleged, was the owner of the notes. Since the institution of the present proceedings and joining of issue Mrs. Witkowski has transferred all her rights in and to the judgment to one Herman Witzcinski, who, by order of court, was substituted to her, and permitted to proceed in the prosecution and defense of the two suits. Frellsen, one of the defendants in the original suit, who is the plaintiff in injunction proceedings, contends that the alleged transfer of the judgment by Johnson & Co. to Mrs. Witkowski is null for various reasons, and that, even were it valid, it is barren of effect, because it was not notified to him. He therefore concludes that the settlement which, in ignorance of that transfer, he avers to have since made with Johnson & Co., has discharged him from the debt.

On the trial, the ostensible plaintiff by substitution, Witzcinski, offered as a witness Simon Witkowski. Objection was made, on the ground of his being the husband of Mrs. Witkowski, the first transferee, who had an interest at stake in the suit. The objection was answered by saying that, as Mrs. Witkowski had ceased to have any interest involved, in consequence of her

<sup>1</sup>As to how far the rule disabling the husband and wife from being witnesses for or against each other, has been changed by statute, see *U. S. v. Jones*, 23 Fed. Rep. 500, and note.

transfer of her rights in the suit, the opposition was groundless. The district judge sustained the objection, and refused to allow the witness to be heard. There was no error in the ruling. Mrs. Witkowski appears to have sold, by authentic act, to Herman Witzcinski, all her rights in and to the judgment, and to the two cases, for the reviving of the same, and for an injunction, above mentioned, and all other suits growing therefrom, etc. Upon production of this act, an order was obtained, as already said, to substitute Witzcinski to Mrs. Witkowski, after issue had been joined, in the two cases. The sale of those rights by Mrs. Witkowski, though the same be unexpressed in the act, implied a warranty of the existence of the debt, evidenced by the judgment, although it did not include, as a matter of course, that of the solvency of the debtor, for this has to be specially stipulated. Rev. Civil Code, arts. 2646, 2647. It therefore follows that, as she was a warrantor of the existence of the judgment debt sold to Witzcinski, she had an interest at issue, which existence was denied in the suit to revive. It is manifest that, if the ground urged by Frelsen is well-taken, viz., that the judgment debt had been extinguished, Mrs. Witkowski, as warrantor of that claim, would be liable for reimbursement of her evicted vendee. Rev. Civil Code, art. 2500 *et seq.*; *Toler v. Swayze*, 2 La. Ann. 880; *Corcoran v. Riddell*, 7 La. Ann. 268; *Rutherford v. Hennen*, 18 La. Ann. 336. This would be the case even if she had known or strongly suspected the insolvency of the debtor at the time of the assignment; for then the law provides that the contract would be rescinded, and the assignor compelled to restore the price. Rev. Civil Code, art. 2649. As Mrs. Witkowski had an interest involved in the litigation, consisting in the recognition and maintenance of the debt, the existence of which she had warranted, it is clear that the husband could not be permitted to testify either for or against her. Rev. Civil Code, art. 2281. The record contains another bill to testimony affecting the genuineness of Mrs. Witkowski's signature to the transfer to her, but the view which we have taken respecting that instrument renders it useless to pass upon that bill.

The next question to be considered is whether the judgment sought to be revived, and the execution of which is enjoined, was or not extinguished previous to notice or knowledge of the transfer to her. Frelsen strenuously charges the nullity of the transfer which was apparently made, of the judgment and the original plaintiffs, to Mrs. Witkowski, and urges in support several grounds, which it is needless to consider. Admitting that the transfer was truly and legally made, it does not follow that from that fact the settlement which Frelsen claims to have made with these plaintiffs, previous to knowledge, has not discharged him. The transfer, in order to invalidate that settlement, ought to have been notified, by the original plaintiffs, or at least by the subrogee, to the judgment debtor. The law on the subject formally declares that if, previous to the notice having been given of the transfer, either by the transferrer or the transferee, the debtor should have made payment to the former, he will be discharged from the debt. Rev. Civil Code, art. 2644. In answer to this defense, Mrs. Witkowski retorts that Frelsen had notice of her title to the judgment at the time of the alleged settlement by him with Johnson & Co., (March 9, 1878,) because the act of subrogation to the judgment was and had been on file, and in the papers of the suit, and also been duly recorded. She alleged no other notice. Conceding this to be true, it does not follow that the filing and recording are in law equivalent to the notice required by the Code, which must consist in something more. The law does not require any particular form of notice, but it demands that notice be given. The object of the notice is as well for the protection of the transferee as for that of the debtor, in order to prevent an improper payment; thus securing the rights of the transferee to payment, and those of the debtor against loss, and to a legal discharge, in case of payment or settlement. It matters not in what manner knowledge of the transfer is brought home to

the debtor, provided it be clearly shown that he knew that his former creditor was divested of his right, and that such knowledge was properly conveyed. The notice or knowledge was indispensable. *Tremoulet v. Cenau*, 6 La. (N. S.) 286; *Gillett v. Landis*, 17 La. 471; *Bach v. Twogood*, 18 La. 414; *Succession of Delassize*, 8 Rob. (La.) 259; *Flint v. Franklin*, 9 Rob. (La.) 207; *Bank v. Morton*, 12 Rob. (La.) 409; *Plympton v. Preston*, 4 La. Ann. 356; *Lewis v. Labauve*, 13 La. Ann. 384; *Martin v. His Creditors*, 14 La. Ann. 394; *Dockham v. New Orleans*, 26 La. Ann. 302. It has consequently been held that the record of an assignment in the office of a parish judge is not notice sufficient to bind third persons, (*Dupau v. Richardson*, 5 La. N. S. 181,) and that knowledge, in the judgment debtor's attorney of record of the assignment of the judgment, is not sufficient notice. *Adams v. Henning*, 9 La. Ann. 225. The transfer in question to Mrs. Witkowski purports to have been made on December 27, 1876. It is not claimed or shown that it was in any manner notified to Frellsen, or that he had any knowledge of it, previous to the institution of the suit to revive. The consequence of the omission is, therefore, under the very terms of the law, that if Frellsen has made any settlement with Johnson & Co., who had obtained against his firm, his partner, and himself *in solido* the judgment in question, before he had any knowledge of the transfer to Mrs. Witkowski, he has satisfied his debt, and that, neither Mrs. Witkowski nor her transferee can obtain a revival of the judgment.

Now, the evidence is clear that on March 9, 1878, Frellsen made a settlement with Chas. F. Johnson & Co., by which, in consideration of the amount acknowledged to have been paid, he was discharged by them of all claims against him, whether included or not in the account on which the receipt and discharge was signed by P. Prudhomme, the partner who represented, with authority, the partnership in liquidation in the transaction. The objection that Frellsen cannot claim a discharge under article 2644, Rev. Civil Code, because such is obtainable only on payment, and not at all on compromise, has no force. A creditor, if he choose, can extinguish part of his claim by remission, and accept payment of the debt, as reduced, in full of what it previously was. A full payment discharges, as well as a payment in full, by consent of parties. Rev. Civil Code, art. 2130. These views relieve us from passing upon the title of Mrs. Witkowski to the notes on which the judgment was obtained, and on the question of her obligation to account for the property originally seized when the suit was brought, and which was released on a bond signed by her as surety.

We therefore conclude that, as the judgment sought to be revived and executed was satisfied and extinguished previous to notice and knowledge of the transfer to Mrs. Witkowski, the finding of the lower court must be maintained. Judgment affirmed.

Rehearing refused May 9, 1888.

(40 La. Ann. 567)

CAMBON v. LAFENE.

(Supreme Court of Louisiana. May 7, 1888.)

**TAXATION—ADVANCEMENT OF REDEMPTION MONEY—SUBROGATION TO OWNER'S RIGHTS.**

Where property has been sold for taxes, and the tax-payer redeems it within the time allowed therefor, the one who lends him the money to enable him to redeem it does not thereby become invested with title to the property, although the act acknowledging the loan contains an express subrogation of the lender to his (the tax-payer's) rights. The title is in the purchaser at the tax sale, and he alone could pass it to another; and, when it was redeemed, the title reverted to the original owner, and could be made liable for his debts.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

Controversy between Henry Cambon and Jules Lapene, involving certain immovable property. Third opposition of Mrs. Virginia Callier, who alone appeals from an adverse judgment.

*Henry L. Lazarus and Chas. Louque*, for appellant. *Gibson & Hall*, for appellee.

TODD, J. The plaintiff, under a judgment in his favor against the defendant, seized a plantation situated in the parish of Terrebonne, and described in the pleadings as his property, to satisfy the debt. Mrs. Virginia Callier, widow, claimed, as third opponent, to be owner of the property seized, and enjoined its sale under the writ of execution. The plaintiff, in answer to the petition of third opponent, pleaded the general issue. The case was tried, the opposition dismissed, and the injunction dissolved, with \$75 damages for attorney's fees, and Mrs. Callier has appealed. On the 14th of April, 1885, this plantation was sold at tax sale as the property of the defendant, Lapene, and was bought by one John Buger. On the 18th of April, 1886, the property was redeemed by Lapene, as evidenced by a notarial act of that date passed before a notary public in the parish of Terrebonne. On the same day, Mrs. Callier and Jules Lapene appeared before the same notary, and entered into an act substantially as follows: After reciting the sale of the property for taxes, and its purchase at such sale by Buger, and that Lapene, the tax-payer and owner, had a right to redeem the property within a year after the tax sale, it was declared that Lapene was unable to make said redemption, or was without the means to do so, and that, in order to raise the money to redeem the land, he had borrowed of Mrs. Callier \$543.80, and the receipt of Lapene for this sum was made part of the act; and it was further declared that Lapene intended (quoting) "to subrogate the lender in the rights of the creditors;" and further, again (quoting:) "It is understood and agreed that said Jules Lapene, or any of his creditors, \* \* \* shall have the right, within one year from this date, (18th April, 1886,) to redeem said property on paying one thousand dollars." John Buger, the purchaser at the tax sale, was no party to this instrument. It is exclusively on this act that the asserted title of Mrs. Callier to the property rests. Beyond the fact that it evidenced the loan of the money by Mrs. Callier to Lapene, and fixed the liability of the latter for the sum loaned, it seems to us that the act was without any legal effect or significance whatever. It certainly did not convey to Mrs. Callier any title to the land, either from Buger or from Lapene, and we cannot discover that it subrogated her to any right to or against the property in question. Thus concluding, the judgment of the lower court is affirmed, with costs.

(40 La. Ann. 321)

#### OLIVER v. BOARD OF LIQUIDATION.

(*Supreme Court of Louisiana. March 26, 1888.*)

##### 1. STATES AND STATE OFFICERS—STATE BOARDS—PROCEEDINGS TO COMPEL PERFORMANCE OF DUTY—RULE.

It is irregular to proceed by rule to compel a legal organization to perform a duty, however clearly imposed upon it.

##### 2. SAME—MANDAMUS.

The objection that such proceeding is unauthorized, and ought to be by *mandamus*, is well founded, and cannot be disregarded.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge. Action by William Oliver against the board of liquidation, to compel the latter to fund warrants held by plaintiff, aggregating about \$2,692. From a judgment favorable to plaintiff, the defendant appeals.

*M. J. Cunningham*, Atty. Gen., for appellant. *W. S. Benedict*, for appellee.

BERMUDEZ, C. J. This is an appeal from a judgment commanding the board to fund certain state warrants, under act No. 8 of 1874 and other acts. The board of liquidation charges that judgment was rendered on an irregular proceeding by an incompetent court; that the judgment which recognizes the validity of the warrants, and which serves as a foundation for the demand to fund, is an absolute nullity, because rendered without citation duly served, and on an answer filed by and contradictorily with the clerk of the then attorney general; because the board never had legal knowledge of the suit; because, had it been properly notified, it would have set up defenses destructive, at least in part, of plaintiff's pretensions, etc. That judgment, rendered in November, 1884, by the civil district court for the parish of Orleans, was affirmed by this court in May, 1885. 87 La. Ann. 412. It may be that this judgment is a nullity; but that issue cannot be here passed upon, as the question of form of the proceeding to enforce it must be first decided, and the conclusion is in favor of the defendant board. The judgment brought up for review is rendered on a proceeding, the object of which is to have the warrants funded by the board as though the original judgment had directed the performance of that operation by that organization. It is unnecessary to determine whether that judgment or the law made it the duty of the board to fund the warrants. Conceding that either did, the question arises, on the objection of the board, whether this purpose can be accomplished otherwise than by *mandamus*. The proceeding is by rule. The authorities are numerous that, in order to compel a legal organization to perform a duty, even if clearly imposed upon it, the proceeding ought to be by *mandamus*. No doubt, the question of form may be waived, and the obligation to perform may be determined, on a more summary proceeding, by rule; but, where objection is made to the form, it cannot be disregarded.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that the rule to fund be dismissed, with costs in both courts.

(84 Ala. 356)

ASKEW *et al.* v. SANDERS.

(Supreme Court of Alabama. May 5, 1888.)

1. MORTGAGES—REDEMPTION—LACHES.

A bill to redeem, filed 9 years and 10 months after a sale under foreclosure, and seeking to avoid the sale on the sole ground that the mortgagee purchased at his own sale, comes too late in the absence of satisfactory explanation of the delay.

2. SAME—SALE UNDER POWER—AFTER PAYMENT—VACATION—LIMITATION.

A sale under foreclosure, after payment of the debt, such payment not operating to reinvest the legal title in the mortgagor prior to act Ala. Nov. 28, 1884, where the mortgagee became the purchaser, may be vacated at any time within 10 years as to such mortgagee, and all holding under him with notice.

3. SAME—PRACTICE.

On a bill to redeem on the ground that the sale under foreclosure, where the mortgagee became the purchaser, had been made after full payment of the debt, a decree setting aside the sale before preliminary ascertainment of payment is premature.

Appeal from chancery court, Marengo county; THOMAS COBBS, Chancellor.

Bill in equity to set aside sale of land under a mortgage, and for account and redemption, by Joseph H. Sanders against Samuel H. Askew and W. H. Askew. Judgment for plaintiff, and defendants appeal.

R. H. Clarke and Taylor & Johnston, for appellants. Brooks & Bush, for appellee.

CLOPTON, J. By the bill as amended, complainant's case is presented in two aspects: one in which complainant seeks to be let in to redeem, on the ground that the surviving mortgagee purchased at his own sale; and the other in which he seeks to have the sale vacated on the allegations that the essential prerequisites to the power of sale were not complied with; that the debt se-

cured by the mortgage had been paid; and nothing was due at the time of the sale. On the former appeal the equity of the bill in the first aspect was considered, when it was said: "If the mortgage sale under the power was in all things regular, save the one pointed out, it must be declared that it has become valid and binding by the lapse of time." The irregularity pointed out was that the mortgagee was the purchaser. The evidence satisfactorily shows that notice of time, place, and terms of sale was given by posting the same in two or more public places, as required by the mortgage. This being true, the original bill, which was filed 9 years and 10 months after the sale, no satisfactory explanation of the delay being shown, comes too late as a bill to redeem, and to avoid the sale on the mere ground that the mortgagee purchased at his own sale. *Sanders v. Askeo*, 79 Ala. 433.

A different rule of limitation applies if the debt, secured by the mortgage under which the land was sold, had been fully paid before the sale. The payment of a mortgage on real estate did not operate to reinvest the legal title in the mortgagor prior to the passage of the act of November 28, 1884, which constitutes section 1870 of the Code of 1886. The doctrine which prevailed in this state was that after the payment of the debt secured by such mortgage the legal title remained in the mortgagee, without an equitable interest, which he held in trust for the mortgagor, who was entitled to a reconveyance. The power of sale is regarded as a part of the security, which the mortgagee can exercise only for the purpose of paying the debt. The payment of the debt terminates the relation of the parties as mere mortgagor and mortgagee, and removes the incumbrance of the mortgage as such, and the contingency for the exercise of the power cannot thereafter arise. Payment extinguishes the power, and the mortgage becomes the same as if no such power had been included in it. If the mortgagee sells the property after the debt has been satisfied, he thereby offends the equitable rights of the mortgagor, which a court of equity will intervene to protect, by its injunctive power if invoked before the sale, or by vacating it if already made. The mortgagor, not having the legal title, had no adequate remedy at law. It may be that if he fails to institute proceedings to enjoin the sale, he would be afterwards estopped from asserting payment to defeat the title of a *bona fide* purchaser without notice. But when the mortgagee himself is the purchaser, the court will vacate the sale as against him and all claiming under him with notice of the state of the accounts between the mortgagor and mortgagee. *Cameron v. Irwin*, 5 Hill, 272; *Redmond v. Pakenham*, 66 Ill. 484. The limitation which bars the right to relief in such case is the same within which an action for the recovery of lands may be brought,—10 years,—which limitation was not complete when the bill was filed. As requisite notice of the sale was given, and as complainant is not entitled to avoid the sale on the ground that the mortgagee was the purchaser, but is entitled to relief only on satisfactory proof of the averments of the bill that the debt secured by the mortgage had been paid, and nothing was due at the time the power was exercised, a decree setting aside and vacating the sale without the preliminary ascertainment of payment, is premature. The chancellor decreed that the mortgage sale be set aside and vacated; that the purchaser be declared a mortgagee in possession; and ordered a reference to the register to ascertain and report the state of the accounts between the mortgagor and mortgagees, charging the purchasers with the rents and waste of timber. As we interpret the decree, relief was granted the complainant as on a bill to be let in to redeem. It is evident from the reference to the register, as to the manner in which and the time at which the state of accounts should be ascertained, that the chancellor did not pass on the question of payment, *vel non*. If there was nothing due on the mortgage debt when the power of sale was exercised, the purchaser cannot be regarded as mortgagee in possession, but a party in possession having the naked legal title, which he holds in trust for the mortgagor, and accountable

as such for the rents and profits and waste. In this aspect of the case an inquiry as to the amount due on the second mortgage is immaterial unless the sale under the first mortgage is set aside. In such event the bill may be further entertained as a bill to redeem from the second mortgage, under which no sale has been made, and the court may proceed to settle the entire litigation, and do complete justice between the parties. But if the debt secured by the first mortgage was not paid before the sale, the litigation must terminate upon the ascertainment of that fact. We have examined the evidence with the view of determining whether we could reach a satisfactory conclusion on the decisive question of payment, so as to enable us to render a decree, but find it so indefinite and uncertain that we deem it best to remand the cause that a reference may be made to the register for this distinctive purpose, before whom the evidence may be made more certain and satisfactory.

We have not passed on the question of parties, but, that the litigation may not be further embarrassed or unnecessarily delayed, will simply observe that if no conveyance was made to the purchaser at the mortgage sale the legal title still resides in the surviving mortgagee and the heirs of the deceased mortgagee, M. C. Askew, and they are necessary parties in order that the entire legal title may be before the court. Reversed and remanded.

(24 Ala. 279)

## THOMPSON v. JONES.

(Supreme Court of Alabama. May 11, 1888.)

## 1. SHERIFFS AND CONSTABLES—WRONGFUL SEIZURE—DETINUE—PRACTICE.

In detinue against a sheriff, who had simultaneously levied separate attachments, sued out by M. and L., upon goods assigned for the benefit of creditors, defendant alleged fraud in the assignment, in reply to which plaintiff attempted to introduce evidence of proceedings to show acceptance of the assignment on the part of M., which would preclude him from alleging fraud, but L. was not shown to have taken part in the proceedings. Held not admissible; defendant having full power, under L.'s attachment, if fraud was shown, to seize the goods, and detain enough to pay L.'s demand, and the question whether it would be illegal to seize and detain more than enough cannot be raised in detinue.

## 2. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to testimony as a whole, much of it being proper, should be overruled.

Appeal from circuit court, Hall county; JOHN MOORE, Judge.

Definue, by R. L. Thompson against Cadwallader Jones. Judgment for defendant, and plaintiff appeals.

*Bush, Taylor & Johnston*, for appellant. *Coleman & Coleman* and *George W. Craig*, for appellee.

STONE, C. J. Taylor & Turk, merchants, made a deed of assignment to Thompson, assignee, for the benefit of all their creditors. The assignment embraced a small stock of merchandise. Twenty days after the assignment was made, Moore & Kennedy and L. & E. Lamar sued out separate writs of attachment against Taylor & Turk, placed them in the hands of Jones, the sheriff, who levied them simultaneously on the stock of merchandise. The goods yielded a surplus over the sum required to pay the claim of L. & E. Lamar, but not enough to pay the two claims. Thompson instituted this action of detinue against the sheriff for the recovery of the goods, and the defense relied on was that the assignment by Taylor & Turk was made with intent to delay, hinder, and defraud their creditors. In reply to the charge of fraud in the execution of the assignment, plaintiff, Thompson, offered to prove that, after Moore & Kennedy knew of its execution, they, as creditors, made application by petition to the register of the chancery court for an order requiring him (Thompson) to give bond for the faithful administration of the trust. Code 1886, §§ 35, 49, *et seq.* This application was made nine days

before the attachment was sued out. He offered to prove, further, that the register took jurisdiction of the petition, appointed a day for its hearing, gave notice to Thompson, and actually granted the order requiring him to give bond with sureties. The order was made after the issue and levy of the attachment. It was not attempted to be shown that L. & E. Lamar took any part in this proceeding. The testimony, on motion of defendant, was ruled out. It is contended for appellant that this testimony would have proved or tended to prove that Moore & Kennedy ratified the assignment by electing to take under it, and that they thereby precluded themselves from assailing it as fraudulent. If theirs was the only attachment or claim under which the sheriff detained the goods, it is probable their position would be well taken. It is not permissible to take both under and against an assignment made for the benefit of creditors. *Baileer v. O'Brien*, 5 Ala. 316; *McReynolds v. Jones*, 30 Ala. 101; *Hatchett v. Blanton*, 72 Ala. 423. The testimony, however, would not have tended in the slightest degree to preclude L. & E. Lamar from assailing the assignment as fraudulent; and, if fraudulent, the sheriff had ample authority, under their attachment, for seizing the goods, and detaining enough to pay their demand. If it be contended that, Moore & Kennedy's attachment being out of the way, the sheriff could rightfully take and detain only enough goods to meet the Lamar attachment, and that any excess would be a wrongful withholding by the sheriff, the answer is that that question cannot be raised in an action of detinue, as this is. It could, at most, furnish ground for an action on the case for the abuse of lawful process by the sheriff in making an excessive levy. *Dezell v. Odell*, 3 Hill, 215, 38 Amer. Dec. 628; *Seavey v. Adkison*, 40 Cal. 408; *Handy v. Clippert*, 50 Mich. 355, 15 N. W. Rep. 507; *Murfree*, Sher. § 527. The testimony offered could have exerted no influence in the maintenance of the present action, and the circuit court did not err in refusing to admit it.

The objection to the testimony of the witness Moore was to it as a whole. Much of it was legal evidence, and the objection was rightly overruled. 3 Brick. Dig. 443, § 570. There is nothing in the other questions raised. Affirmed.

(84 Ala. 309)

STOUTZ v. ROUSE.

(Supreme Court of Alabama. May 3, 1888.)

1. MORTGAGES—CONVEYANCE TO MORTGAGEE IN LIEU OF FORECLOSURE—AGREEMENT TO REDEEM.

A mortgagor, after default, to save the expense of foreclosure, conveyed the mortgaged land by a warranty deed to the mortgagee for the amount of the debt, and gave him possession. It was further provided in writing that the mortgagor "might redeem said property within two years from the date of the deed in like manner, and upon the same terms and conditions, as if the said land had been sold under a decree of the chancery court to satisfy the mortgage." Held, that the transaction constitutes a valid and *bona fide* contract, by which the mortgagor, for a valuable consideration, reduced his equity of redemption to a statutory right of redemption, and that he cannot redeem the land after the expiration of the two years.

2. SAME—REDEMPTION—GROUND OF EQUITABLE RELIEF.

In a bill in equity to redeem land which had been conveyed to the mortgagee by a warranty deed, to avoid foreclosure of a mortgage thereon, brought after the expiration of the time to redeem reserved to the grantor by special agreement when the conveyance was made, an averment that the land was worth much more than the consideration for which it was conveyed, unsupported by an averment that the land would probably have brought more at a foreclosure sale than the price obtained for it, is no ground for equitable relief.

3. SAME—CONVEYANCE OF LAND IN SATISFACTION OF MORTGAGE—BILL TO REDEEM—GROUNDS OF EQUITABLE RELIEF.

The fact that a mortgagor who conveyed land by warranty deed in satisfaction of the mortgage due thereon, and reduced his equity of redemption to the statutory right of redemption, was in bad health at the time of the transaction, does not show undue influence to have been used or unconscionable advantage taken by the mortgagee, and affords no ground for equitable relief.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge. Bill in equity to redeem lands, filed by Frederick A. Stoutz against Susan F. Rouse. Complainant executed a mortgage on certain real estate, known as "Hollinger's" or "Montgomery Island," to secure his indebtedness to appellee. This indebtedness, amounting to \$5,940, had become due; and to avoid a foreclosure suit, and a sale of the property under a chancery decree, complainant executed a deed conveying the property to the appellee, for the said sum of \$5,940, and put the appellee in the possession of the said land. It was further provided in writing that complainant "might redeem said property within two years from the date of the deed, in like manner and upon the same terms and conditions as if the said land had been sold under a decree of the chancery court to satisfy the mortgage." Complainant filed his bill to redeem, and appeals from the decree of the chancellor refusing to allow him to redeem.

*Austell & Ervin*, for appellant. *F. G. Bromberg*, for appellee.

SOMERVILLE, J. A court of chancery will set aside any agreement entered into by a mortgagor, contemporaneously with the execution of the mortgage, by which he waives, unduly fetters, or agrees not to exercise his equity of redemption in event of default in the payment of the mortgage debt; and, as observed by Lord Chancellor NORTHINGTON in *Vernon v. Bethell*, 2 Eden, 110: "There is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." The right of redemption is the creature of law, and not of contract. The parties are not, therefore, permitted by special agreement to disannex from the mortgage, at the time of its execution, that which the law has declared shall be annexed to it, to prevent the undue oppression of debtors by creditors. And a like rule has been applied, for similar reasons, to the statutory right of redemption. *Parmer v. Parmer*, 74 Ala. 285. But the reason of this rule, however, does not apply to any fair and *bona fide* purchase of the right of redemption which is entered into subsequently to the execution of the mortgage. Although courts of equity will scan such a purchase with watchfulness, it will still be upheld, unless procured by fraud, actual or constructive, including any unconscientious advantage or undue influence or on a consideration which is grossly inadequate. *Hitchcock v. Bank*, 7 Ala. 386, 443; *McKinstry v. Conly*, 12 Ala. 678. It is sometimes said that a purchase of the equity of redemption will be sustained only when it is based on an adequate consideration. Thomas, *Mortg.* § 678; 2 Jones, *Mortg.* (3d Ed.) § 1045. There is much reason, however, in the rule that, in the absence of fraud, undue influence, or unconscionable advantage, the mortgagor may, at any time after the execution of the mortgage, by a new and separate contract, sell or release his equity of redemption to the mortgagee for a consideration that is not grossly inadequate. This we incline to hold to be the better rule. *Wynkoop v. Cowing*, 21 Ill. 570; *Hicks v. Hicks*, 5 Gill & J. 75; 3 Pom. Eq. Jur. § 1193, note 1; *Russell v. Southard*, 12 How. 139; Adams, Eq. (7th Ed.) \*112, note 1; 4 Kent, *Comm.* \*143; 3 Add. Cont. (Morgan's Ed.) 21; 1 Jones, *Mortg.* (3d Ed.) § 702; *Austin v. Bradley*, 2 Day, 466. But, without deciding whether a mere inadequacy of consideration will alone authorize a court of chancery to set aside an unconditional release of such equity of redemption, we are of opinion that it will not justify the setting aside of the present transaction, by which the mortgagor contracted with the mortgagee, *bona fide*, for a valuable consideration, to reduce his equity of redemption to a statutory right of redemption. The mortgagee certainly had the right to go into a chancery court, and foreclose his mortgage by due process of law. Had he done so, the result would have been to cut off the mortgagor's right of redemption, and convert it into a statutory right of redemption; thus vesting the legal title of the estate abso-

lutely in the mortgagee, subject only to the right of the mortgagor, and certain other parties in privity with him, to redeem the premises on terms specified in the statute, and within two years from the date of the foreclosure. And this would be true if the mortgagee himself bought at the foreclosure sale, or even under a power in the mortgage. *Mewburn v. Bass*, 82 Ala. 622, 2 South, Rep. 520; *Cooper v. Hornsby*, 71 Ala. 62; *Comer v. Sheeham*, 74 Ala. 452; Code 1886, § 1879, *et seq.* Why may not the mortgagor and mortgagee provide by a fair contract, without resort to the courts, for doing precisely what the law would do for them? Shall the law prohibit the parties from contracting *bona fide*, at an agreed price, to do what it will compel by legal process? We think not, unless the relation of the parties is used to acquire some undue influence, by which the creditor unfairly oppresses the debtor, or the sale made is based on a grossly inadequate consideration; for the legal effect of the transaction is that of a sale, with the privilege of repurchase within two years, and not of a mortgage or security for a debt. This is not an unfair sale of the equity of redemption, nor an unreasonable fettering of it within the meaning of the law. It merely converts it by contract into the statutory right of redemption, in order to save the expenses of foreclosure incident to a suit in chancery. The law highly favors the compromise of lawsuits, whether pending or threatened, upon the soundest principles of public policy. That is all that has been done in this case. The transaction clearly extinguished the mortgage debt, which amounted to nearly \$6,000. 2 Washb. Real Prop. (5th Ed.) 204. Admitting the mortgaged lands to be worth as much as \$10,000, as averred in the bill, the complainant shows, in our opinion, no ground for relief. It is not averred that the land would probably have brought more at a foreclosure sale than the price obtained for it. There is no fraud alleged or proved, and the mere fact that the mortgagor was in bad health does not show undue influence or unconscionable advantage taken of him by the mortgagee.

The bill, being filed after the expiration of the two years allowed by contract for redemption, was properly dismissed. Affirmed.

(84 Ala. 83)

**STEINER *et al.* v. RAY *et al.***

(Supreme Court of Alabama. May 4, 1883.)

**1. CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF SALE OF FERTILIZERS.**

The act establishing a department of agriculture, (Code Ala. § 129 *et seq.*) and regulating the sale of commercial fertilizers, and guarding the public against worthless compounds, by affording a cheap and reliable method of detecting fraud, is a legitimate police regulation, and constitutional.

**2. SALE—FERTILIZERS—FAILURE TO ATTACH TAGS.**

One who sells a fertilizer, omitting, at the request of the purchaser, to tag each package sold, as required by Code Ala. § 141, but delivers to such purchaser tags for each package, he promising to attach them, does not violate the statute, and a note given for the purchase price of such fertilizer is valid.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.

Action on a promissory given for the purchase price of a fertilizer, brought by Joseph Steiner & Sons against M. A. Ray and another. Judgment for defendants. Plaintiffs appealed.

*Richardson & Steiner*, for appellants. *J. R. Farnham* and *Stallings & Wilkinson*, for appellees.

STONE, O. J. The consideration of the note sued on in this case was a commercial fertilizer sold by appellants to appellees in April, 1884. The "Act to establish a department of agriculture for the state of Alabama," approved February 23, 1883, (Sess. Acts, 190,) determines the rights of the parties to this suit. Code 1886, § 129 *et seq.* The constitutionality of that statute is assailed on many grounds. As we understand the statute, its controlling pur-

pose was to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers; to fix on sellers a statutory guaranty that fertilizers sold by them contain the chemical ingredients, and in the proportions, represented; and to furnish to buyers cheap and reliable means of proving the deception and fraud, should such be attempted. The accomplishment of these objects will greatly promote the prosperity and success of agricultural industry, and we do not hesitate to declare that they are strictly within the pale of legitimate police regulation. 1 Whart. Crim. Law, §§ 425, 487, 490, and note; Cooley, Const. Lim. (5th Ed.) 722, 723. We think the statute clearly constitutional. The record shows the following state of facts: Plaintiffs, Steiner & Sons, were merchants, and, among other merchandise, sold guano to their customers. The defendants applied to them for the purchase of this fertilizer, and were informed that they had none in store, but expected a car-load during the day. The car arrived about 2 o'clock P. M., and thereupon the written contract declared on was entered into. There is no testimony showing whether or not the guano had been analyzed, and that inquiry does not appear to have been raised in the trial court. The case seems to have gone off mainly on the failure to have tags attached to the packages. The testimony most favorable to the plaintiffs (appellants here) is, in substance, as follows: When the car arrived, it was soon opened for the delivery of its freight; and defendants, being anxious to leave for home, loaded a ton of the guano from the car upon their wagons. This was done without the direction or knowledge of the plaintiffs or their agent. The agent, coming up, and having the requisite tags in his possession, was proceeding to attach them to the packages on the wagon, 10 in number. He had attached them to two or three of the packages, when, at the request of the defendants, and that they might be allowed to leave for home, he gave them the remaining tags, they promising to attach them; and allowed them to depart, carrying with them the fertilizer. As we understand this testimony, if it be believed, the contract of sale was in progress, and did not become completely executed until plaintiffs' agent consented that the defendants might depart with the guano. Till then the plaintiffs had not relinquished their ownership and control over it. We have said that the purpose of the statute was to create and furnish evidence of a guaranty of the chemical ingredients of the fertilizer sold. This the statute requires to be done by attaching tags to the several packages. The agent of the seller was proceeding to do this, when, at the urgent request of the buyers, he delivered the tags to them, and permitted them to depart; they promising to attach them. They failed to do so. We hold that this was a substantial compliance with the statute. The sellers committed no fraud on the department of agriculture, for they purchased and paid for the requisite tags. They committed no fraud on the purchasers, for they furnished to them the proper guaranty, and the means of proving it. If the tags were not attached, the fault was not with the sellers. To allow the purchasers to take advantage of this technical omission of duty would be to reward them for the violation of their promise, which we are not inclined to do. Of course, what we have said is based on the testimony as given by plaintiffs' agent. If the jury failed to find the facts as deposed to by him; then the rules declared above do not apply. This case is distinguishable from *Campbell v. Segars*, 81 Ala. 259, 1 South. Rep. 714. In that case the agricultural department failed to realize its fees for the tags, and the purchasers failed to obtain the statutory guaranty. The purchasers, as further security, might have requested the sellers to draw samples from each package in their presence, but they are not shown to have requested it. The circuit court erred in the charge given. Reversed and remanded.

(84 Ala. 242)

**JACKSON v. JACKSON et al.**

(Supreme Court of Alabama. May 11, 1888.)

**1. INJUNCTION—MOTION TO DISSOLVE—BURDEN OF PROOF.**

A bill filed by an administrator alleged that defendant had received a sum of money from the intestate, claiming it as a gift, and was now proceeding to collect the same in an action at law from one in whose hands it had been placed. The gift was denied, and it was charged that defendant was insolvent. The action at law was enjoined; and, upon the filing of a sworn answer averring that the money was a gift from intestate, denying that the same was taken without authority, and admitting insolvency without the money in question, motion was made to dissolve the injunction. *Held*, that such motion was properly denied; the case not falling within the rule that when a bill avers facts the burden of proving which is on complainant, if the sworn answer made on knowledge contains a denial of the charges on which the right to an injunction rests, the injunction must be dissolved, as the burden was on defendant to establish the gift.

**2. SAME—PLEADING—SUFFICIENCY OF BILL—ADEQUATE REMEDY AT LAW.**

A bill filed by an administrator, alleging that defendant had received a sum of money from the intestate, claiming it as a gift, and was now proceeding to collect the same in an action at law from a firm of which plaintiff is a member, in whose hands it had been placed, denying the gift, charging the insolvency of defendant, and praying an injunction against the action at law, is not demurrable as disclosing an adequate remedy at law; Code Ala. § 2610, providing that a defendant against whom an action is pending for the recovery of money may, at any time before issue joined, make affidavit that a person not a party to the suit, without collusion with him, claims the money in controversy, and thereupon such person may be made a party defendant, not applying to the case because of the double relation of complainant.

**3. INTERPLEADER—WHEN LIES—ACTION TO RECOVER CHATTELS.**

Code Ala. § 2611, providing that a defendant in an action for the recovery of chattels *in specie*, not claiming title, may, at any time before issue joined, make affidavit that one not a party to the suit, without collusion, claims the chattels, and thereupon such party shall be required to come in and defend, etc., does not apply to a suit on a money demand.

Appeal from chancery court, Lauderdale county; THOMAS CORBES, Chancellor.

Bill in equity, in which Felix E. Jackson and another, administrators of Aristides E. Jackson, were complainants, and Elizabeth Jackson, widow of Aristides E. Jackson, was defendant, to enjoin an action at law brought by the said Elizabeth Jackson against Jackson Bros. for money which she had deposited with them, and which she claimed as a gift from her husband. The chancellor refused to dissolve the temporary injunction, and defendant appeals. Code, § 2610, referred to, provides that a defendant against whom an action is pending for the recovery of money may, at any time before issue joined, make affidavit that a person not a party to the suit, without collusion with him, claims the money in controversy, and thereupon such person shall be made a party defendant. Code, § 2611, contains similar provisions in case of a suit for the recovery of specific chattels.

*O'Neal & O'Neal* and *McClellan & McClellan*, for appellants. *Stimpeon & Jones*, for appellees.

STONE, C. J. Aristides E. Jackson died intestate in January, 1887, and in March afterwards the appellees were appointed administrators of his estate. Felix E. Jackson and Andrew Jackson were partners in trade in the firm name of Jackson Bros. Soon after the death of intestate, Mrs. Elizabeth Jackson, his widow, deposited with Jackson Bros. \$880, as of her own money, and took their receipt therefor. Subsequently she demanded the money of them, but they refused to pay it to her, on the ground, as they alleged, that the money was claimed as part of the assets of the estate of the intestate, and was not hers. She thereupon instituted an action at law against them for the recovery of the money she had so deposited with them. Felix E. Jackson, one of the administrators, is the same Felix E. Jackson who is a member of the firm of Jackson Bros. The present bill was filed by the administrators. It asserts

that said money is the property of the estate of Aristides E. Jackson, that Mrs. Jackson claims it under an alleged gift made by her husband to her in his life-time, denies that such gift was made, and prays an injunction against her suit at law. It charges that she is insolvent. A temporary injunction was awarded. The foot-note waives answer under oath. Mrs. Jackson filed a sworn answer. She admitted that, without the \$880, she is insolvent. She denies the averments of the bill that she took the money without authority, and avers that her husband gave it to her in his life-time. She demurred to the bill, mainly on the ground that complainants had an adequate remedy at law, to be particularly noticed further on. A motion was made to dissolve the injunction,—*First*, for the want of equity in the bill; and, *second*, on the denials contained in the answer. The chancellor overruled the motion to dissolve, and from that ruling the present appeal is prosecuted. We will first consider the question of the denials in the answer.

When the bill avers facts the burden of proving which is entirely on complainant, then, if the sworn answer is made on knowledge, and contains an unequivocal denial of the charges on which the right to an injunction rests, the general rule is that the injunction must be dissolved on the denials in the answer. 8 Brick. Dig. 352, § 303. But even this rule is not universal. *Satterfield v. John*, 53 Ala. 127; *Chambers v. Iron Co.*, 67 Ala. 353; *Davis v. Sowell*, 77 Ala. 262. The present case, however, does not fall within the class described above. Under the averments of the bill, the burden of disproving the alleged gift from intestate to his wife does not rest on complainants. On the contrary, stated as the question is in the bill, it was for her to satisfy the court by proof that the gift had been made to her. The answer on this point is in the nature of a confession and avoidance, and will not avail to dissolve an injunction. *Rembert v. Brown*, 17 Ala. 667; *Miller v. Bates*, 35 Ala. 580. The chancellor did not err in refusing to dissolve the injunction on the denials in the answer. The second ground taken in demurrer is that complainants had an adequate remedy at law, and therefore the bill is without equity. The remedy claimed in argument is what is known as our statutory provision for interpleader at common law. Code 1886, § 2610. Possibly, a sufficient answer to this argument is that the enlargement of the jurisdiction of the courts of law, or the recognition or enforcement by them of equitable rights and interests, even when conferred in terms by statute, does not, in the absence of statutory prohibition, take away or impair the original jurisdiction of the chancery court. *Lee v. Lee*, 55 Ala. 590; *Westmoreland v. Foster*, 60 Ala. 448. We hold, however, that the statute invoked is not adapted to such a case as this. The double relation which Felix E. Jackson sustains to the transaction incapacitates him to seek redress under its provisions. It can scarcely be said that F. E. Jackson, administrator, is not a party to a suit against F. E. Jackson; and he surely could not make oath that he, in the one capacity, is not in collusion with himself in the other. Other clauses of the statute might be commented on, but we deem it unnecessary. Section 2611, Code 1886, is not suited to a suit on a moneyed demand. We hold that the bill contains equity, and that the chancellor did right in retaining the injunction until the hearing on the merits. *Farris v. Houston*, 78 Ala. 250. Affirmed.

(34 Ala. 78)

#### UNION WAREHOUSE & ELEVATOR CO. v. MCINTYRE.

(Supreme Court of Alabama. May 12, 1888.)

##### LANDLORD AND TENANT—LIEN FOR RENT—WHAT PROPERTY SUBJECT TO.

A lease describing the premises as about one and a half acres of land, on which was to be erected, by the landlord, a mill and cotton-gin, and letting, in addition, an acre, under the same common fence, with the above, on which the landlord was to erect a dwelling-house, contains this clause: "To have and to hold the aforesaid pieces of land, with the appurtenances thereon, for the purpose of carrying on a ginning or milling business." Held, under Code Ala. § 3060, providing that the

landlord of any store-house, dwelling-house, or other building shall have a lien superior to all other liens on the property of the tenants, for his rent, an attachment for rent, levied on the machinery in the gin and mill, is valid, and a prior lien to a mortgage executed by the tenants on the machinery, after it has been placed on such premises.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Hamilton McIntyre, the landlord, sued an attachment against W. J. and O. E. Robertson, tenants, under the statute giving the remedy, for unpaid rent of certain buildings and land leased to the said tenants. The attachment was levied on a steam-engine, boiler, etc., in said buildings. The said steam-engine, boiler, etc., had been mortgaged to the appellant and claimant, the Union Warehouse & Elevator Company, after their erection in said buildings. After the levy, appellant claimed the property, and executed the claim bond and took possession of it.

*Troy, Tompkins & London*, for appellant. *Rice & Wiley*, contra.

STONE, C. J. The present suit was commenced by attachment for the recovery of rent, under the statute. Sess. Acts 1882-83, p. 175, as amended by act approved February 17, 1885, (Sess. Acts, 131.) The substance of the first section of the act as amended constitutes section 3069 of the Code of 1886, and is as follows: "The landlord of any store-house, dwelling-house, or other building shall have a lien on the goods, furniture, and effects belonging to the tenants, for his rent, which shall be superior to all other liens, except those for taxes." The succeeding sections of the Code, up to and including section 3074, provide a remedy for enforcing this lien, and declare the extent of it. As we understand the questions raised on the trial of the present case, no objection was raised to the nature or *bona fides* of the debt, or to the form of the proceedings resorted to for enforcing its collection. The real and only contention was that the house and premises, for the rent of which the notes were given, do not make a case within the provisions of the statute.

The lease was granted and taken in June, 1883, to continue for five years, at a rent rate to be paid semi-annually. The premises are described as "about one and a half acres of land immediately upon and along the Montgomery Southern Railway." On this lot the landlord was to erect, and did erect, a house of stipulated dimensions, adapted to and suitable for a mill and cotton ginnery. The lease also described and let another acre of ground, about 500 yards distant, on which the landlord was to erect, and did erect, a three-room dwelling. After describing both lots, and the improvements to be placed on them, the lease contains this clause: "To have and to hold the aforesaid pieces of land, with the appurtenances thereon, for the purpose of carrying on a ginning and milling business." The tenants put the mill and gin in operation, furnishing, for the purpose of supplying motive power, an engine, steam-boiler, and other machinery necessary to drive the gin and mill. These were in place and on the premises when they were attached at the suit of the landlord for matured unpaid rent. The bill of exceptions recites that the two lots of land embraced in the lease were "contiguous and under one common fence." Claimant rested its title and claim on a mortgage executed by the tenants to it, after the machinery had been placed and put in use on the rented premises. The machinery so remained in place until the attachment was levied. The trial court decided that the landlord had the superior lien; and that presents the sole question for decision. We have another statute giving to the landlord of agricultural lands a lien on the crops grown on rented premises, and on some other chattels, for rents due, and for advances made by, the landlord. Code 1886, § 3056. We think the proper test for determining which of these statutes is applicable to any given case of tenancy is to inquire whether the store, dwelling or other house, on the one hand, or the land to be cultivated on the other, was the leading inducement for tak

ing the lease. Testing this case by the principle announced, we feel no hesitancy in holding that it is governed by section 3069 of the Code of 1886, and the circuit court did not err in holding that the landlord's lien was superior to that of the claimant. It is possible that cases may arise presenting features of each of these systems. This is not one of them. Affirmed.

(85 Ala. 73)

ROSWALD *et al.* v. HOBBIE *et al.*

(*Supreme Court of Alabama. May 14, 1888.*)

1. ATTACHMENT—REPLEVY BOND—SUBSEQUENT EXECUTION OF CLAIM BOND.

Where an attachment is levied on property of plaintiffs' debtor, in possession of defendants, claiming it under a prior sale, and on the same day defendants execute a replevy bond, and the sheriff returns the property to them, and on the next day defendants make the required affidavit, and execute a claim bond, which the sheriff accepts and approves, such approval of the claim bond annuls the replevy bond.

2. SAME—INTERVENTION—CLAIM UNDER SALE—EVIDENCE.

On the trial of the right to property, where the sheriff in levying an attachment on property in possession of defendants, claiming it under a sale from an insolvent debtor, in consideration of a debt to them, makes an inventory of the "reasonable market value" of such property, such inventory is admissible, as tending to show an absolute purchase of such property by defendants at a price near its market value.

3. SAME—CLAIM UNDER PURCHASE FROM DEBTOR—BURDEN OF PROOF.

On trial of the right to property, where it appeared that plaintiffs attached their debtor's property in the hands of defendants, claiming it under a prior sale, the court properly refused to charge that the burden is on defendants to show that such sale was without benefit to the debtor.

Appeal from circuit court, Autauga county; JAMES W. LAPSLEY, Judge.

Roswald & Stoll levied an attachment on property formerly owned by one Rawlinson, and in the possession of Hobbie & Teague, claiming it under a prior sale. The charge referred to in the opinion as the first charge of the plaintiff was as follows: "(1) The plaintiffs having proved that Rawlinson was indebted to them at the time the attachment was sued out, and the transaction between the claimants and Rawlinson, sought to be established as a sale, being assailed by the plaintiffs in this case, the burden is upon the claimants to show that the transaction was supported by an adequate and valuable consideration, is honest, and without benefit to Rawlinson." The court refused to give this charge, and the plaintiffs appeal.

*Rice & Wiley*, for appellant. *Thorington & Smith*, contra.

STONE, C. J. The present suit was what is known in our jurisprudence as a trial of the right of property. Rawlinson had formerly owned the merchandise which is the subject of the controversy, and the testimony leaves but little, if any, doubt that both appellants and appellees were creditors. Roswald & Stoll sued out an attachment against Rawlinson, which was levied on the merchandise about 10 o'clock A. M., December 20, 1886. The claim of Hobbie & Teague is that, earlier on the same morning, Rawlinson sold and conveyed the goods to them in payment of the debt he owed them, delivered them, and that they were in the possession of their agent when the levy was made. No question appears to have been made on the sufficiency of the consideration. On the same day the attachment was levied, the agent of Hobbie & Teague, in their name, executed a replevy bond, conditioned, if defendant failed in the action, to return the specific property in 30 days. The bond conforms to the provision of the statute. Code 1886, § 2964, (3289.) Thereupon the sheriff restored the property to claimants. On the next day, December 21, 1886, the claimants, Hobbie & Teague, through their agent, made affidavit that they had a just claim to the property levied on, and executed a claim bond in conformity with sections 3004, (3341,) 3012, (3290,) Code 1886. This claim bond and affidavit were, on the day of their date, tendered to the sheriff, and the replevy bond demanded, that it might be canceled. The sheriff declined to

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surrender the replevy bond, but we are not informed what reason he gave, if any. He accepted the claim bond, however, approved it, and returned both bonds and the affidavit of claim to the court. At the return-term, Roswald & Stoll moved the court to strike the claim affidavit and bond from the file, on the ground that they were improperly received after the goods had been replevied, and the goods obtained and held by the claimants themselves under such replevy bond, and to dismiss said claim proceeding out of court. The court overruled the motion, and ruled that Roswald & Stoll should tender an issue, with a view to the trial of the right of property. To this ruling plaintiffs excepted.

In *Braley v. Clark*, 22 Ala. 361, as in this case, property was attached, and a replevy bond was given by a stranger to the record. Judgment was obtained in the attachment suit, execution placed in the hands of the sheriff, and he demanded of the bondsmen a return of the property. The demand not being complied with, he returned the bond forfeited. The principal in the replevy bond thereupon interposed his affidavit and bond, claiming the property as his own. The circuit court allowed the claim, but this court reversed its ruling, on the ground that the claim came too late. The language of this court was that, "to authorize such claim, the property must either be in the actual or constructive possession of the officer of the law under process. In the case under consideration it had been taken out of his possession by the defendant in error, under the replevy bond, and by him retained when demanded by the sheriff. It is true, he might, under the condition of his bond, surrender the slave to the sheriff in discharge of his liability; and, having thus placed it in the custody of the officer, he could, if he were disposed to do so, interpose his claim, and try the right to it. But, having elected to forfeit the condition of his bond," etc., he lost his right to interpose his claim. It will be observed that in this case no attempt was made to assert the claim until after the replevy bond had been returned forfeited; nor had the sheriff accepted the claim bond until ordered to do so by *mandamus* from the circuit court. *Cooper v. Peck*, 22 Ala. 406, is only part and parcel of substantially the same case as that above considered. The same property, a slave, was attached as the property of the same defendant in each case. In this last case it was shown that the slave had died before the sheriff made demand of his return under the replevy bond, and the offer to institute the claim suit was made at the time the sheriff demanded the return of the slave. The sheriff refused to accept the affidavit and bond offered, and indorsed the replevy bond "Forfeited." An execution was thereupon issued on the forfeited bond, which the sheriff was proceeding to collect. Under a petition filed for the purpose, the circuit court ordered the sheriff to accept the claim affidavit and bond, and quashed the execution issued on the forfeited replevy bond. This court reversed his decision; saying "that the condition of a replevy bond can only be complied with by a delivery of the property replevied to the sheriff, on his demand, after judgment against the defendant in attachment. The tender of the bond to try the right of property replevied, when the property itself is withheld from the sheriff, is a breach of the condition of the bond, and justifies the sheriff in returning it forfeited." In *Rhodes v. Smith*, 66 Ala. 174, speaking of the liability of a bondsman on a replevy bond, and the means of relieving himself, this court said: "If the title resides in him, and the defendant is without an interest therein subject to levy, this will not excuse him from performance of the condition of the bond. The redelivery of the goods, to answer the levy of the writ, is the duty to which the bond obliges him. When he has redelivered them, he may then interpose a claim to them, and demand a trial of the right of property." See, also, *Munter v. Leinkauff*, 78 Ala. 546; *Mead v. Figh*, 4 Ala. 279; *Mitchell v. Ingram*, 38 Ala. 395; *Adler v. Potter*, 57 Ala. 571; *Brown v. Hamill*, 76 Ala. 506; *Woolfolk v. Ingram*, 58 Ala. 11.

Our rulings have certainly settled these propositions: *First*, that when attached property has been replevied, and the liability of the bondsmen has become fixed by a proper demand, and indorsement of the bond "Forfeited," the bondsmen are estopped from denying the liability of the property to the process, and from setting up any adversary claim to it; *second*, when attached property has passed from under the control of the attaching officer on the execution and approval of a replevy bond, so long as the property remains out of his control the bondsmen, at least, can interpose no valid claim to it under the statute; *third*, until the liability of the bondsmen is fixed by a refusal to deliver the property to the officer, the bondsmen may restore the control of the property to him, and may then assert any claim to it which they could have asserted before the execution of the replevy bond. We think the circuit court did not err in overruling the motion to strike the claim proceeding from the file. True, there was no formal surrender of the possession of the goods to the sheriff, but the sheriff is not shown to have made any point on that. He accepted the affidavit of claim, and approved the claim bond offered. This estopped the claimants from denying that they acquired the possession and held it under the claim bond. If the sheriff had been placed in possession of the property, he would have retained it only long enough to approve the bond, when it would have passed instantly back to the claimants. If the possession acquired under the replevy bond had been tendered to the sheriff, and simultaneously a sufficient affidavit of claim and sufficient claim bond had been tendered to him, he would have had no authority to refuse either. Had he done so, on proper application a *mandamus* would have been awarded, compelling him to accept the redelivery of the goods, to receive the affidavit of claim, and to consider the sufficiency of the sureties offered on the claim bond; and, if found sufficient, he would have been compelled to have approved the claim bond, thus annulling the replevy bond, and inaugurating proceedings for a trial of the right of property. Now, what is the difference between the case supposed, and the case we have in hand? Merely the unsubstantial, fruitless ceremony of placing the sheriff, for a moment, in the actual or constructive possession of the goods. The law has regard for the substance, not the empty forms, of things. This case is distinguishable from our former rulings, which merely hold that when the liability of the bondsmen has become fixed by a failure to deliver according to the stipulations of their bond, or until after it had become impossible to restore the property to the sheriff's possession; it then becomes a statutory judgment, and precludes all denial that the property is subject to the attachment or execution under which it was seized.

The present case being a trial of the right of property, if the verdict had been for the plaintiffs, it would have been the duty of the jury to assess the value of the property levied on. *Townsend v. Brooks*, 76 Ala. 808. To do so, the jury must have had testimony as to the value. Plaintiffs proved, by the sheriff, that, when he attached the goods, he made an inventory of them, affixed a value to the several articles which was shown by the inventory, and which, in his opinion, were the "reasonable market values of the said goods, wares, and merchandise." This inventory was offered in evidence by plaintiffs, in connection with and as part of the oral testimony. Claimants objected, "upon the ground that the said claim bond fixed the measure of the value of the goods." The court sustained the objection. It is manifest that the ground stated by the counsel for excluding the evidence was indefensible. The value fixed in the claim bond is the *ex parte* work of the sheriff, and does not conclude either plaintiffs or claimants. It is not evidence on which a jury can act in assessing the value of property condemned to the satisfaction of an execution or attachment. Pending the trial, when the result of the suit cannot be known, evidence of value should be received, if offered by either party. But the ruling in this case, considered in reference to the phase of the ques-

tion we have been considering, did the appellants no harm. They failed to obtain a condemnation of the property, and hence assessed value did not become an element of the verdict. But this question has another phase. Hobbie & Teague made claim under a purchase of the merchandise, the sole consideration being an indebtedness from Rawlinson, the defendant in attachment. This sale, made by a known insolvent debtor, giving a preference to one creditor to the prejudice of others, cast on the preferred creditor the duty and burden of proving that the goods were acquired in absolute purchase, and at a price not materially disproportionate to their fair market value. *Crawford v. Kirksey*, 55 Ala. 282; *Hodges v. Coleman*, 76 Ala. 108. Proof of the value of the merchandise should have been received on this phase of the inquiry. The form in which the testimony was offered, was free from objection. *Hirschfelder v. Levy*, 69 Ala. 351; *Moonney v. Hough*, *ante*, 19.

The first charge asked by plaintiff was rightly refused. The duty was on Hobbie & Teague to prove that their purchase was on a "valuable and adequate consideration," but not to prove the negative, that no benefit was reserved to Rawlinson. The laboring oar on that negative proposition was with Roswald & Stoll. We find but the one error in this record. Reversed and remanded.

(84 Ala. 99)

HENDERSON *et al.* v. VINCENT.

(*Supreme Court of Alabama*. May 16, 1888.)

PRINCIPAL AND AGENT—REAL-ESTATE BROKERS—RIGHT TO COMMISSIONS.

In an action by real-estate brokers to recover a commission for effecting a sale, it appeared that defendant agreed to pay plaintiffs a certain commission for selling his property at a certain price; that H., who subsequently became the purchaser, refused, in the first place, to pay the required price, but afterwards instructed an agent to buy the property and give the full price if he could not get it for less; that the agent bought the property for less of another broker, and that plaintiffs omitted to inform defendant of their belief that H. would pay the full price. *Held*, that plaintiffs did not act in good faith by such omission, and that they were not entitled to recover.<sup>1</sup>

Appeal from circuit court, Mobile county; W. E. CLARKE, Judge.

I. M. Henderson & Co., brought an action to recover commission on effecting a sale of real estate against Benjamin Vincent. Judgment for defendant. Plaintiffs appeal.

*McIntosh & Rich*, for appellants. *G. B. Clarke and F. B. Clarke, Jr.*, for appellee.

CLOPTON, J. The appellants, who are real-estate brokers, bring the suit to recover commissions claimed to be due on a contract of employment to sell a house and lot in the city of Mobile, of which the defendant was the owner. By the express terms of employment the right to commissions is made dependent on selling the property at a fixed price—\$2,500. The plaintiffs having accepted an employment by which their right to commissions was conditioned on effecting a sale at a designated price are not entitled to recover the agreed commissions, except on showing that the stipulated and specified services was performed, unless performance was prevented by the improper and unauthorized interference of the defendant. It is not claimed that the plaintiffs effected a sale. The claim is that they were prevented by a subsequent sale made by defendant, through another broker, at a less sum, to the purchaser procured by their efforts and instrumentality. By the contract of employment no time was specified during which the authority to sell should continue. It was, therefore, subject to revocation at any time before a sale was made,

<sup>1</sup>Respecting the rights of real-estate brokers, and when their commissions are earned, see *Jarvis v. Schafer*, (N. Y.) 11 N. E. Rep. 634; *Robinson v. Kindley*, (Kan.) 12 Pac. Rep. 537; *Ratts v. Shepherd*, (Kan.) 14 Pac. Rep. 496; *Zeimer v. Antisell*, (Cal.) 17 Pac. Rep. 643.

or a purchaser procured who was ready and willing to comply with the authorized terms. *Chambers v. Seay*, 78 Ala. 372. Ordinarily, notice of revocation should have been given to the plaintiffs before the defendant dispensed with their services by disposing of the property to the same person with whom they had been previously negotiating. Under the contract, the plaintiffs were entitled, in the absence of a revocation, to a reasonable time to find a purchaser; but on failure to do so, after reasonable opportunity, the defendant was at liberty to sell the property at less than the fixed price without liability to the plaintiffs for commissions. The defendant could employ other brokers to sell the house and lot, being liable for commissions only to the broker who made the sale, or, he could have sold it himself, without liability to either broker. This rule is subject to the qualification that the broker by whose efforts and instrumentality the particular purchaser is procured is entitled to compensation, though he may not be present when the sale is actually consummated. A broker who is the efficient agent in producing the sale is entitled to commissions. *Sussdorff v. Schmidt*, 55 N. Y. 319; *Satterthwaite v. Vreeland*, 3 Hun, 152; 3 Wait, Act. & Def. 282. These general rules are dependent on the agent's exercise of good faith in dealing with his principal.

The undisputed facts are that Hibart, who became subsequently the purchaser, called at the office of plaintiffs, looking for property, and desirous of purchasing a home in Mobile. The plaintiffs, having seen a notice that the property of defendant was for sale, sought him, who agreed to pay them commissions if they would sell the property at a fixed price. They showed the property to Hibart, who, after examination, offered \$2,250 for it. This offer was submitted to the defendant, and declined. The plaintiffs did nothing thereafter, but did not abandon the expectation of selling the property, believing that defendant would abate his price, or that Hibart would increase his offer and eventually pay the price fixed by the contract of employment. About two weeks afterwards the property was sold by another broker, for a sum less than the price thus fixed, to King, ostensibly, but who really purchased for Hibart, who had authorized his agent to pay \$2,500 if it could not be purchased for a less sum. The defendant was not informed, and did not know, that Hibart was the real purchaser, or that he was willing to pay for the property more than the amount at which he purchased it; and plaintiffs did not communicate to defendant that they had any reason to believe, or did believe, that Hibart would agree to pay the price originally fixed. It may be conceded that the real purchaser was procured by the efforts of the plaintiffs, and if the property had been sold to him for the sum fixed by the contract under which plaintiffs were employed the defendant would have been liable to them for commissions. The defendant cannot be held to have waived the stipulation of the contract as to the price when he had no knowledge, and no reason to believe, that Hibart would pay the stipulated price. *McArthur v. Slauson*, 53 Wis. 41, 9 N. W. Rep. 784. To entitle an agent to compensation he must act in good faith to his principal. "A real-estate broker's commissions are earned whenever he has procured a purchaser or buyer who will comply with the conditions fixed by his principal for the property proposed to be sold. But it is to be understood that this rule depends, not only on the fact that the broker is to be regarded as the agent of the seller, but that, as such agent, he acts with the utmost good faith towards his principal; and if he does not so act, he is entitled to nothing." *Pratt v. Patterson*, 112 Pa. St. 475, 3 Atl. Rep. 858. Good faith required the plaintiffs to inform the defendant that they believed that Hibart would pay the price fixed by the defendant for the property. The intentional concealment of this material fact operated to the injury of defendant, and defeats the right of plaintiffs to commissions. On the undisputed facts the court would have been justified in giving the affirmative charge in favor of the defendant. If errors have intervened in the rulings of the court they are without injury. Affirmed.

(84 Ala. 249)

MITCHELL *et al.* v. HARDIE.

(Supreme Court of Alabama. May 17, 1883.)

## 1. EQUITY—BILL OF REVIEW—WANT OF NOTICE OF APPLICATION TO FILE—WAIVER OF OBJECTION.

Where no notice of application to file a bill of review is given to the adverse party, and such irregularity is not assigned as cause of demurrer, and no motion is made to have the application taken off the file, the adverse party is taken as waiving such irregularity, and cannot make it available on appeal, where, after answering, he allows the case to proceed to final decree without objection.

## 2. SAME—BILL OF REVIEW—TIME OF FILING—CODE ALA. § 3497.

Under Code Ala. 1886, § 3497, providing that "application to file bills of review must be made within three years after the rendition of the decree, except in case of infants, or married women unless the matter of the decree relates to their separate estates, and persons of unsound mind, who may apply within three years after the termination of their respective disabilities," the bill itself need not be filed, but the application therefor must be filed within the time specified.

## 3. SAME—BILL OF REVIEW—TO DECREE SELLING INFANT'S LAND—FRACTION.

On a bill of review it appeared that lands were sold and conveyed, under an erroneous decree, to the complainant's solicitors; that the sale was confirmed by consent of the solicitors of record and the guardian *ad litem* of the infant defendants; that the bill to review was filed by one infant defendant to the former suit, another infant defendant being statute barred. *Held*, that the court erred in annulling the conveyances *in toto*; that the same should be annulled only so far as respect the rights and interest of the infant not statute barred.

## 4. SAME—DECREE—RECITALS.

Where, on a former trial, it appeared that a decree was obtained on a "submission on the pleadings, testimony, and written agreement of the respective parties," and afterwards a decree, made in vacation, recited that, "by agreement of counsel of both complainant and defendant, and guardian *ad litem* of the minor defendants, the following decree is rendered," such recitals repel the presumption that it was made on evidence noted on the first submission, or on any evidence before the court.

Appeal from chancery court, Russell county; JOHN A. FOSTER, Judge.

Bill in equity to reform a former decree. Judgment for complainant. Defendants appeal.

*Brickell, Sample & Gunter*, for appellants. *G. P. Harrison, Jr.*, and *A. Barnes*, for appellee.

CLOPTON, J. Notice of the application to file the bill of review was not given to the adverse parties. It is insisted that without such notice the chancellor had no right to allow the bill to be filed. It may be conceded that the proceeding was irregular, and subjected the bill to a demurrer, or to a motion to be ordered to be taken off the file. The irregularity was not assigned as cause of demurrer, and no motion was made to have the bill taken from the file. The defendants, having answered, and the case having proceeded to a final decree without objection, will be regarded as having waived the irregularity, and cannot make it available on appeal.

Section 3497 of the Code of 1886 provides: "Application to file bills of review must be made within three years after the rendition of the decree, except in case of infants, or married women unless the matter of the decree relates to their separate estates, and persons of unsound mind, who may apply within three years after the termination of their respective disabilities." The statute does not require that the bill of review itself shall be filed, but that application to file it must be made within the statutory period. The application was made to file the bill within three years after the termination of the disability of complainant, and was in time.

Notwithstanding the guardian *ad litem* of an infant defendant may admit the allegations of a bill, or consent to a decree, the complainant is still bound to prove, by independent evidence, every material fact essential to relief; and, if it appears from the decree that it is rendered only on the admissions or by the consent of the guardian *ad litem*, it constitutes error apparent, which will support a bill of review. On the former appeal, we held that if a decree is

rendered, on a bill to sell real estate to pay the debts of a decedent, only by consent of the guardian *ad litem*, or on his admissions of the facts of debts against the estate, and the insufficiency of the personal assets to pay them, this was error apparent, for which the decree should be reversed back to the pleadings, that there may be a further and fuller trial on legal and independent testimony. *Hooper v. Hardie*, 80 Ala. 114. The correctness of the rule is conceded; but it is insisted that, it appearing from the proceedings and decrees in the former suit that the first submission was upon the pleadings, testimony, and written agreement of the respective parties, the subsequent submissions, of necessity, were upon the evidence thus already before the chancellor, and that the presumption must be indulged that the chancellor considered the evidence sufficient to support the decree; and that the rule applies that in such case no inquiry can be made, on a bill of review, whether there is evidence to support the decree, or whether the decree is contrary to the evidence. There would be much force in the position of counsel if the record did not disprove the contention. The first submission was made in term-time, November 19, 1867, when a decree was rendered that the complainant was entitled to the interposition of the court, and a reference to the register ordered to ascertain and report the value of the real estate. The note of testimony shows that on this submission the depositions of several witnesses were put in evidence, and the decree recites that the cause was submitted "on pleadings, testimony, and the written agreement of the solicitors of the respective parties." No other submission appears to have been made in term-time. On November 22, 1867, without any reference being held or report by the register, the guardian *ad litem* and the solicitors of the parties consent and agree that a sale, already drafted, be made in vacation; and on December 2, 1867, the consent decree of sale was made in vacation, which recites: "Now, by agreement of counsel of both complainant and defendants, and guardian *ad litem* of the minor defendants, the following decree is rendered." It is thus shown by the decree itself that it was rendered only on the consent of the guardian *ad litem* and the solicitors of the parties. The recitals of the decree exclude and repel the idea or presumption that it was made on the evidence noted on the first submission, or on any evidence before or considered by the chancellor. The general rule is that a party to an erroneous judgment or decree, purchasing at a judicial sale, acquires only a defeasible title, which falls with its subsequent reversal. *Marks v. Cowles*, 61 Ala. 299; *McDonald v. Insurance Co.*, 65 Ala. 358. The land was sold under the decree of sale made by consent, and purchased by the solicitors of complainant. The sales were confirmed by the consent of the solicitors and the guardian *ad litem*. The solicitors of record of the party obtaining the decree are charged with the knowledge of its erroneous character, and purchased subject to the risk of losing the title by the subsequent reversal of the decree. They are not in a position to claim the protection afforded to *bona fide* purchasers without notice. On a bill of review the court has power to do complete justice, and to put the party complaining in the same condition in which he was at and prior to the rendition of the decree in the former suit. The decree having been carried into execution, the land sold, conveyances executed, and the purchasers put into possession, a simple reversal of the decree would fall far short of doing complete justice. To this end it is essential that the sales made under the decree be vacated, the conveyances annulled, and the purchasers be held to account for the rents and profits. *McCall v. McCurdy*, 69 Ala. 65. The bill of review is filed by only one of the infant defendants to the former suit. The other, being barred by the statute of limitations, is made a party defendant. No relief can therefore be granted to the latter.

The chancellor erred in reversing the decree, and vacating the sales and conveyances *in toto*. The decree should be reversed, and the sales and conveyances vacated only so far as respects the rights and interests of the com-

plainant in the bill of review, and as may be necessary to a further trial of the original suit in reference to his rights; and it should be allowed to remain in force, and sales and conveyances to stand, so far as respects the interest of the infant defendant whose rights are barred. *Bank v. Ritchie*, 8 Pet. 128. For this error the decree is reversed, and the cause remanded.

(84 Ala. 307)

**BOUTWELL v. STEINER.**

(*Supreme Court of Alabama*. May 14, 1883.)

1. **MORTGAGES—FORECLOSURE—NECESSARY PARTIES.**  
A mortgagor of land having sold his equity of redemption is not a necessary party to a suit to foreclose the mortgage.
2. **SAME—SUIT TO DECLARE MORTGAGED PREMISES THE WIFE'S SEPARATE ESTATE—FAILURE TO JOIN MORTGAGEE.**  
Where land mortgaged by the husband is thereafter decreed to the wife, as part of her separate estate, upon a bill against the husband, the mortgagee, not having been made a party, is not prejudiced.
3. **SAME—SALE TO MORTGAGEE—RIGHTS OF PURCHASER OF EQUITY OF REDEMPTION.**  
Where a mortgagee purchased the mortgaged chattels at his own sale, and the mortgagor during nine years failed to interpose objection by offering to pay the debt, the purchaser of the equity of redemption cannot exercise that option for him.
4. **SAME—STIPULATION BY MORTGAGOR TO PAY COSTS—HOW ENFORCED.**  
A mortgagor's stipulation to pay all costs of recording the mortgage and the costs and expenses of enforcing collection of the mortgage debt is a lien on the land for these reasonable expenses.
5. **LIMITATION OF ACTIONS—PURCHASE OF MORTGAGED PREMISES—WHEN STATUTE BEGINS TO RUN.**  
A purchaser of land is charged with notice of a mortgage already duly recorded, and his possession cannot mature into a good title, under the statute of limitations, short of 10 years.

Appeal from chancery court, Butler county; THOMAS W. COLEMAN, Judge. The bill was filed by the appellee, Joseph Steiner, who was the mortgagee, against Burt Boutwell and wife, to foreclose a mortgage on the lands. The mortgage was executed by James F. Hinson, January 9, 1873, and was duly recorded. In June, 1873, Elizabeth Hinson filed her bill against her husband, John F. Hinson, alleging that the land (mortgaged to Steiner) was purchased with her money; and in October, 1873, according to the prayer of the bill, the chancellor decreed that the title to said land be divested out of John F. Hinson, and be vested in her, (Elizabeth.) Steiner was not made a party to this bill. Elizabeth Hinson and her husband took possession, lived on the land, and in January, 1879, they conveyed the property to Burt Boutwell and his wife, F. M. Boutwell. All the other facts are sufficiently stated in the opinion. *Gamble & Richardson*, for appellant. *R. E. Steiner*, for appellee.

SOMERVILLE, J. 1. The mortgagor, Hinson, having immediately sold and conveyed to the appellant, Boutwell, his entire interest in the land, being a mere equity of redemption, he was not a necessary party to the present suit, the purpose of which is to foreclose the mortgage lien. His assignee only need be made a party defendant. *Batre v. Auzee*, 5 Ala. 173; *Wilkinson v. May*, 69 Ala. 33; *Barb. Parties*, 463; *Story*, Eq. Pl. § 197.

2. The mortgage having been recorded in the proper county before Boutwell purchased the land, he was charged with a knowledge of the lien created by it. His possession under the purchase could not mature into a good title, under the operation of the statute of limitations, short of 10 years. *Smith v. Gillam*, 80 Ala. 296; *State v. Conner*, 69 Ala. 212. This period of time did not elapse between the possession taken under the sale and the filing of the present bill.

3. The appellee, never having been made a party to the bill filed by Mrs. Hinson against her husband, by which she set up a resulting trust in the mort-

gaged lands, is in no manner prejudiced by the decree rendered in that case. *Owen v. Bankhead*, 76 Ala. 143.

The demurrer to the original bill, raising these points, was properly overruled, even admitting the appellant's right to assign errors on the decree rendered August 30, 1886. That decree, we are inclined to think, however, is final; and, the present appeal not having been taken until September 24, 1887,—more than a year from that date,—and being confined by the condition of the appeal bond to the decree rendered July 7, 1887, on exceptions taken to the register's report, the appellant could not assign errors on the first decree, and the motion to strike out these assignments could properly be sustained. But we can well rest this opinion on the ground that the first decree is entirely free from error.

4. Nor do we discover any error in the last decree, confirming the register's report. The amount allowed by the register for the mules sold under the mortgage was the price bid for them at the sale. It is true they were purchased by the mortgagee at his own sale, but nine years had since elapsed up to the present suit, and no objection had been interposed by the mortgagor showing his disapproval of the purchase and asking to disaffirm the sale. His only mode of doing this was by filing a bill and proposing to do equity by paying the mortgage debt. *Ezzell v. Watson*, 85 Ala. 120, 3 South Rep. 309; *Garland v. Watson*, 74 Ala. 323. The appellant certainly cannot exercise this option for him.

5. The mortgagor had bound himself to pay all costs of recording the mortgage, and the costs and expenses attending the enforcement of the collection of the mortgage debt. This stipulation was as much binding on his assignee, the appellant, as the mortgage debt itself, and fastened a lien on the land for these reasonable expenses. We do not see that the several amounts allowed by the chancellor, under this head, are at all unreasonable, and his decree must be affirmed.

(84 Ala. 286)

#### RIDDLE v. MESSER.

(*Supreme Court of Alabama. May 17, 1888.*)

#### 1. TAXATION—DELINQUENT TAXES—BOOKS REQUIRED TO BE KEPT.

Under Acts Ala. 1878-79, pp. 1-8, providing for two substantial books to be kept,—one by the tax collector, containing a description of each parcel of land on which taxes are unpaid, allotted to the beat where the land is situated, the name of the owner, and the amount due, and—one by the probate judge, containing a description of each parcel sold, the amount of each kind of tax, the penalties, the purchaser, the price paid, and the date of sale, one book, substantially bound, forming a record which contains all that is required in the two, is a sufficient compliance with the act.

#### 2. SAME.

An entry in a tax collector's book, required by Acts Ala. 1878-79, pp. 1-8, to be made in alphabetical order, in the space allotted to the beat in which the land lies, complies with the act, where the owner is designated as residing in beat No. 2, and but three names are entered, these being in alphabetical order.

#### 3. SAME—TAX TITLES—NOTICE OF CONDEMNATION PROCEEDINGS.

In ejectment, where plaintiff claims under a tax title, a notice, under Code Ala. §§ 569, 570, of the condemnation proceedings duly served as required by statute, regular in form and in substance, is admissible to show that the probate court had acquired jurisdiction to sell.

#### 4. SAME—NOTICE OF CONDEMNATION PROCEEDINGS—IMPRACHEMENT OF COLLECTOR'S RETURN.

Where plaintiff in ejectment claims under a tax title, the tax collector's return of service of notice, pursuant to Code Ala. §§ 569, 570, of condemnation proceedings, is not conclusive, as the notice is jurisdictional; but evidence of a levy on the owner's personal property, being a defense that might have been urged before the judgment of condemnation, is inadmissible to assail the judgment.

#### 5. SAME—VERIFICATION OF TAX-BOOK—AFFIDAVIT OF COLLECTOR.

It is no objection to an affidavit of the tax collector to his tax-book, drawn in the precise form required by Code Ala. 1886, § 567, that it is without date, and does not immediately follow that part of the book prepared by him.

6. SAME—TAX SALES—DESCRIPTION OF LAND.

Under Code Ala. 1886, § 588, authorizing abbreviations to be used in indicating dates and amounts in tax sales of land, abbreviation by a peculiar mode of designating fractions, known by the court to be not infrequently used, is allowable.

7. SAME—TAX DEED—VALIDITY.

A tax deed conforming, in substance, to the form of Code Ala. 1876, in force at the time of the sale, and duly acknowledged and recorded, is admissible in an action of ejectment, although it fails to recite the name of the owner of the land sold; and the deed is *prima facie* evidence of its contents under Code 1886, §§ 593, 594, providing that a tax deed, duly signed and acknowledged, shall be *prima facie* evidence of the facts therein recited.

Appeal from circuit court, Clay county; LEROY F. BOX, Judge.

Action of ejectment by Archibald B. Riddle against James F. Messer. Sections of the Code referred to in the opinion are as follows: The affidavit provided by section 567 of the Code of 1886 reads: "I do solemnly swear that I have, in each case entered in this book, made diligent search for personal property of the parties against whom the taxes are respectively assessed, and, after diligent search, I have been unable to find sufficient personal property out of which to collect the taxes, or any part thereof." Section 593 provides that the tax deed, signed by the judge of probate in his official capacity, and acknowledged, shall, in all the courts of the state, be *prima facie* evidence of the facts therein recited, in any controversy, proceeding, or suit involving or concerning the rights of the purchaser to the real estate conveyed thereby. Section 594 requires the attorney general to furnish the auditor with suitable forms for deeds to be printed, and distributed among the probate judges. Judgment was rendered for the plaintiff, and the defendant appeals.

*Brickell, Semple & Gunter*, for appellant. *W. M. Lackey, contra*.

SOMERVILLE, J. If the proceedings, under which the plaintiff's tax title was acquired were regular, and in conformity to the statute regulating the sale of lands for payment of delinquent taxes in force when the sale was made, he was plainly entitled to recover in the present action, which is one of ejectment. The chief contention upon the trial related to the admission in evidence of the docket or book of the tax collector, which he is required by law to deliver into the office of the probate judge, properly verified by his affidavit in the mode required by section 12 of the act of February 12, 1879, the law in force at the time of the sale. Acts 1878-79, pp. 1-8. The plaintiff introduced in evidence, against the defendant's objection, a substantially bound book, which the probate judge testified was the docket or book that had been prepared by the tax collector, and delivered by him into the probate office by March 1, 1881, as required by law, and that it was the only docket or book kept by either himself or the collector.

1. It was objected that the book, from the entries in it, did not appear to be such a docket or book as was required to be kept by the collector under the provisions of section 1 of the act of 1879, or such a decree docket, or such a record book, as was required to be kept by the probate judge under section 7 of said act. Acts 1878-79, pp. 1, 6. It was also insisted that the affidavit required to be made, and appended at the end of the book, by section 12 of the act, had not been made in the manner conformable to the statute, and that for this reason it should be excluded as fatally defective. *Fleming v. McGee*, 81 Ala. 409, 1 South. Rep. 106. The statute seems to contemplate that two books of record shall be prepared and kept,—one by the tax collector, and the other by the probate judge. The following are the essential requisites of the tax collector's docket, which he is required to prepare and deliver into the office of the probate judge by the 1st of March of each year, or which the judge shall cause to be prepared at the collector's expense if he fails in this duty: (1) It must be a substantially bound book, prepared in the usual form of a docket. (2) It must contain a description of each parcel of land in the county,

as it is assessed, upon which the taxes are unpaid. (3) The name of the owner, if known, or that it is assessed as the property of "unknown owner." (4) The amount of unpaid taxes and charges due by the known owner, or due on the particular land, if assessed to an unknown owner. (5) These descriptions are required to be entered by "beats of the residence" of the owners, and "in alphabetical order" as to names; but, if the owner is unknown or a non-resident, in the beat where the land is situated. Acts 1878-79, pp. 3, 4; Code 1886, § 567. There is a further provision that this docket, besides being in a regular and legible handwriting, without erasures and interlineations, shall be prepared "with sufficient space to make the entries hereafter required, [in subsequent sections of the act.]" Acts 1878-79, p. 4, § 2. These entries refer obviously to the notice required by section 3 and the decree of sale, the full form of which is given in section 4 and perhaps some other parts of the history of the case.

2. The book kept by the probate judge is required to contain (1) a description of each parcel of real estate sold or offered for sale, as it is described in his "decree docket;" (2) the amount of each kind of tax, as contained in and to be copied from the collector's list; (3) the penalties and costs for each tract or lot; (4) what part of each lot was sold; (5) the name of the purchaser; (6) the price paid; (7) the date of the sale, or, if no sale has been effected, a statement of that fact. Acts 1878-79, p. 6, § 7; Code 1886, § 577

3. The book or docket introduced in evidence, in our opinion, contains all that each of the foregoing books are required to contain, as above enumerated. In other words, the probate judge and the collector have each used the same book. Is this a compliance with the law? We can see no reason why we should hold that it is not. While the more convenient and orderly course would, no doubt, be to have two separate books, one of which should be kept in the constant custody of the probate judge, yet the essential thing is to have a record, in lasting form, of all the proceedings in the case of each tax sale made under authority of the probate court by its process of judicial condemnation. *Driggers v. Cassaday*, 71 Ala. 529. This is accomplished by one book or record, as well as by two or more, provided it contains all the essential requirements of the statute, which should be so construed as to uphold, and not to destroy, if this can be done without violating any established canon of statutory construction. *Martin v. King*, 72 Ala. 354. We accordingly so hold.

4. It was further objected to the introduction of the collector's docket that the entries in it were not made in alphabetical order, nor the description of the defendant's property entered by the number of the beat of his residence, as required by the statute. This requirement of the tax law has reference only to the collector's docket, which is intended also to be used by the probate judge as a "decree docket." The provision is that, where the owner resides in a given beat or precinct, the description of his land, with his name and the amount of unpaid taxes and charges, must be entered in the place on the book accorded to such beat, as it may be designated by its number, and the names of owners must be written in alphabetical order. How far this requirement is mandatory and jurisdictional we need not inquire. *Clark v. Crane*, 5 Mich. 151, 71 Amer. Dec. 776; Blackw. Tax Titles, \*143, \*144; *Driggers v. Cassady*, 71 Ala. 529. It is sufficient for us to say that the entry of the defendant Riddle's land is in substantial compliance with this requirement. It is apparent from the entry that he is designated as residing in beat No. 2, and but three names, including his, are entered, these being in alphabetical order.

5. The abbreviations used in describing the lands were allowable; the peculiar mode of designating fractions being known to us not to be of infrequent use. Code 1876, § 870, subd. 6; Code 1886, § 588.

6. The objection to the affidavit or oath of the tax collector appended to the end of that part of the book prepared by him is not well taken. This objec-

tion is that it is without date on the face of it, and does not appear to be at the end of the book, or any book required to be prepared by the collector under the provisions of section 1 of the act of 1879. It is in the precise form required by the statute. *Fleming v. McGee*, 81 Ala. 409, 1 South. Rep. 106; Code 1886, § 567. This form does not seem to require any date to be embraced in it. We cannot infer that it was fraudulently appended after the sales were made. There is no presumption that one will commit such a fraud, but, on the contrary, the law usually presumes that every officer has done his duty, unless this presumption be repelled by satisfactory evidence of some kind. Such evidence is not, in this case, furnished by the record itself, and the testimony of the probate judge does not impugn its verity. It is no mark of suspicion that the decrees of the probate judge occupy a place on the collector's docket anterior to the affidavit, although they bear date after March 1, 1881, when the docket was placed in the hands of the probate judge, and ought then to have been verified by the collector's oath. The law required that blank space should be left in the collector's book, to be filled up by just such entries. Acts 1878-79, p. 41, § 2; Code 1886, § 568.

7. The notice of the proceeding of condemnation of the lands, which is required by the statute to be served on the owner, was shown to be regular in form and substance in all respects, and appeared to be served personally on him; the return of the tax collector showing such service. This paper was clearly admissible in evidence to show that the probate court had acquired jurisdiction of the person of the owner, without which the tax sale would be void. Acts 1878-79, p. 4, §§ 3, 4; Code 1886, §§ 569, 570. The objection taken to the introduction of this paper was properly overruled.

8. But the return of the collector that the notice had been served was not conclusive on the owner. He had a right in this proceeding to show that the return was false, and that no jurisdiction had been acquired over his person. Much injustice might often be done if tax-payers were precluded from thus protecting themselves against the sheer negligence of an officer in failing to notify them of the pendency of a proceeding, by which lands of great value might be sacrificed for a trifling amount. The jurisdiction of the probate court in proceedings of this kind, condemning the lands of a tax-payer for the enforcement of unpaid taxes, is statutory and limited; and decrees or judgments rendered by courts of this class are exempt from the rule, applicable only to courts of general jurisdiction, that parol evidence is inadmissible to collaterally contradict the record of such court reciting the appearance of the defendant, or notice to him of the pendency of the suit. *Cox v. Johnson*, 80 Ala. 22; *Carlisle v. Watts*, 78 Ala. 486; *McGee v. Fleming*, 82 Ala. 276, 8 South. Rep. 1. The record in such case is not conclusive of notice to the owner of the land sold, which, as we have said, is jurisdictional, but only of such matters of defense as could have been set up on the trial in the probate court had the owner appeared and defended; and, we may add, is also invulnerable to collateral attack for reversible irregularities, although they might be fatal on direct appeal. *Driggers v. Cassady*, 71 Ala. 529. The only exception to this rule is the defense that the taxes had been paid before the sale, and this is statutory. *Watson v. Kent*, 78 Ala. 602.

9. The circuit court erred in not allowing the defendant to prove that the return of the tax collector, reciting notice of the time and place of the proceeding of condemnation, was untrue, and that in fact he had no such notice, either personally or otherwise, as required by statute. The court, however, under the rules above declared, properly excluded the evidence offered by the defendant tending to show that the tax collector had levied on a sufficient amount of personal property belonging to the owner to pay the taxes. This, if true, was such a defense as might have been urged at the trial against the rendition of the judgment of condemnation by the probate court. *Driggers v. Cassady*, *supra*.

10. The tax deed was properly admitted in evidence, and it was no sufficient objection to such admission that the deed failed to recite the name of the owner of the land sold. Where the form of such deed is not prescribed by statute, as in this state under the present Code of 1886, any deed which would be sufficient to transfer the title of the owner by private sale would be regarded as an operative mode of conveyance, if made by the properly authorized person, provided it shows or recites the power under which it is made, and is accompanied by evidence of the fact that every substantial requirement of the law had been complied with in making the sale. *Blackw. Tax Titles*, (3d Ed.) \*368, \*369; *Moss v. Shear*, 25 Cal. 48; *Lyon v. Hunt*, 11 Ala. 295, 46 Amer. Dec. 216. But, independently of this general rule, at the time of the present sale the Code of 1876 was in force, and prescribed the form of the tax deed to be executed by the probate judge. This form was substantially, if not strictly, followed in the present case; and the instrument, being duly acknowledged and recorded as required by the statute, was *prima facie* evidence of the facts recited on its face. Code 1876, §§ 459, 460; Code 1886, §§ 593, 594.

For the error above pointed out, the judgment is reversed, and the cause remanded.

(34 Ala. 64)

BELL *et al.* v. BELL *et al.*

(*Supreme Court of Alabama. May 1, 1888.*)

**HOMESTEAD—RIGHTS OF WIFE AND CHILDREN—DISPOSITION OF PROPERTY BY WILL.**

The right of the widow and minor children to the exemption of the homestead under Code Ala. 1886, § 2543, providing for the exemption from administration of the homestead of any resident of the state, is not barred by the attempted disposition of the property by the decedent in his will.

Appeal from probate court, Cleburne county; BARTLETT OWEN, Judge.

Application by Sarah E. Bell *et al.* to have a homestead set apart for the benefit of the widow and minor children. Defendants, S. R. Bell *et al.*, executors, appeal from a judgment in favor of plaintiffs.

*Aiken & Burton*, for appellants. *Kelly & Smith*, for appellees.

SOMERVILLE, J. In *Hubbard v. Russell*, 73 Ala. 578, it was decided that where a decedent leaves a will by which he disposes of his entire property, providing for the widow by making her a devisee under the terms of the instrument, she could claim her exemptions of personal property provided for by statute without being first required to dissent from the will. In that case the testator had directed the property, real and personal, to be sold, giving the widow, during her life or widowhood, one-half interest in the net proceeds, to be retained in trust by the executor for her use, with remainder to the testator's lawful heirs. The same principle, in our opinion, applies to the claim of exemption by the widow to the homestead owned and occupied by the decedent at the time of his death. The homestead declared to be exempt is not that of one dying intestate, but the homestead of "any resident" of this state; thus including decedents both testate and intestate. It is not only exempted from the payment of debts contracted since the 23d of April, 1873, but is declared expressly to be "exempted from administration." The effect of the statute is to take the homestead out of the operation of the will, during the life of the widow and minority of the child or children, for the purpose and to the extent declared in the statute. Code 1886, §§ 2507, 2543; *Jarrell v. Payne*, 75 Ala. 577; *Coffey v. Joseph*, 74 Ala. 271; *Hendrix v. Seaborn*, 25 S. C. 481. The attempted disposition of the property, therefore, by the testator in his will, cannot bar the widow and minor children of the statutory right of exemption. There is no room for the operation of an equitable estoppel in such a case, at least in the probate or circuit court, where issues

arising out of the contest relating to homestead rights are authorized to be tried. Whether a testator could lawfully provide a legacy or devise which should vest only on condition of a waiver of all exemption rights, in any mode, is a question not now before us for decision.

The judgment of the probate court, in view of these principles, is free from error, and must be affirmed.

(84 Ala. 88)

WOOLSEY *et al.* v. JONES *et al.*

(Supreme Court of Alabama. May 14, 1888.)

1. **LIENS—ON CROPS—WHAT PROPERTY SUBJECT TO.**

Where, in an action for the conversion of cotton claimed under a crop mortgage, there was conflicting evidence as to whether the cotton claimed was part of the mortgagor's crop, an instruction that it was incumbent on the plaintiffs to satisfy the jury that the cotton in question was raised by the mortgagor was proper.

2. **SAME.**

In such case an instruction that if the jury found that the cotton was raised on land rented by the mortgagor, but by him leased to another in payment for labor, it would not be subject to the mortgage, was proper; and the fact that the mortgage also transferred the mortgagor's rents was, in the absence of evidence that any rent was due him and unpaid, immaterial.

3. **MORTGAGES—FAILURE TO DATE—TIME OF EXECUTION—HOW ASCERTAINED.**

A mortgage not dated, given to secure a note dated April 18, 1884, bearing interest on its face "from this date," and incorporated in the mortgage as a part thereof, and referred to therein as "bearing interest from this date," imports the date of its execution to be coincident with that of the note.

4. **SAME—CONTRACT FOR MORE THAN LAWFUL INTEREST—WHEN NOT USURY.**

A contract to pay more than 8 per cent. per annum in a note and mortgage contemplating a sale of the property by the mortgagees, as commission merchants, irrespective of the power of sale for default, does not on its face import usury under Code Ala. 1886, § 1754, which declares usurious "all contracts for the payment of interest upon the loan or forbearance of goods, money, or things in action, at a higher rate than 8 per cent."

5. **CONTINUANCE—WHEN GRANTED—ABSENCE OF MATERIAL WITNESS.**

An instruction that a statement, in the affidavit of a party desiring a continuance, as to what an absent witness would testify if he were present, having been admitted by the adverse party, as prescribed in the sixteenth rule of practice, which provides that if, where a continuance is desired, the adverse party will admit such statement, the cause shall not be continued for the absence of such witness, must be taken as if such witness had actually so testified,—is proper.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

An action was brought by Woolsey & Sons against W. B. Jones & Bros. for the alleged conversion of cotton, upon which defendants claimed that they had a prior mortgage, given by one Houser. Defendants obtained judgment, and plaintiffs appeal. The facts concerning these mortgages, and by whom the said cotton was raised, and the question of usury, appear in the opinion. The court gave the following charges at the request of defendants, and to the giving of each of them plaintiffs separately excepted: (1) "The statement introduced by defendants as to what Houser would swear, if he were present, must be taken by the jury as though Houser were present and swore to it before the jury." (2) "It is incumbent on plaintiffs to show to the satisfaction of the jury that the cotton in controversy was raised by Houser; and unless this is done by them, plaintiffs cannot recover." (3) "If the jury find that the note and mortgage of May 1, 1884, was given as a consideration and contract to pay more than eight per cent. per annum, or such consideration, then plaintiffs cannot be regarded as *bona fide* purchasers or creditors, as to said mortgage and debt of May 1, 1884, as against defendants' mortgage." (4) "If the jury find that the cotton in controversy was grown on the land that Houser had rented from Dobson, and which he (H.) had turned over to the daughter of Sophie Jones in payment for their labor on H.'s land, then such cotton would not be subject to either of plaintiffs' mortgages." The several

rules of the court, and the giving of these charges, are assigned as error. Rule 16 of practice is as follows: "The party applying for a continuance of any civil action must state in the affidavit the names and places of residence of the absent witness or witnesses; what diligence he has used to obtain his or their testimony, and what he expects to prove thereby. If the adverse party will admit what it is so alleged such absent witness will swear, the cause shall not be continued by reason of the absence of such testimony. After the first continuance, such other showing must be made, and such terms may be imposed, as to the court shall seem proper."

*Troy, Tompkins & London*, for appellants. *Graves & Blakey* and *Williamson & Holtzclaw*, for appellees.

SOMERVILLE, J. The first charge given by the court at the request of the defendant asserted that the statement introduced by the defendant as to what the absent witness would swear, had he been present, should be taken by the jury as if the witness were actually present, and had testified in person to the facts before the jury. This was unquestionably correct, and any other view of the law would practically nullify the sixteenth rule of practice, relating to continuances in *nisi prius* causes. *Crawford v. State*, 44 Ala. 382.

2. The two mortgages executed to the plaintiffs by Houser, in January and May of the year 1884, which are claimed to confer a lien on the cotton in controversy in favor of plaintiffs, can be construed to cover only the crop of the grantor himself, or such as might be raised by him, or his employees, on land in which he had some interest or estate. The language of these instruments clearly imports this construction, and is not susceptible of any other meaning. The mortgages cannot, therefore, embrace within their terms cotton derived from any other source. The second and fourth charges are, in our opinion, free from error, when construed in reference to the evidence, which was conflicting on the point as to whether the cotton in controversy was a part of the crop raised by Houser, or whether he obtained it by purchase from one of the tenants for advances made during the year. If the jury were satisfied that the latter view was a correct inference from the evidence, the lien of the plaintiffs' mortgages would no more attach to the cotton than if the mortgagor had gone into the market and purchased it from a stranger. The land leased to the tenant Sophie Jones was her own for the purposes of occupancy and cultivation, and was, to this extent, no longer the land of Houser. One of the mortgages, it is true, transfers the "rents" of the mortgagor; but there is no evidence tending to show Houser had any rents due him and unpaid.

3. The mortgage executed by Houser to defendants also covers his entire crops of cotton grown during the year 1884 on the plantation cultivated by him in Autauga county—the same crop that was mortgaged to plaintiffs. One of the questions in the case is the relative priority of the lien created by this instrument and that created by the plaintiffs' mortgages to which we have above alluded. This inquiry arises only on the supposition that the cotton delivered to the defendants constituted a portion of this crop. It is insisted that although defendants' mortgage was not recorded until May 14, 1884,—subsequently to the plaintiffs',—it was executed on April 18th of the same year,—prior in date,—and that the plaintiffs are chargeable with notice of its existence. This instrument in its concluding clause is without date—the date being left blank. But it is given to secure a note dated April 18, 1884, which bears interest on its face "from this date." This note is incorporated in the mortgage, as a part of it, and the mortgage itself, in referring to the note, describes it as bearing "interest from this date;" which means, by necessary implication, the date of the execution of the mortgage. The note and mortgage were, therefore, executed on the same day,—April 18, 1884,—and this is imported by an inspection of the face of the papers.

4. The ground upon which it is insisted that the plaintiffs were chargeable

with notice of this unrecorded mortgage is that their mortgage debt was usurious, and, under the principle settled in *McCall v. Rogers*, 77 Ala. 849, and other cases running back to *Saltmarsh v. Tuthill*, 13 Ala. 390, decided in 1848, that the holder of a usurious mortgage cannot be regarded as a *bona fide* purchaser without notice, and is not protected against prior incumbrances or secret equities of which he has no actual or constructive notice. If the mortgage debt was usurious, this contention is necessarily correct. *LeGrand v. Bank*, 81 Ala. 123, 131, 1 South. Rep. 460.

5. The test of usury, however, is not always the mere retention of more than the lawful rate of interest in making a loan. Usury is commonly defined to be the taking of more for the use of money than the law allows. The statute makes all contracts usurious which are for the payment of interest upon the loan or forbearance of goods, money, or things in action at a higher rate than 8 per centum per annum. Code 1886, § 1754. If an extra and reasonable amount be charged for some incidental service, expense, or risk assumed by the lender, or his employes, this is not for the use of the money,—it is not interest,—and cannot render the contract of loan usurious, unless the transaction be a shift or device intended in substance and legal effect to cover a usurious loan. Contracts to pay the usual commissions to a commission merchant for making advances of money and sales of products consigned are of this character, and, though often liable to suspicion, are not necessarily usurious. The *onus* of proving them such is cast on the party seeking to impeach their legality, and this he can do only by showing the guilty intent to evade the laws against usury. *Uhlfelder v. Carter*, 64 Ala. 527, and cases there cited; *Nourse v. Prime*, 7 Johns. Ch. 69, 11 Amer. Dec. 403, note 416. In *Dosier v. Mitchell*, 65 Ala. 511, the borrower, who was a farmer, agreed to deliver to the lenders, who were commission merchants and warehousemen, 22 bales of cotton for storage and sale, and in default of delivery to pay reasonable storage, and commissions on the value of the cotton, by way of liquidated damages. It appearing that the actual delivery of the cotton was contemplated, and no intent being shown to make the transaction a cover for usury, the contract was sustained, as one designed to compensate the lenders for risk, trouble, and expense incurred by them in their business as warehousemen and commission merchants. That case is closely analogous to the one in hand. The suggestion that the agreement in this case imposed no obligation on the mortgagees to perform the services by which the commissions were earned is unsupported. The phrase “to be sold by them, and the proceeds to be applied to the above-mentioned liabilities,” which occurs in the instrument, clearly has reference to the sale at any time of the cotton by the plaintiffs as commission merchants, irrespective of the power of sale in the mortgage, which is an additional and supplementary power. The word “commission,” moreover, implies a compensation to a factor or other agent for services to be rendered in making a sale or otherwise. The acceptance of this agreement by the mortgagees bound them to all the duties expressly or impliedly imposed by its terms as fully as if they had signed it.

6. The question of intent is commonly one for the jury, where it does not follow as a clear deduction from undisputed facts, or is not imputed by the mere construction by the court of a written instrument, unaided by extrinsic evidence, when it then becomes a question of law to be determined by the court. The latter is the case where the contract, on its face and by its own terms, *per se* imports usury. *Davis v. Garr*, 6 N. Y. 124, 55 Amer. Dec. 387, note, 392, 393; *Uhlfelder v. Carter*, *supra*.

The third charge given by the court at the request of the defendants was in conflict with these views, in making the retention of more than 8 per cent. per annum by the lender the sole test of an intent to make a usurious loan. The contract did not import usury on its face, and the burden was cast on the defendants to show it was vitiated by the requisite illegal intent, which was

a question proper to be submitted to the jury. This inquiry was, by the third charge, improperly withdrawn from the consideration of the jury. The judgment is reversed, and the cause remanded.

(34 Ala. 1)

## LANG v. STATE.

*(Supreme Court of Alabama. May 14, 1898.)***1. HOMICIDE—MURDER—EVIDENCE—CHARACTER OF DECEASED.**

On an indictment for murder, it not appearing that the deceased, at the time the act was committed, was making any demonstration of violence against defendant which could tend to produce in his mind any apprehension of harm, evidence of the character of deceased for turbulence and violence is not admissible.

**2. SAME—EVIDENCE—CONFESSIONS—COLLATERAL FACTS.**

On an indictment for murder, a confession by defendant that he struck the blow, assigning as a reason that deceased had struck him on a former occasion, was given in evidence. *Held*, that evidence that it was not deceased who struck defendant on the occasion referred to was not admissible to impeach the credibility of the witness relating the confession, as it would raise an issue as to a collateral fact.

**3. SAME—MURDER IN THE FIRST DEGREE—WHAT IS—INSTRUCTIONS.**

Under Code Ala. § 8725, declaring "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," etc., to be murder in the first degree, it is proper, on a trial for such offense, to charge that "if the defendant \* \* \* purposely killed the deceased, \* \* \* after reflection, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree."

**4. SAME—MURDER—DEGREE OF PROOF—REASONABLE DOUBT.**

On an indictment for murder, an instruction that "to prove beyond a reasonable doubt that the defendant is guilty does not mean that the state must make the proof by an eye-witness, or to a positive, absolute, mathematical certainty. This latter measure of proof is not required in any case. If, from all the evidence, the jury believe that it is possible, or that it may be, or perhaps, the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is that the jury should, from all the evidence, believe beyond a reasonable doubt that the defendant is guilty; and, if they so believe, \* \* \* they must find the defendant guilty, although they may also believe, from the evidence, that it may be that he is not guilty, or that it is possible that he is not guilty," is not error.<sup>1</sup>

Appeal from city court of Mobile; O. J. SEMMES, Judge.

In May or June, 1887, there was at Mount Vernon a general fight, in which the deceased, Willie Boyd, was struck in the back of the head with a base-ball bat or stick, and knocked down. From the effects of this blow, which fractured the skull, Boyd subsequently died. The deceased, Willie Boyd, was actively engaged in the fight at the time he was struck on the head with the bat or stick, which proved to be the fatal blow. Just before the blow was struck, the deceased had knocked down two or three men with a base-ball bat. He had knocked down two men, and they were lying senseless on the ground. The deceased was standing leaning over the last man he had knocked down, when some one came up out of the crowd, and struck the deceased over the

<sup>1</sup> A reasonable doubt is one for which a sensible man can give a good reason, based on the evidence or want of evidence. It is such a doubt as a sensible man would act upon, or decline to act upon, in his own concerns. *U. S. v. Jones*, 31 Fed. Rep. 718. The guilt of an accused is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have and feel an abiding conviction to a moral certainty of the truth of the charge. A reasonable doubt does not consist of possible or conjectural doubts not growing out of the evidence, but is one which, when considering the evidence alone, leads the juror to hesitate, and upon which he would refuse to act in the important concerns of life. *Carr v. State*, (Neb.) 37 N. W. Rep. 680. Respecting "reasonable doubt" in criminal cases, see *Knarr's Appeal*, (Pa.) 9 Atl. Rep. 878; *People v. Lee Sare Bo*, (Cal.) 14 Pac. Rep. 810; *McCullough v. State*, (Tex.) 5 S. W. Rep. 175; *White v. State*, (Tex.) 3 S. W. Rep. 718, and note; *U. S. v. Jackson*, 29 Fed. Rep. 508, and note; *People v. Kernaghan*, (Cal.) 14 Pac. Rep. 566; *Cowan v. State*, (Neb.) 35 N. W. Rep. 405; *State v. Robinson*, (S. C.) 4 S. E. Rep. 570; *Kidd v. State*, (Ala.) 3 South. Rep. 442; *State v. Maher*, (Iowa), 37 N. W. Rep. 2.

back of the head with a base-ball bat or stick. The man who struck the fatal blow struck a left-handed blow, holding the bat or stick with both hands. The man who struck the fatal blow dropped the bat or stick, and ran north along the railroad track. There was evidence tending to show that the defendant was a right-handed man. There was also evidence tending to show that the deceased had struck the appellant over the head with a stick, up in front of a store where the fight commenced, and in the early part of the same fight in which said Boyd was killed. The question of fact for the jury was as to the identity of the defendant as the man who struck the fatal blow. The state introduced evidence of a confession by the defendant that he struck the blow, assigning as a reason that he had been struck on the head with a skillet by the deceased some time before, which had left a scar on his forehead. Defendant offered to prove by one Patton that he (Patton) was the party who had struck Lang with the skillet, but the court refused to allow the testimony. The court refused to allow the defendant to introduce evidence of the deceased's character for turbulence and violence. One of the charges given by the court, and excepted to by the defendant, is set out in the opinion, and the other is as follows: "To prove beyond a reasonable doubt that the defendant is guilty does not mean that the state must make the proof by an eye-witness, or to a positive, absolute, mathematical certainty. This latter measure of proof is not required in any case. If, from all the evidence, the jury believe that it is possible, or that it may be, or perhaps, the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is that the jury should, from all the evidence, believe beyond a reasonable doubt that the defendant is guilty; and, if they so believe, and it was in this county, and before the finding of this indictment, they must find the defendant guilty, although they may also believe, from the evidence, that it may be that he is not guilty, or that it is possible that he is not guilty." Lang was found guilty of murder in the second degree, and sentenced to 10 years' imprisonment in the penitentiary. From the judgment he brings this appeal.

*McCarron & Lewis*, for appellant. *Thos. N. McClellan*, Atty. Gen., for appellee.

CLOPTON, J. As a general rule, in cases of homicide, evidence of the bad character of the deceased, for turbulence and violence is not admissible, unless it tends to qualify or explain the conduct of the deceased, or to illustrate the motive or intent of the accused in committing the homicide, when it may be said to constitute a part of the *res gesta*. The character of the deceased, however rash and blood-thirsty, furnishes *per se* no excuse for taking his life. To render such evidence competent and relevant, the conduct of the deceased must be of such nature that its tendency, under the circumstances and as illustrated by his character, is calculated to create a reasonable apprehension of great bodily harm. The purpose of such evidence is to show the honesty of the accused's belief of imminent peril. *Franklin v. State*, 29 Ala. 14; *Pritchett v. State*, 22 Ala. 89; *Storey v. State*, 71 Ala. 329; *De Arman v. State*, Id. 857. The deceased, at the time the fatal blow was struck, was making no demonstration of violence against the defendant; spoke no words and did no act which could tend, even remotely, to produce in the mind of the defendant any apprehension of harm. Under the circumstances, the evidence of the deceased's character for turbulence and violence was not admissible.

The credibility of the witnesses who may prove confessions, and of the confessions themselves, are legitimate subjects of inquiry, and may be impeached in any authorized mode. Though the defendant may have confessed the crime, he may show that the offense with which he is charged was not, in fact committed, or that he is not the guilty agent. These are the immediate issues to be tried, and any evidence is pertinent which properly tends to prove or

disprove them, and to elucidate the main inquiry. But confessions of the specific offense are distinguishable from admissions and declarations of incidental and collateral facts, though they may be made at the same time. An investigation of the truth or falsity of such admissions and declarations would raise collateral inquiries, multiply the issues, and, by diverting the minds of the jury from the main inquiry, confuse their deliberations. Had the defendant been allowed to prove, in order to show that his declaration of the cause of his striking the deceased was false, or to impeach the witnesses who testified to such declarations, that some person other than the deceased struck him with a skillet on a previous occasion, it would have been competent for the prosecution to introduce rebutting and contradictory evidence. An inquiry as to the details of the previous difficulty would have been inaugurated, and the main issue rendered materially dependent upon ascertaining whether the deceased struck the defendant, or whether the defendant had reason to believe that he struck him. The evidence of the witness Patton was properly excluded.

The court, at the request of the solicitor, instructed the jury: "If the defendant, in this county, before the finding of this indictment, purposely killed the deceased, by striking him with a base-ball bat, after reflection, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree." In quoting the charge, we have inserted the word "heart" where "heat" occurs in the record, regarding and treating its use as a mere clerical mistake in copying, which the charge itself corrects. The statute declares: "Every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," is murder in the first degree. In *Mitchell v. State*, 60 Ala. 26, it is said that, to come within the last clause of the statutory definition, "the act must be qualified by each of the named adjectives,"—willful, deliberate, malicious, and premeditated, which "may be grouped under the very expressive phrase, 'formed design.'" "Purposely killing" is intentional, willful; "after reflection" is deliberation; "with a wickedness or depravity of heart towards the deceased" is the highest grade of malice; and "determining on the killing beforehand" is premeditation. The statute does not fix any length of time as requisite to deliberation or premeditation. If reflected and determined on before the killing, however brief may be the period, the law concludes a formed design. *Com. v. Drum*, 58 Pa. St. 9. While, as we have said in other cases, it is much the better practice to use the statutory words in defining the highest degree of murder, which cannot be simplified, the foregoing analysis of the charge shows that its hypothesis contains and sets forth, though in different phraseology, all the statutory elements of murder in the first degree. *Floyd v. State*, 82 Ala. 16, 2 South. Rep. 683.

The charge in reference to reasonable doubt asserts correct legal propositions, as settled by several decisions of this court. It may be obnoxious to criticism as being somewhat involved and argumentative, but neither giving nor refusing such charge will cause the reversal of the judgment. *McKleroy v. State*, 77 Ala. 95. There is no error in the other rulings of the court. Affirmed.

(84 Ala. 278)

#### BETTS v. NICHOLS *et al.*

(*Supreme Court of Alabama. May 15, 1893.*)

#### FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—RIGHTS OF PURCHASER AT EXECUTION SALE.

A purchaser at execution sale of lands fraudulently conveyed by the judgment debtor has a plain and adequate remedy at law, when out of possession, by ejectment, and cannot come into equity to obtain a cancellation of the conveyance, as a cloud on his title.

Appeal from chancery court, Conecuh county; JOHN A. FOSTER, Chancellor. *G. R. Farnham*, for appellant. *Stallworth & Barnett* and *John Gamble*, for appellees.

CLOPTON, J. The appellant, who brings the bill, purchased the land in controversy in January, 1887, at a sheriff's sale, under an execution issued on a judgment rendered in his favor against Mary A. Crawford by the circuit court. The bill seeks to have certain conveyances made by the debtor prior to the rendition of the judgment declared fraudulent; that the land is subject to the debt of complainant; and that the conveyances be delivered up and canceled. It has been so frequently held by this court as to be placed beyond further discussion, that a purchaser at an execution sale of lands fraudulently conveyed by the judgment debtor has a plain and adequate remedy at law, and, when out of possession, cannot come into equity to obtain the cancellation of the conveyance as a cloud on his title. *Smith v. Cockrell*, 66 Ala. 64; *Grigg v. Stindal*, 67 Ala. 187; *Pettus v. Glover*, 68 Ala. 417. In such case the judgment creditor has an election of two modes of procedure: by bill in equity to test the *bona fides* of the conveyance, or by levy and sale under the execution, and test the validity of the deed by an action of ejectment. The chancellor held the conveyance to be valid. As to this we express no opinion. The decree must be affirmed, on the authority of the cases cited above, on the ground that there is no equity in the bill. Affirmed.

(84 Ala. 287)

PURCELL v. LAY *et al.*

(Supreme Court of Alabama. May 18, 1888.)

**PUBLIC LANDS—PRE-EMPTIONS—ACTUAL SETTLEMENT.**

When a portion of certain lands conveyed belongs to the United States, and the vendor agrees with the vendee that the latter shall enter it, and be reimbursed by the vendor for all expenses in perfecting his title, the entry in pursuance of such agreement does not infringe Rev. St. U. S., § 2290, requiring the pre-emptioner to make such application for his exclusive use and benefit, for actual settlement, and neither directly nor indirectly for the benefit of another.

Appeal from chancery court, Etowah county; S. K. MOSPADDEN, Judge.

Bill to enforce vendor's lien, by W. P. Lay *et al.*, executors, against J. J. Purcell. Judgment for plaintiffs, and defendant appeals.

*Dunlap & Dortch*, for appellant. *Aiken & Martin*, for appellees.

SOMERVILLE, J. The bill is one for the enforcement of a vendor's lien on land, the title of a part of which was shown never to have been in the vendor. The defendant, by cross-bill, seeks, on account of this failure of title, to abate the amount of the purchase money, which was originally \$600, but had been reduced before suit to about \$400 by part payment. The point of contention between the parties relates only to the amount properly allowable for such abatement. It appears that the testator of the complainants, one Hollingsworth, was in possession of all this land, claiming it as his own under a warranty deed from his vendor, and believing his title to be good. Forty acres of it, however, belonged to the United States government, and, after the sale of the land to the defendant, Purcell, who went into possession of it, this defect of title was brought to the attention of the complainants. It was thereupon agreed between them and Purcell that the latter should enter the 40-acre tract in question, which he was authorized to do under the pre-emption laws of the United States, as being contiguous to the other portion of the tract, and that the complainants would reimburse him for all expenses incurred in making the title good. Purcell, pursuant to this agreement, proceeded to make the entry in strict accordance with the law, so as to be entitled to a patent from the government on proper application for it. The bill offers

to reimburse him for these expenses thus incurred, which complainants insist is all he can equitably claim. He claims, in his cross-bill, the abatement of an amount equal to the full value of the 40-acre tract. It is not denied that the rule, in ordinary cases, is to allow the vendee, under these circumstances, to abate the purchase money only to the extent of the expenses incurred by him in making the title good. *Jones v. Lightfoot*, 10 Ala. 17; *Clark v. Zeigler*, 79 Ala. 346, 351. But it is contended that the agreement between the parties was, in legal effect, a contract for a sale of a pre-emption right, and therefore illegal and void as in contravention of the public land laws of the United States. We do not so construe it. The requirement of the law governing entries of this kind by pre-emptioners, among other things, is that the settler shall make affidavit that his application is made "for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." Rev. St. U. S. 1878, § 2290. The agreement does not infringe this law. The settler obtained the full and exclusive interest in the land entered by him. No one else obtained or intended to obtain any use or benefit in it of any kind whatever. The benefit which consequentially results to complainants by reason of the entry being made, is not the evil prohibited by the statute; it not being an interest or benefit in the land itself, but collateral and incidental to it. The legal effect of the agreement in question was simply to fix the amount to be abated or recouped from the entire purchase money at a sum to be measured by the cost of entering the land from the government. This the contracting parties had a right to do, just as they had a right to agree upon any other sum by way of recoupment or reduction. It was not, in any respect, a contract repugnant to the provisions or policy of the pre-emption laws of the general government. Contracts of this kind rest on a different principle. *Gallagher v. Witherington*, 29 Ala. 420; *Hudson v. Milner*, 12 Ala. 667; *Colthran v. McCoy*, 33 Ala. 65; *Harkness v. Underhill*, 1 Black, 316.

The decree of the court sustaining the demurrer to the cross-bill, and granting the relief prayed in the original bill, is free from error, and must be affirmed.

(84 Ala. 109)

THORNTON v. SHEFFIELD & B. R. Co.

(*Supreme Court of Alabama*. May 15, 1888.)

1. RAILROAD COMPANIES—AGREEMENT FOR RIGHT OF WAY—TIME OF THE ESSENCE OF THE CONTRACT, WHEN.

Where one executes an instrument binding herself to convey a right of way to certain persons on condition that they shall commence the construction of a railroad within three months and complete it through certain counties within three years, time is of the essence of such agreement, and upon failure to comply with these conditions compensation may be recovered for such right of way.

2. SAME—CONSTRUCTION OF ROAD—LIABILITY FOR RIGHT OF WAY—ESTOPPEL.

One who permits a railroad company without interference to construct its road over his land is not thereby estopped to claim compensation for the right of way.

3. EQUITY—PLEADING—FORM OF BILL—CHANCERY RULE 13.

Chancery rule 13, Code Ala. p. 812, prescribing a form to precede the interrogating part of a bill, has no application to bills containing no interrogating part.

Appeal from chancery court, Colbert county; THOMAS COBBS, Judge.

The appellant, Ella Thornton, a married woman, by her next friend, filed a bill in chancery praying for compensation for the right of way used by the Sheffield & Birmingham Railroad Company, and also for an injunction until compensation was paid. The eighth ground of demurrer set up that complainant was estopped from making claim for compensation, by a written agreement set out in full in the opinion. Demurrer sustained on this ground, and complainant appealed.

*Simpson & Jones*, for appellant. *J. B. Moore*, for appellee.

STONE, C. J. The appellee railroad company surveyed its route, and had partially constructed its road, beginning at Sheffield, in Colbert county, and extending south-eastward towards Birmingham. When this bill was filed the road was completed, equipped, and in running order for a distance of 40 or more miles, in Colbert and Franklin counties, running through the lands of the female complainant, after noticed. On the 8th day of October, 1881, Mrs. Thornton, then Mrs. Henry, together with her husband, entered into an agreement, partly printed and partly written, a proper interpretation of which is necessary to a decision of this cause. This agreement was signed without witnesses, but was, on the day of its date, acknowledged and certified in form required to convey a homestead, and also to convey lands owned by a married woman. Code 1886, §§ 1790, 1802, 1894, 2508. The instrument was duly recorded in the proper office. We insert a copy of the contract, italicizing the written words so as to distinguish them from the printed matter. The contract is as follows: "Know all men by these presents, that whereas, Eugene C. Gordon, of the state of Mississippi, and his associates, of the states of New York, Georgia, Alabama, Mississippi, and Tennessee, propose to build a railroad from some point on the Alabama Great Southern Railroad, or from some point on the Memphis & Charleston Railroad, into or through the counties of Tuscaloosa, Walker, Winston, Marion, Franklin, Colbert, and Lauderdale, state of Alabama: and whereas, the building of said railroad would, in our opinion, enhance the value of our farming and timbered lands, and the production thereon: and whereas, the building and operating of said railroad would, in our opinion, become a convenience and advantage in various ways to our property and our labor, in furnishing facilities for transportation and more rapid communication to and from the markets of the country: Now, for and in consideration of any and of all these benefits and advantages which, in our opinion, would accrue to us from the building of said railroad, should the said Gordon and associates, within four months from this date, begin the work of surveying or locating or building said railroad, and shall, within three years from this date, so complete the said railroad, so as to have it in operation [to the] *through the counties above named*, [county lines between \_\_\_\_\_ and \_\_\_\_\_ counties:] Now, in that event, in consideration of the said benefits and advantages likely to accrue to us and to our property, as hereinbefore referred to, from the building of the proposed railroad, we, *Gus A. Henry and Ella W. Henry*, his wife, of the county of \_\_\_\_\_, state of Alabama, do hereby agree and bind ourselves, our heirs, administrators, executors, and assigns, to make unto the said Eugene C. Gordon and his associates, and upon the compliance of the said Gordon and associates with the terms of this contract, [hereby vest the said Gordon and his associates, with good and sufficient title to all the coal, iron, coal-oil, in or upon or in anywise belonging to the following described lands or real estate, to-wit:] *we give the right for the said railroad to enter our plantation and go through the same in constructing the said road, free of charge, provided it does not interfere with the buildings.* [And in addition to the above-described real estate, we hereby bind ourselves and legal representatives to make good and sufficient titles, in fee-simple, to all the following described lands or real estate, to-wit: \* \* \* together with the right to enter upon the said lands to prospect for said mineral substances, and to mine and utilize the same, if they so desire:] also we hereby grant unto the said Gordon and his associates the right for road and railroads across our lands, free of charge, and the free use of timber necessary for railroad or mining purposes. It is expressly understood that any and all of the above-specified donations are to be made by the undersigned to aid the said Gordon and his associates in the construction of said railroad, in consideration of the benefits and advantages likely to accrue to us from the building of the same. It is further expressly and specially understood that no such deed to the lands as above described

[or to the coal, iron, coal-oil, and other mineral interests owned by us, as above specified] is to be made as described in this instrument if the said Gordon and associates should fail to build such portion of the road, and do the work as is required by the terms of this instrument; nor, on the other hand, the said Gordon and his associates shall not be held liable for damages should they fail to build said railroad. The object of thus deeding, or thus binding ourselves to deed, certain lands, [and our coal, iron, coal-oil, and other mineral interests] on certain conditions, to the said Gordon and his associates, is hereby expressly declared to be to induce the said Gordon and his associates to build the said railroad, the consideration to the undersigned being the supposed benefits to accrue to us from the increased circulation of money along the said railroad line in building and operating the same, and the general benefits of our having increased railroad facilities, by which, in our opinion, we will be fully compensated for the said aid extended or to be extended by us in securing the same." Dated, and signed by Gus A. Henry and Ella W. Henry, with their seals. In framing this agreement a printed blank was used, which contained many words and stipulations not germane to the contract made, or intended to be made. We inclose in brackets such stipulations, sentences, phrases, and parts of the same, as we think should not be considered in the interpretation of the agreement actually made.

It is a rule of interpretation of deeds or other instruments, partly printed and partly written, that the written portions are presumed to have commanded the stricter attention of the parties; and if there is an irreconcilable conflict between them, the writing prevails over the printed matter. 2 Devl. Deeds, § 837; Bish. Cont. § 413. This is but the teaching of human experience crystallized into law. We are satisfied that in this case there was no intention to contract for mineral rights, or for any easement or privilege in connection therewith. The sole purpose was to obtain a right of way through the plantation of the female complainant, free of charge, and, on like terms, "the free use of timber necessary for railroad purposes." The contract is not free from ambiguity. It is earnestly contended for appellee that time was not made of the essence of this contract. On the other hand, it is claimed for appellant that the writing is only an agreement to convey, on conditions to be performed within a specified time; and the time having elapsed, and the conditions not being performed, the agreement to convey is canceled. The contract does not employ either of the words "grant," "bargain," "sell," or "convey," or any word of equivalent import. Considering the entire instrument, we hold it not a conveyance, but an agreement to convey, on conditions therein expressed. *Chapman v. Glassell*, 13 Ala. 50. The conditions most important to be noted are the following: To commence the survey of the said road within four months of the date of the contract,—October 8, 1881,—and within three years to complete it, runing "into or through the counties of Tuscaloosa, Walker, Winston, Marion, Franklin, Colbert, and Lauderdale, state of Alabama." The clause which binds Henry and his wife—the latter now Mrs. Thornton—is in the following terms: "Now, in that event, \* \* \* we, Gus A. Henry and Ella W. Henry, his wife, do hereby agree and bind ourselves, our heirs, administrators, executors, and assigns, to make unto the said Eugene C. Gordon and his associates, and upon the compliance of the said Gordon and his associates with the terms of this contract, hereby [agree to] vest the said Gordon and his associates with good and sufficient titles. \* \* \* We give the right for the said railroad to enter our plantation and go through the same, in constructing said road, free of charge, provided it does not interfere with the buildings." There are other provisions in the contract clearly indicating that it was not intended as a conveyance, but only as an agreement to convey. Among them is the following: "It is further expressly and specially understood that no such deed to the lands as above described \* \* \* is to be made, as described in this instrument, if the said Gordon and asso-

clates should fall to build such portion of the road, and do the work as required by the terms of this instrument." Under the force of the clauses copied, and other provisions of the contract, we feel authorized to insert the words "agree to" which we have placed between brackets above. We hold that, under the terms of this contract, the complainant bound herself to give and convey the right of way only in the event Gordon and associates, or their assigns, performed the stipulations they entered into, and which constituted the consideration of complainant's agreement to convey. *Railroad Co. v. Railway Co.*, 73 Ala. 426, 440. We hold, further, that the agreement in this case makes time an essential element of the contract, and Gordon and associates, having broken the agreement on their part, have forfeited all right to claim its observance on the part of complainant. It is contended for appellee that, by permitting the railroad company to construct its road and operate it without interference, complainant has estopped herself from now asserting her right to compensation for the right of way. There is no principle of estoppel against this claim, considered as a mere demand for damages for the right of way. If she were seeking to evict the corporation there might be something in the objection. That is not the purpose of this suit. She claims only for the injury done to her freehold; and that claim, under the averments of the bill, stands on the same meritorious ground as if the road had been built without prior attempt to procure or condemn the right of way. Such acquiescence, to operate a bar, must be of sufficient duration to toll entry. *Association v. Jones*, 68 Ala. 48; *Jones v. Railroad Co.*, 70 Ala. 227; *Railroad Co. v. Railway Co.*, 73 Ala. 426; 1 Wood, Ry. Law, § 209; *Perkins v. Railroad Co.*, 72 Me. 95. The course adopted by the complainant in this case is fully justified by the authorities, and the bill should be retained and made effective, by injunction if necessary, until the damages are properly ascertained, or until the railroad company obtains the right of way in legal form. *Taylor v. Railroad Co.*, 25 Iowa, 371; *Browning v. Railroad Co.*, 4 N. J. Eq. 47; *Gilman v. Railroad Co.*, 40 Wis. 659; *Rusch v. Railway Co.*, 54 Wis. 136, 11 N. W. Rep. 253; 2 Wood, Ry. Law, § 246.

The present suit was instituted in July, 1887. At that time, and since February 23, 1887, "the wife must sue alone, at law, or in equity, \* \* \* for the recovery of her separate property, or for injuries to such property." Act approved February 23, 1887, (Sess. Acts, p. 80, § 7; Code 1886, § 2347.) The chancellor erred in sustaining the eighth ground of demurrer, and there is nothing in the other grounds assigned. Rule of chancery practice No. 13, Code 1876, same number in Code 1886, has no application to bills which contain no interrogating part, and, like the forms of the complaints given in the Code, is, at most, directory.

The decree of the chancellor is reversed, and a decree here rendered overruling the demurrer. The decree appealed from being interlocutory, the cause is still pending in the court below, and there is no need of an order of remandment.

(34 Ala. 546)

#### GRAYSON v. LATHAM.

(*Supreme Court of Alabama. May 16, 1888.*)

#### 1. COUNTIES—LIABILITIES AND INDEBTEDNESS—MAINTENANCE OF SOLDIERS' FAMILIES.

The fact that a county warrant for payment of a sum of money was issued in recognition of a debt contracted in the purchase of provisions during the war, for the maintenance of the families of soldiers who were serving or were disabled, or had lost their lives, in the Confederate army, is a valid defense to an action on the warrant.

#### 2. SAME—PURCHASE OF PROVISIONS FOR INDIGENT PERSONS—VALIDITY.

Provisions purchased and used for the support of the indigent in a Confederate state during the war, but not being used in promotion of the Confederate government, constitute a valid consideration for a county warrant issued for payment therefor.

**3. SAME—PROOF OF WARRANT—PRESUMPTION.**

In an action on a warrant issued for the payment of money, plaintiff having proved his warrant, that it had been registered, that the proper time had come for payment according to its place on the register, and that payment had been demanded and refused, or that a demand was unnecessary, the burden is then on defendants to overturn the presumption of liability.

**4. SAME—VALIDITY OF WARRANT—EVIDENCE.**

In an action on a county warrant for the purchase of corn, the validity of the warrant being disputed, the time and place of purchase and the persons by whom the contract was made, when and how the delivery was effected, whether or not the claims were properly audited, and all such matters pertaining to the warrant and the purpose for which it was given, are admissible in evidence.

**5. SAME—VALIDITY OF WARRANT—EVIDENCE—HEARSAY.**

In an action on a county warrant for the purchase of corn, the validity of the warrant being disputed, hearsay testimony as to the purchase of the corn, the use of it, etc., and as to matters pertaining to the validity of the warrant, is inadmissible.

**6. SAME—VALIDITY OF WARRANT—EVIDENCE—DESTRUCTION OF RECORDS.**

The fact that a warrant sued on was never authorized by the county commissioners, which was necessary to its validity, may be shown by oral proof, where the records pertaining thereto are proved to have been burned.

**7. SAME—UNAUTHORIZED PURCHASE BY—SUBSEQUENT ALLOWANCE OF CLAIM BY COMMISSIONERS.**

To vacate a warrant issued by a county for the purchase of corn, evidence is not admissible to show that no prior order had been granted authorizing the purchase, as the lack of such order constitutes no defense if the county commissioners had allowed the claims and authorized the issue of the warrant.

**8. SAME—ACTION ON COUNTY WARRANT—LIMITATION BEGINS TO RUN, WHEN.**

The statute of limitations against an action on a warrant issued by a county for the payment of money begins to run when the county treasurer, having funds for the purpose, failed to apply them to the payment of such claim after it was reached in the order of registration.

**9. SAME—ILLEGAL CONTRACT—SUBSEQUENT LEGAL CONSIDERATION.**

Where a county made an illegal contract for the purchase of corn, a part of which was not delivered, and subsequently purchased and used the undelivered portion for a legal purpose, giving a warrant therefor, the consideration of the warrant is valid, the former illegality being purged by the new and legal executed contract.

**Appeal from circuit court, Pickens county; S. H. SPROTT, Judge.**

This suit is founded on two county warrants, alleged and purporting to be issued by the commissioners' court of Pickens county, and signed by the probate judge: one for \$2,878 to C. W. Moore, administrator of William Robinson, on the 1st day of February, 1866; and the other for \$1,188 to D. P. Davis, or order, on the 28th day of February, 1867. These claims were registered with the county treasurer on April 5, 1870, numbered 146 and 147, and those numbered were passed on the register of claims by the treasurer, without payment in July, 1876; and since passing said claims the treasurer of the county has paid out more money than was sufficient to pay the whole amount of the two warrants. Demand for payment was made on the county treasurer in December, 1881. This suit was instituted January, 1882, by motion against appellees, H. B. Latham, the county treasurer, and his sureties on his official bond, on his refusal to pay the warrant sued on. The charges referred to in the opinion are as follows: "(3) The plaintiffs in this case cannot recover unless they show that the warrants upon which this suit is founded are valid warrants, and to constitute valid warrants, they must have been drawn by the judge of probate of the county in pursuance of an order of the court of county commissioners allowing claims against the county with which the county was legally chargeable; and if the jury shall believe from the evidence that the judge of probate of Pickens county, Ala., drew the warrants sued on in this cause without the authority of the court of county commissioners of said county, then the plaintiff cannot recover in the action, and the jury must find for the defendants." "(5) On the county warrants sued on in this case the statute of limitations begins to run from the time payment of said warrants was denied by the commissioners' court of Pickens county, or by the treasurer of said county, or by both." "(6) When a right exists, but a de-

mand is necessary to entitle the party to an action against any officer, agent, or attorney, the limitation commences from the commission or omission of the act giving the right of action, and not to the date of the demand. Code, §§ 2915, 3241." A motion was made in this court to strike the bill of exceptions from the file.

*E. D. Willett, E. D. Willett, Jr., Caldwell & Johnston, and Brickell, Semple & Gunter*, for appellant. *M. L. Stansel, L. M. Stone, and Troy, Tompkins & London*, for respondent.

STONE, C. J. The motion to strike the bill of exceptions from the transcript must be overruled. Its beginning, on the sixth page, is in usual form, and its contents, up to and including the first half of page 86, are such as are usually found in bills of exceptions. It is very unnecessarily long, containing *in extenso* all the testimony before the jury, when, as to a large part of it, no exception was reserved to any ruling made in regard to it. The conclusion of the bill of exceptions is less full than is generally shown, but we think the record in its present shape is sufficiently explicit to enable us to determine conclusively what questions were reserved during the trial. This is the proper office of a bill of exceptions, and the present transcript meets the requirement. Code 1886, § 2758.

The warrants declared on, issued and signed by the judge of probate, as they were shown to have been, *prima facie* imported a liability on the county. *Commissioners Court v. Moore*, 53 Ala. 25. The defense assumed several forms: First, that the warrants were issued in recognition of debts on the county, contracted in the purchase of corn during the war, for the maintenance of the families of soldiers who were serving or were disabled, or had lost their lives, in the Confederate armies. If this was satisfactorily shown to the jury, either as to one or both of the warrants, it was, to the extent proved, a defense to the action. *Speed v. Cocks*, 57 Ala. 209, and authorities cited. On the other hand, if the debt was for corn purchased and used for the support of the indigent, and not in promotion of the Confederate government, while the conflict was raging, then the consideration was lawful, and the other conditions co-existing, the warrants are evidence of a liability on the county. *Henry v. Cohen*, 66 Ala. 382. Another phase of this question: There is some testimony tending to show that Davis made a contract for the purchase of corn during the war, to be paid for in Confederate money, the corn to be distributed among the families of Confederate soldiers; and that some of this corn remained unpaid for, uncalled for, and undelivered at the cessation of hostilities. That after the surrender an arrangement was agreed on by which Pickens county became the purchaser of this corn, and contracted to pay Robinson for it at a different price, and in good money, and that it actually received and distributed the corn among its indigent poor under this second contract. This is claimed to have been the consideration of the smaller of the two warrants, and that it was made payable to Davis, to distinguish it from the larger purchase, although all the while it was the property of the Robinson estate. If this be the true history and version of the transaction for which the smaller warrant was issued, there was nothing illegal in its consideration, and it fastened a liability on the county. Any taint of illegality in the original executory purchase would thereby have become purged by the second executed contract. As to this part of the claim, the true inquiry is whether the relation of debtor and creditor between Davis and Robinson was abandoned, and a new agreement, on terms somewhat varied, entered into, by which Pickens county became debtor directly to Robinson. Upon the question we have been discussing, the plaintiff made a *prima facie* case when he produced and proved his warrants, showed they had been registered, proved that, in the receipt and disbursement of county funds, the time had arrived for their payment, according to their place on the registry, and that payment

had been demanded and refused; or, if payment was not shown to have been demanded, by proving that demand would have been unnecessary. Making this *prima facie* case, if made, the burden would then be shifted to the defendants to overturn the presumption of liability. If the testimony produced a reasonable conviction on the minds of the jury that the corn was purchased, procured and distributed among the families of Confederate soldiers while hostilities continued, that is a defense to the action. It is shown that the court-house of Pickens county was burned in 1876, and with it, among other things, the records of the court of county commissioners. It was attempted to be shown in defense that no order of the court of county commissioners had ever been made authorizing the issue of the warrants which are the subject of the present suit. The burden was on the defendants to show that there was no such order. The record being destroyed, it could be shown by oral proof. *Smith v. Wert*, 64 Ala. 34; *Derrett v. Alexander*, 25 Ala. 265; 1 Greenl. Ev. § 509. If there was an order of the court allowing the claims, and ordering warrants to be issued, this is enough. Hence, it would not avail defendants if they could show that no prior order had been granted authorizing the purchase of the corn. If the claim was audited by the court and allowed, even if no prior order had been passed directing the purchase, the warrants could not be assailed for want of authority to issue them. To vacate them on the ground of unauthorized issue, it must be shown that the court of county commissioners had not allowed the claims—had not authorized the issue of the warrants.

The questions discussed above were subjects of oral testimony. Any facts pertinent to any of the inquiries of which witnesses had personal knowledge were competent evidence. This would include proof of time and place when and the person or persons by whom the contract or contracts of purchase were made; when, how, and under what authority the delivery and distribution were effected; whether paid for in whole or in part; and, if paid for, in what currency; whether or not the claim or claims were audited and allowed by the court of county commissioners, and orders made for the issue of warrants; whether or not the warrants were registered, and when; whether or not all claims of older registration had been paid, and when the time arrived for demanding payment of these warrants, in the order of their registration; whether or not demand of payment had been made, and, if not proved, whether or not an order had been made refusing payment, and whether demand would have been fruitless; and possibly many other inquiries of pertinent facts which may arise in the trial of the case. As a rule, however, only facts can be given in evidence. On the other hand, hearsay testimony, or what witnesses have gathered or learned in the community, is not competent testimony on any issue presented in this case. All such testimony, when objected to, ought to have been excluded. We need not particularize all the rulings which fall within this class. It should be rejected on another trial.

The present suit was commenced in January, 1882. The court of county commissioners adopted the resolution instructing the county treasurer not to pay the warrants issued on corn claims in July, 1875. There is no evidence in the record that Robinson's administrator had notice of the adoption of this resolution. There was proof that the claims here sued on, as entered in the registry of claims against the county, were reached and passed, either in July, 1876, or in May, 1877. Either of these dates was less than six years before this suit was instituted. We hold that the present claims were not due and demandable until they were reached in the regular order on the registration book. Code 1876, § 845; *Caldwell v. Guinn*, 64 Ala. 64. We hold further that the limitation to a suit on these claims is six years from the date of the right to sue; and if they were not reached in the order of their registration until July, 1876, or May, 1877, they are not barred by the statute of limitations.

Charge No. 8 given at the instance of defendants is erroneous in that it misplaces the burden of proof of the order of court on which the warrants were issued. It was not, however, excepted to separately. Charge No. 5 given for defendants is faulty, for two reasons, as shown above. Charge No. 6 may be correct, but the time from which the limitation commenced to run is the date when the treasurer, having funds for the purpose, failed to apply them to these claims, after they were reached in the order of their registration. We feel it our duty to make a special order in reference to costs in this case. It is, however, the only means within our power of protecting the appellees against what would be an oppression. The two faulty transcripts heretofore rejected by us will not be taxed against the appellees as costs of appeal to be paid by them. If they are paid for, it is not right the appellees should be taxed with the burden. And the bill of exceptions is more than twice the length it need have been. Reversed and remanded.

(84 Ala. 53)

MILLER v. CANNON *et al.*

(Supreme Court of Alabama. May 17, 1888.)

WITNESS—COMPETENCY—CONVERSATION WITH DECEASED PERSONS.

Under Code Ala. 1886, § 2765, providing that neither party shall testify against the other as to any transaction with or statement of a deceased person whose estate is interested in the result of the suit, where an administrator proved a conversation between his intestate and one E., from whom defendant derived title, E. was not competent as a witness to deny the conversation.

Appeal from circuit court, Wilcox county; JOHN MOORE, Judge.

Detinue was brought by J. N. Miller, as administrator, against G. R. Cannon & Co., for a mule which plaintiff claimed was sold by his intestate conditionally to one Edwards, who mortgaged the mule to G. R. Cannon & Co. The defendants took possession of the mule, under the power contained in the mortgage, for Edwards' debt, and the plaintiff brought suit to recover. Judgment for defendants, and plaintiff appeals.

J. N. Miller, for appellant. R. Gaillard, for appellees.

STONE, C. J. There appears to be some misapprehension or confusion in the interpretation of our various rulings on section 3057, Code 1876; section 2768, Code 1886. Possibly, some of our unguarded expressions have contributed to this confusion. We propose in this opinion to attempt an explanation and reconciliation of the various rulings, and to declare what we conceive to be the true interpretation of the statute. The case of *Cousins v. Jackson*, 52 Ala. 262, was as follows: B. T. Cousins recovered a judgment or decree against Morris Cousins, as administrator. Jackson was one of the sureties on his administration bond. Morris Cousins died, and McCain was appointed his administrator. B. T. Cousins sued Jackson, surety of Morris Cousins, to recover the amount of his said decree. On the trial, McCain, the administrator, testified to a conversation he claimed to have had with B. T. Cousins after the death of Morris, tending to prove that B. T. admitted the decree had been settled. B. T. Cousins was examined in rebuttal. He testified, first, contradicting to some extent, and explaining the alleged conversation with McCain. He further testified that he had two interviews with McCain, and that the alleged conversation between them took place at the second of the interviews. He was asked by his counsel "what reply he made to these statements of McCain, for the purpose of contradicting McCain as to what he said was plaintiff's reply." He was further asked "what settlement had ever taken place between him and Morris Cousins since the rendition of said decree, in which said decree was embraced." This last question does not appear to have been objected to. The witness answered there had been none. He was then asked "if any settlement had been had between him and Morris

Cousins since the rendition of said decree, embracing other matters than said decree." This question was objected to, and the witness was not allowed to answer it. It is manifest that the witness ought to have been allowed to answer the question first above stated. It was clearly legal, for it related to a conversation, not with the deceased, but with his administrator. His testimony, as asked for, did not relate to a transaction with the deceased as a transaction, but to a conversation he had had with a living witness, proved as an admission against him by a living witness. He was asked to speak of the conversation, and not of the transaction, except to the extent the alleged conversation related to it. BRICKELL, C. J., in his opinion, considered the questions together, and treated them as simply explaining and rebutting the alleged admission proved against plaintiff. The following are extracts from the opinion: "It [the testimony offered] had a tendency to explain the admission proved to have been made by appellant; to show that it referred to settlements in which the decree was not included. Or it may have tended to show that if the appellant made the admission, as understood and repeated by the witness, the admission was not itself deliberately made, and was unfounded in fact. It also tended to contradict the witness proving the admission, by showing the admission was untrue in point of fact, and could not have been made by the appellant. \* \* \* The point of controversy is, was that admission made, or, if made, was it founded in fact or in mistake? The admission certainly refers to a transaction with a deceased person, but that transaction is material only in determining whether the admission was made, or, if made, to enable the jury to give it proper application. \* \* \* The evidence of appellant was not intended to prove such settlements as independent facts, disconnected from the admission. The settlements were material only so far as they enabled the jury to determine whether the appellant had made the admission to him, or, if he made it, whether it was founded in fact or in mistake; or to determine whether the admission he made did not refer to settlements in which the decree was not included." Construed as Chief Justice BRICKELL construed the questions propounded, it may be that the ruling in that case was free from error. It would seem, however, that the rule he declared, when applied to the question "if any settlement had been made between him and Morris Cousins since the rendition of said decree, embracing other matters than said decree," cannot be harmonized with the later rulings in *Tisdale v. Maxwell*, 58 Ala. 40, and *Killen v. Lide*, 65 Ala. 505. In *Wood v. Brewer*, 73 Ala. 259, the question arose as follows: Wood owned a plantation, and Hall was either his tenant in possession, controlling the place as such, or he was Wood's superintendent, in control of it. Wood had died before the suit was brought, and the suit was against his administrator. Graham had worked on the place as a laborer, and had transferred his claim for wages to Brewer, who sued for its recovery. There was controversy as to any express contract, or promise to pay Graham for his services, but both Wood and Hall knew of their being rendered, and no dissent by either was shown. The most important issue of fact that arose on the trial was whether Wood or Hall should pay for Graham's services; whether the one or the other had employed him to labor. Proof was made by defendant tending to show that Graham, before he entered upon the service, had said "he had seen Hall, and made arrangement with him to work for him." Graham was examined as a witness for plaintiff, and was permitted to testify to the following statements of fact: "I lived on the plantation of R. H. Wood, the decedent, in 1875. \* \* \* I went there in March of that year. \* \* \* I stayed there from March until about two weeks before Christmas. \* \* \* I did not make any contract with Julius Hall to work for him for 1875. \* \* \* There was no agreement or understanding between me and Julius Hall by which he was to pay me for my services." There were objection and exception to each of these separate sentences as they were permitted to be given in

evidence. We held there was no error in these rulings. It is clear no part of this testimony came within the letter of the statute. He did not testify to any transaction with or statement by Wood, the decedent. Nor was any part of the testimony of that character that either the law or common experience would suggest would be within the knowledge of Wood, and about which he, more than another, could testify. As to the service on Wood's plantation, Hall, or any other person familiar with the place, could speak of that as intelligently as Wood could; and as to what he testified in regard to not making a contract with Hall, Hall was the witness who could controvert or explain that, and he was not shown to be dead. This case was neither within the letter nor spirit of the statute, nor is it opposed to the principle declared in *Killen v. Lide*, 65 Ala. 505. The statute, (Code 1886, § 2765,) while relieving parties and persons of disabilities to testify in civil suits on account of interest, contains an exception "that neither party shall be allowed to testify against the other as to any transaction with or statement by a deceased person, whose estate is interested in the result of the suit or proceeding." In *Boykin v. Smith*, 65 Ala. 294, we said: "The policy of the exception is the exclusion of the parties in interest from testifying to transactions with or statements by a deceased person, when the purpose of the evidence is to diminish the rights of the deceased, or of those claiming in succession to him. \* \* \* If death has sealed the lips of one party, the law intends, as to this species of evidence, to seal the lips of the living." In *Dismukes v. Tolson*, 67 Ala. 386, we said: "Its purpose and policy are to exclude the living from testifying against the dead, because the latter cannot be heard in explanation or contradiction." In *Wood v. Brewer*, 73 Ala. 259, the language employed is that, "to fall within the prohibited line, the transaction or statement must be of such a character, and so connected with the deceased, as that, if living, the presumption would be that he could deny, qualify, or explain it. This is the sense of the rule. The legislature, by it, intended to deny to the living suitors the advantage they would otherwise have over the estates of deceased adversaries, if permitted to testify to transactions with and statements by such adversaries after death had rendered it impossible that such adversaries could be heard in reply. If the testimony relate to a transaction with another, or fall not within the class supposed to be particularly within the knowledge of the deceased, neither the rule of the exclusion nor the reason of it applies." The foregoing extracts show the reason of the rule, and the extent of it.

We think our former interpretations of the statute we are construing, considered collectively, have established the following propositions: When the case falls within either of the exceptions for which the statute makes provision, neither a party to the record, nor any one else having a vested pecuniary interest in the result of the suit, can testify, against the estate of a deceased party—*First*, as to (that is, directly relating to) any transaction with or statement by the deceased involved in the issue on trial; *second*, that testimony whose direct office and purpose are to corroborate or weaken, strengthen or rebut, other evidence given of such transaction with or statement by decedent, is equally within the reason and spirit of the prohibition. *Tisdale v. Maxwell*, 58 Ala. 40; *McCrary v. Rash*, 60 Ala. 374; *Insurance Co. v. Sledge*, 62 Ala. 566; *Boykin v. Smith*, 65 Ala. 294; *Killen v. Lide*, Id. 505; *Dismukes v. Tolson*, 67 Ala. 386; *Goodlett v. Kelly*, 74 Ala. 213. When, however, the testimony does not relate directly to, nor shed any direct light on, some transaction with or statement by the deceased adversary, then the prohibition does not apply. Hence such witness may testify to pertinent collateral facts and transactions not falling directly within the expressly prohibited class, although the effect may be to materially change the aspect of the case, and impair the probative force of the testimony. *Wood v. Brewer*, 73 Ala. 259, falls within this class. In this case the plaintiff, who sues as

administrator, having proved by a witness a conversation, respecting the mule in controversy, between plaintiff's intestate and Edwards, from whom defendant derived title, the defendant introduced Edwards, who was allowed to testify that no such conversation ever occurred with the deceased. Under the rules declared above, the court erred in admitting this evidence. Reversed and remanded.

(84 Ala. 103)

**CHANDLER et al. v. BUSH.**

(Supreme Court of Alabama. May 18, 1888.)

**TRESPASS—PUNITIVE DAMAGES—TESTIMONY OF PLAINTIFF.**

In trespass for breaking into plaintiff's house, and removing his furniture, it is error to permit plaintiff to testify as to the punitive damages which he thought himself entitled to recover.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. This was an action by John Bush, plaintiff, against W. L. Chandler and others, defendants, for breaking into and entering a house, and removing a lot of household and kitchen furniture. Judgment for plaintiff, and defendants appeal.

*Arrington & Graham*, for appellants. *Moore & Finley*, for appellee.

SOMERVILLE, J. The circuit court erred in allowing the question propounded to the plaintiff as to the amount of damages which, in his judgment, he had suffered by reason of the alleged trespass in breaking and entering his house, and the removal of his furniture. The question involved not only the damage done to the furniture, and the value of what may have been proved to be lost, but also an estimate of any exemplary or punitive damages to which the witness thought himself entitled. His opinion as to this matter was not admissible. *Railroad Co. v. Varner*, 19 Ala. 185; *Railroad Co. v. Burkett*, 42 Ala. 83. Reversed and remanded.

(84 Ala. 353)

**SEALS et al. v. PHEIFFER et al.**

(Supreme Court of Alabama. May 18, 1888.)

**APPEAL—REVIEW—MATTER NOT APPARENT ON THE RECORD—DISMISSAL OF PETITION TO ASSIGN HOMESTEAD.**

Where a petition for a homestead exemption is filed after a final decree upon creditors' bill directing a sale of the land, but before the sale, and the same is dismissed by the chancellor, the court will not set aside the dismissal, there being no notice given by the petitioner to the adverse party, and nothing on the record to show on what grounds the petition was dismissed.

Appeal from chancery court, Pike county; JOHN A. FOSTER, Judge.

On a final decree in a creditors' bill directing a sale of the debtor's land, but, before sale, R. C. Seals, the widow of the debtor, and others, filed a petition for a homestead exemption against P. Pheiffer & Co. and others, the creditors. Petition dismissed. Petitioners appeal.

*Parks & Son*, for appellants. *Gardner & Wiley*, for appellees.

STONE, O. J. This case has had quite a history. It is a creditors' bill, filed in 1882, and seeks to set aside, as voluntary and fraudulent, certain conveyances made, and procured to be made, by S. J. Seals, an insolvent debtor, to R. C. Seals, his wife. The main equities of the case made by the bill were ruled on by this court at the term of 1884-85. *Seals v. Pheiffer*, 77 Ala. 278. The case was again before us at the term of 1886, (81 Ala. 518, 1 South. Rep. 267,) and the principles governing it were so clearly declared that all hope or expectation of defeating the object of the suit must thenceforth have ceased. In June, 1886, the chancellor overruled a second application for a

rehearing. We affirmed his decree, ordering certain real estate to be sold in payment of certain ascertained debts, commanded the register to make sale and conveyance of the property, and to report the sale to him. At the spring term of the court, 1887, the register reported that, after proper advertisement, he had sold the property; that Pfeiffer & Co. had become the purchasers, and paid the purchase money, and had received a conveyance. Two petitions appear in the transcript, praying an allotment of a substitute for homestead exemption under section 2544, (2840,) Code 1886. These petitions show on their face that they were prepared after final decree of sale was rendered, but before the sale was made. One of the petitions is signed by the guardian *ad litem* of the infant defendants. This petition is without date, contains no affidavit of verification, is not shown to have ever been filed in court, and it nowhere appears that the chancellor took any action upon it, or was asked to do so. There is nothing to show that this petition is rightfully made a part of the transcript. S. J. Seals, the debtor, had died before the suit was commenced; and Mrs. R. C. Seals, the widow, presented her sworn petition, claiming the lot of land decreed to be sold as exempt to her and her minor children in lieu of homestead exemptions; her husband, at the time of his death, residing on lands not his own. This petition was filed in office, February 14, 1887, before the sale of the property. No demurrer, answer, or plea appears to have been filed to this petition, and it is nowhere shown that any attempt was made to give notice of it, except what is shown further on. As we have said, the petition by Mrs. Seals for homestead allowance was filed after the final decree was rendered ordering a sale of the lot, but before the sale was made. The report of the sale purports to have been made at the "special spring term, 1887," of the chancery court; but it is without other date. Mrs. Seals filed exceptions to the report of sale, mainly on the ground that her petition for exemption in lieu of homestead had not been acted on. At the fall term of the court, 1887, the chancellor made two separate orders, as follows: "*Ex parte R. C. Seals*. The prayer of the petition is denied, and the petition is dismissed, at the cost of the petitioner." The other order is in the following language: "*P. Pfeiffer & Co. et al. v. R. C. Seals et al.* The exceptions are overruled, and the report of the register is confirmed." Each of these orders bears date September 12, 1887; and they are the rulings and proceedings had on the petition, the report of sale, and the exceptions filed thereto. They are the last orders in the cause.

It is very questionable if the petition for exemption did not come too late, after final decree rendered, ordering a sale of the property. *Sherry v. Brown*, 66 Ala. 51, and authorities cited; *Toenes v. Moog*, 78 Ala. 558; *Randolph v. Little*, 62 Ala. 396. Possibly, there were circumstances in this case taking it out of the operation of this rule, but we need not consider them. It will be noted that, on the question of homestead exemption, this record shows only the verified petition of Mrs. Seals, her exceptions filed to the register's report of sale, and the brief orders of the court copied above. And all this took place after the final decree in the cause. Not only was there no process giving notice of the petition, but no prayer for process. The relief she asked for was not of a character she was entitled to as a matter of course, nor is the proceeding in its nature *ex parte*. The complainants were entitled to notice, and to be heard. 2 Daniell, Ch. Pr. 1606; *Weaver v. Cooper*, 73 Ala. 318. Not being informed on what ground the petition was dismissed, it is our duty to presume that the court did not act illegally. The court may have dismissed the petition for want of prosecution, or for laches in its prosecution. There is not enough in the record to raise the question, nor to show that the chancellor erred. Affirmed.

(40 La. Ann. 585)

SALOY v. WOODS.

(Supreme Court of Louisiana. May 22, 1893.)

**1. TAXATION—COLLECTION OF TAXES—HOW ENFORCED.**

The provision in the present state constitution, directing the collection of taxes otherwise than by suit, was not self-operative; hence a suit for a city tax, instituted and prosecuted before the legislative act was passed to carry into effect the said provision, operated to interrupt prescription against the tax. *City v. Wood*, 34 La. Ann. 732, reaffirmed.

**2. SAME—ASSESSMENT ON PERSONAL PROPERTY—EFFECT ON REALTY.**

An assessment on merchandise or money at interest does not, though duly recorded, operate as a privilege on the immovables of the tax-payer under act 77 of 1880. See section 24 of said act.

**3. SAME—PRESCRIPTION AGAINST PRIVILEGES.**

Act 96 of 1883, fixing the term of prescription against tax mortgages and privileges at five years does not contravene article 176, Const. Nor does the provision in that article, as to the time within which privileges shall be recorded, apply to tax privileges.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

B. Saloy issued executory process to collect from James Woods \$18,000, and defendant's property was seized and sold at sheriff's sale. The city of New Orleans filed a third opposition, claiming to be paid by preference certain taxes for the years 1882 to 1887. The judgment of the lower court maintained the opposition, and plaintiff prosecutes this appeal.

*Chas. Louque*, for appellant. *J. Ward Gurley, Jr.*, for the City. *F. B. Bahart*, for appellee.

TODD, J. Plaintiff caused certain immovable property, situated in the city of New Orleans, to be sold under executory process, to enforce the payment of a mortgage thereon. The city, by third opposition, claimed to be paid by preference out of the proceeds of sale, the city taxes for the years 1882, 1883, 1884, 1885, 1886, and 1887, assessed against the defendant. From a judgment in favor of the city, maintaining the opposition for the full amount claimed, the plaintiff has appealed.

1. Against the tax and tax privilege of 1882 the prescription of three and five years is pleaded. This question must be governed by the revenue act (77 of 1880.) The twenty-fourth section of that act provides "that all taxes, tax mortgages, and tax privileges shall be prescribed by three years from the date of filing the tax-roll in the office of the recorder of mortgages." The tax-roll was so filed on the 14th of July, 1883, and the city's opposition claiming the tax was instituted on the 20th of September, 1887. There was, however, a suit instituted for the recovery of the tax in 1882, which interrupted prescription. The counsel for plaintiff, however, contends that this suit did not interrupt prescription, because of the constitutional inhibition (article 401) against this method of collecting taxes. It was held by this court, in *City v. Wood*, 34 La. Ann. 732, and *Mayor v. Heyman*, 35 La. Ann. 301, that this inhibition did not become operative until rendered so by subsequent legislation. Therefore, the suit was effective to interrupt prescription and the claim was not barred.

2. As relate to the taxes of 1882 and 1884, prescription must be determined by act 96 of 1882. Section 34 of that act changes the prescriptive term with respect to taxes, tax mortgages, etc., from three to five years. These taxes were recorded in the mortgage office, respectively, July 31, 1884, and February 24, 1885. Prescription, therefore, had not run when the opposition was filed. The plaintiff, however, claims that the question of prescription relating to those taxes must be governed by article 176 of the constitution, under which, it is contended, the prescriptive term is fixed at three years, and without reference to the date of record. In the case of *Davidson v. Lindaf*, 36 La.

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Ann. 765, this court held otherwise, and to that decision we still adhere. Nor does the requirement contained in that article as to the time within which privileges must be recorded apply to privileges for taxes. It is, however, shown that part of the tax of 1884 resulted from an assessment of money at interest and merchandise amounting to \$5,000. Of course, this assessment did not operate as a privilege on the real estate of the tax-payer. Therefore the amount of the tax on this item must be rejected as a charge upon said proceeds. Two per cent. on \$5,000 is just \$100, which must be deducted from amount allowed in the judgment below. Section 24, act 77, of 1880. For the same reasons a deduction of \$50 must be made from the city tax of 1886. The tax of this year, (1886), save in this respect, is not objected to, and the tax of 1885 is admitted to be correct.

8. We find in the record no tax bill of 1887. It is mentioned in the note of evidence, but neither the bill was filed, nor any evidence relating to it was introduced. The amount of the tax for this year must therefore be rejected. This completes the review of all matters embraced in the appeal, and from the conclusions announced the judgment will have to be amended.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be amended as follows. That \$100 be deducted from the amount allowed for tax of 1884, and the further sum of \$50 be deducted from the tax allowed for 1886; that the tax of 1887, or the claim of privilege therefor, be dismissed as of nonsuit; that the judgment as thus amended be affirmed; the appellee to pay the costs of appeal.

Rehearing refused, May 30, 1888.

(40 La. Ann. 323)

**GAITHER v. GREEN, Tax Collector.**

(*Supreme Court of Louisiana. March 26, 1888.*)

**1. TAXATION—LEVY—PROCEEDINGS OF DISTRICT BOARD—COLLATERAL ATTACK.**

The minutes of the proceedings of the board of commissioners of the Fifth levee district, wherein a five-mill district levee tax appears to have been levied, are to be taken as of unquestionable verity, and are not to be attacked, and proof entered into, in a collateral proceeding, to which said commissioners are not made parties, to show that they are false.

**2. SAME—MANDAMUS TO CORRECT ERRONEOUS LEVY—WHEN LIES.**

*Mandamus* will not go to the board of commissioners after the levy of the tax has been completed, the tax has been extended on the assessment roll, and the roll placed in the possession of the tax collector for collection, because it would be nugatory for want of power in such board to make the correction that is required; it being *functi officio*.

**3. SAME—ILLEGAL LEVY—HOW TESTED.**

Once the tax is *in esse*, the tax-roll placed in the hands of the tax collector, and the levying and assessing officers have become *functi officio*, the legality of such tax cannot be tested with the collector or alone.

**4. SAME—LEGALITY OF LEVY—COLLATERAL INQUIRY—INJUNCTION.**

A collateral inquiry into the legality of a tax levy or assessment, apparently legal and valid on its face, cannot be entertained in an injunction suit against the tax collector alone, and after the levying or assessing officers have become *functi officio*.

**5. SAME.**

Such an inquiry may be gone into and determined, in such a suit, in case the levy or assessment is void on its face, or made in plain violation of some provision of the constitution or law.

**6. SAME—COLLECTION—PROCEEDINGS FOR.**

The laws confided the levy, assessment, and collection of the special tax in question to three distinct and different sets of officials: (1) its levy to the board of levee commissioners; (2) its extension on the parish assessment rolls to the parish assessor; (3) its collection to the state tax collector.

**7. SAME—REPEAL OF LAW AFTER LEVY—EFFECT.**

Taxes levied under the authority of act 83 of 1879, and not collected prior to the passage of act 44 of 1886, were not abrogated thereby. They were preserved and kept in force, after the passage of the latter, by virtue of the saving clause contained in section 9 of said act.

1. **STATUTES—RULE OF CONSTRUCTION.**

In case there be difficulty in interpreting the qualifying words of a sentence, the rule is to apply them to such other words or phrase as shall immediately precede them therein, rather than to those more remote.

2. **CORPORATIONS—RECORD OF PUBLIC CORPORATIONS—PAROL EVIDENCE TO CONTRADICT.**

Parol evidence, in a collateral action, cannot be received to contradict the records of a public corporation, which are required by law to be kept in writing, or to show a mistake in the matters therein recorded.

10. **SAME—RECORD OF PUBLIC CORPORATIONS—CORRECTION OF—MANDAMUS TO COMPEL.**

If such record be false, and the corporation will not correct it, a party interested may by *mandamus* compel it to make the correction so that it may conform to the truth.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; S. CHARLES YOUNG, Judge. Suit by Mrs. Virginia B. Gaither against T. K. Green, tax collector, involving the constitutionality of a certain levee-district tax. From a judgment annulling the tax, defendant appeals.

*Steele, Garrett & Dagg*, for appellant. *Conner & Conner*, and *J. N. Luce*, for appellee.

**WATKINS, J.** The questions raised in this case are the legality and constitutionality of the five-mill district levee tax that was levied in 1886 for the Fifth levee district. The plaintiff's contentions are: *First*, that if the tax is claimed to have been levied by the commissioners of the Fifth levee district at a meeting alleged to have been held on the 22d of January, 1886, at Delta, it is null and void, because there was, in point of fact, no such meeting held, and no such tax levied, but that three members of said board of levee commissioners did meet at Vicksburg, Miss., on the night of the 22d of January, and then and there attempt to levy this pretended, false, and fraudulent tax; *second*, that, if the legality of said levy be conceded in this respect, then it is null and void, because act 33 of 1879, creating the Fifth levee district, was repealed by act 44 of 1886, and such taxes as may have been levied under the former, and not collected prior to the passage of said repealing act, were thereby abrogated, and their collection cannot be now enforced, in consequence thereof; *third*, that if said tax was levied by the general assembly in section 8 of said repealing statute, it is unconstitutional and void, because said section, thus construed, violates articles 203 and 214 of the constitution. On the trial the district judge held that the tax which was levied by the commissioners of the Fifth levee district on the 22d of January, 1886, was abrogated by reason of the repeal of the law under the authority of which the levy was made; that, in so far as section 8 of the repealing statute was intended to operate as a levy of said five-mill tax by the general assembly, the law was unconstitutional, and could not be enforced; and from a judgment annulling the tax, and perpetuating plaintiff's injunction, the defendant has appealed.

1. The official minutes of the proceedings of the board of levee commissioners show that they levied the tax in question at a meeting duly convened and held at Delta, La., on the 22d of January, 1886. Plaintiff's counsel sought to impeach this record by parol evidence, but the introduction of it was successfully resisted by defendant, on the grounds, *viz.*: *First*, that the official minutes of the board constitute a public record which imports absolute verity on its face, and the same cannot be contradicted by parol, nor attacked in collateral proceedings to which said commissioners are not made parties; *second*, but, if parol proof be deemed admissible, that F. S. Shields was not a competent witness by whom to prove its falsity, because he was a member of the board, and attested the genuineness and correctness of said minutes as the secretary of the board. It is elementary that parol evidence cannot be received for the purpose of impeaching or contradicting the record of judicial proceedings and the decrees of courts, nor for the purpose of explaining or amplifying a legislative or congressional enactment; and it is contended, on

the part of the defendant, that a similar protection is thrown around the proceedings of such political or municipal corporations as the legislature may create. But, in our view of the question, it cannot be examined and decided in this collateral way, and in a suit to which the commissioners, who levied the tax, are not made parties. It is so held by Judge Cooley, in his treatise on Taxation, in the following terse and apposite language: "It is generally held that the returns and certificates required of an officer in the performance of official duty are to be taken, in the proceeding in which they are made, as of unquestionable verity. They are not to be attacked, and proof entered into, in a collateral proceeding, to which the officer is not a party, to show that they are false." Cooley, Tax'n, 195. This principle is in consonance with the views expressed by Mr. Justice Dillon on the subject: "Parol evidence in a collateral action cannot be received to contradict the records of a public corporation required by law to be kept in writing, or to show a mistake in the matter therein recorded. The remedy is to have him, (the officer,) if in office, to correct the record according to the truth." 1 Dill. Mun. Corp. § 286. This opinion is maintained by the courts of our sister states, and the following quotation is selected from a leading case in Connecticut: "If a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such action the record is conclusive. If false, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction." *Turapika Co. v. Pomfret*, 20 Conn. 590. But even this remedy must be seasonably applied. It will be too late to resort to *mandamus* after the officers of the board or corporation have become *functi officio*. On this subject, Mr. High says: "*Mandamus* will not go to a board of supervisors requiring them to make corrections in the assessment of taxes for the county, after the assessments have been completed, and warrants have been issued to the receiver of taxes; and the matter has passed beyond the control of the supervisors, since the writ would be nugatory if issued; and the rule is well established that *mandamus* will never issue when it would be nugatory from want of power in the respondent to perform the act required." High, Extr. Rem. §§ 140, 141. This agreement in opinion of text writers of first ability appears to our minds conclusive, and their reasoning irresistible. It is equally clear to our minds that this is a collateral proceeding,—a third opposition, coupled with an injunction against the enforcement of the tax, and wherein the tax collector is the sole defendant. The legislature required the commissioners to levy the tax, payable on the assessment roll of each current year. Section 8, Act 83 of 1879. It imposed upon them no other duty. That duty is separate and quite distinct from that imposed on the assessor. The law has confided the levy, assessment, and collection of the special tax in question to three sets of officials: (1) Its levy to the board of levee commissioners; (2) its extension on the assessment roll to the parish assessor; (3) its collection to the state tax collector. There is, between their respective duties, a line of demarkation that is well defined and clear. It is essential to the validity of the tax that proper and legal proceedings should be taken in its levy and extension on the assessment roll, because it is through the correct performance of the duties assigned that the tax is brought into existence. But once *in esse*, and the tax-roll placed in the possession of the collector, the levying and assessing officers cease to have any relation to the tax, and are *functi officio*. At this stage, the legality of neither the levy nor the assessment can be tested by either injunction or *mandamus* directed against the collector alone. This contention of the plaintiff cannot be sustained, and the district judge decided correctly.

2. Act 44 of 1886 only purports to repeal, in express terms, that portion of act 83 of 1879 which creates the Fifth levee district; and it purports to create in lieu thereof the Fifth Louisiana levee district. Additional territory was given to the new district, and provision was made for the appointment

of other commissioners to take charge of and administer its affairs. It is clear, then, from this stand-point, that, in all other respects than the one first mentioned, said act 33 remains in force and has effect except in so far as its provisions are inconsistent with those of said repealing law. *State v. Natal*, 39 La. Ann. 239;<sup>1</sup> *Broughton v. Pensacola*, 98 U.S. 266. On this hypothesis the plaintiff must place her reliance in establishing the abrogation of the tax upon an implied and not an express repeal of the law. In opposition to her contention, defendant's counsel attracts attention to the saving clause contained in section 9 of the repealing act, and which is couched in the following words, viz.: "That nothing in this act shall deprive this district of its share of the general engineer fund, and that all taxes hereafter collected on the rolls of the Fifth levee district, as now existing, shall be transferred to the credit of the Fifth Louisiana levee district," etc. He relies on this clause as protecting the tax. His theory is that this provision of the statute, directing that "all taxes hereafter collected on the rolls of the Fifth levee district \* \* \* shall be transferred to the Fifth Louisiana levee district," of necessity implies and presupposes the continued existence and enforcement of such taxes. But a different construction has been placed upon it by the judge *a quo*, and which, in substance, is that the phrase "as now existing" refers to the rolls, and not to the Fifth levee district; and he argues therefrom that if the taxes thereafter collected on the rolls, as then existing, are alone to be transferred to the credit of the new district, the tax in question was not embraced in its provisions, from the fact that on the 2d of July, 1886, the date said act 44 was signed and promulgated, it had not been extended on the assessment rolls of that year. But we are of opinion that the quoted clause is not susceptible of such construction. In case there be difficulty in interpreting the qualifying words in a sentence, the rule is to apply them to such other words or phrase as shall immediately precede them therein, rather than to those more remote. To apply the phrase "as now existing" to the word "rolls," in the sense of the opinion of the judge *a quo*, necessarily involves the complete elision of the phrase "of the Fifth levee district," and thus results in the entire reformation of the sentence. We do not feel ourselves at liberty to do this. The language as employed in the legislative enactment is a mandate unto us; and we cannot consent to any construction of it that would do violence to its letter or spirit; but, in thus expressing our opinion, we do not mean to criticise the views expressed by our learned brother of the lower court, for whose opinion we entertain a high regard. In our view, the plain significance of the clause under consideration is that all the taxes that had been levied by the commissioners of the Fifth levee district antecedent to the passage of the repealing statute, and which might be subsequently collected on the rolls of that district, as that district existed when said repealing statute was enacted, should be transferred to the credit of the Fifth Louisiana levee district. Instead of abrogating the taxes which have been levied under the law of 1879, it was the clearly-expressed intention of the legislature to leave them *in pari vi*. Had such not been the legislative intent, this guarded phrase would not have been employed, but another, that would have been unmistakable in its terms. The tax in question was not abrogated by the provisions of act 44 of 1886, and in this respect the opinion of the district judge was in error.

8. The views expressed in the preceding paragraph render it unnecessary for us to pass upon the unconstitutionality of section 8 of act 44 of 1886, whereunder it is suggested that the general assembly has levied a five-mill district levee tax. The plaintiff's proposition, as we take it, is stated and argued in the alternative, that we should decide, with the district judge, that the tax in question was abrogated, and attempted to be replaced or supplied,

<sup>1</sup>1 South. Rep. 922.

by the legislative tax. As the former exists and may be enforced, there is no room for such an hypothesis, and the construction of the act is not drawn in question, and it was error of the judge *a quo* to so decide.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, the demands of the plaintiff rejected, her injunction dissolved, and all costs of both courts taxed against her.

ON REHEARING.

(May 7, 1888.)

WATKINS, J. Plaintiff and appellee complains of our opinion on several grounds:

1. That it holds parol evidence to be inadmissible in a collateral proceeding to which the levee commissioners were not made parties,—a ground of objection not taken in the lower court by defendant's counsel. Possibly this precise objection was not urged in the court *a quo*; but plaintiff's counsel evidently considered that it was, as his brief on the hearing of the case will attest. Indeed, we selected therefrom some of the most pertinent authorities that are cited in the opinion.

2. That the following enunciation of the opinion, viz.: "But once [the tax] *in esse*, and the tax-roll placed in the possession of the collector, the levying and assessing officers cease to have any relation to the tax, and are *functi officio*. At this stage the legality of neither the levy nor the assessment can be tested by either injunction or *mandamus* directed against the collector alone,"—is opposed to the settled jurisprudence of this court; and, in proof of this assertion, he cites the following cases, viz.: *Cobb v. McGuire*, 36 La. Ann. 801; *Enaut v. McGuire*, Id. 804; *Budd v. Houston*, Id. 960; *Jones v. Raines*, 35 La. Ann. 996; *Surget v. Chase*, 33 La. Ann. 833; *Brown v. Houston*, Id. 843; *Gonzales v. Lindsay*, 30 La. Ann. 1086. A single glance at the opinions referred to will demonstrate the error counsel has fallen into. The legality *vel non* of the levy of the tax under consideration in this case is *de hors* the proceedings of the board of levee commissioners exclusively. If there is any, it is intrinsic. On the contrary, the illegality of the tax under discussion in the quoted cases was either fundamental or extrinsic. It was apparent upon the face of the tax record, or raised under the law. In *Gonzales v. Lindsay*, 30 La. Ann. 1085, the objection urged to the tax was that the levy was in excess of the rate of taxation permitted by law. In *Surget v. Chase*, 33 La. Ann. 833, the question was the constitutionality *vel non* of a 20-mill levee tax, it being in excess of the 10-mill limitation. In *Brown v. Houston*, Id. 843, the question was whether a tax on a lot of Pennsylvania coal on sale in New Orleans was in contravention of the United States constitution. In *Jones v. Raines*, 35 La. Ann. 996, the plaintiff claimed the nullity of a tax levied on a saw-mill, on the ground that it was exempt, under article 207 of the constitution, as property employed in the manufacture of wood. In *Enaut v. McGuire*, 36 La. Ann. 804, a similar question was raised as to the exemption of a certain alleged place of public worship. *Cobb v. McGuire*, Id. 801, was dismissed because this court was without jurisdiction. In *Budd v. Houston*, Id. 959, the tax collector and recorder were enjoined from placing a tax title on record, on the ground that there existed, in the proceedings leading up to the sale, certain "radical defects," which were not enumerated in the opinion. But enough can be gleaned from it to show that the acts of the tax collector were directly assailed. The mooted question was the authority of the tax collector to stand in judgment for the state. The plaintiff was appellant from a judgment dismissing the suit on the ground that her petition disclosed no cause of action. The court held that "it is well settled that when an officer is proceeding to collect a state tax illegally, either on account of a void assessment or irregularity in the mode of collecting, \* \* \* the proceedings may be arrested by injunction in a suit against the

officer alone." There is no question, in our minds, of the correctness of the views expressed in those cases; and there is nothing in the opinion we have quoted from that militates against our opinion in the instant case. Its object and purpose were to decide that a collateral inquiry into the legality of a tax levy, apparently legal and valid on its face, could not be gone into in an injunction suit against the tax collector alone. It was not the object or purpose of the opinion to hold that a levy or an assessment void on its face, or in plain violation of the constitution or the law, could not be tested in such a suit, and with the tax collector alone. The fact that, notwithstanding the views we entertained on this branch of the case, we entertained and decided the controversy in relation to the legality of the tax, is conclusively against plaintiff's hypothesis.

3. That it erroneously holds that this is a collateral attack on the proceedings of the levee board. In support of this contention her attorney cites the following cases as defining what is a collateral attack, viz.: *Gerao v. Gull-beau*, 36 La. Ann. 844; *Ludeling v. McGuire*, 35 La. Ann. 893; *Lannes v. Bank*, 29 La. Ann. 112; *Bank v. Lannes*, 30 La. Ann. 871. The first three of those cases were injunction suits restraining sheriffs' sales, at the instance of creditors of tax delinquents, of property in the possession of purchasers at tax sales under recorded tax titles, and the same were perpetuated on the ground that the validity of tax titles could not be tested in such collateral way. The last of the four was a direct action. The views expressed in each of those cases meet our unqualified approbation. They are only illustrations of what are collateral proceedings, and do not conflict with the views expressed in our opinion herein.

4. That the opinion was in error in assuming that the plaintiff's property was under seizure. This may be true, but there is an allegation in her petition to the effect that demand had been made on her by the sheriff for the payment of the tax complained of, and she was advised that, if she did not pay the same, her property would be seized, and sold in satisfaction thereof. In view of this averment we must confess our surprise at the statement in counsel's brief that "no property has been seized." There is no practical difference between an actual seizure, and one that is apprehended. But, if his intimations were correct, this would be a hypothetical case, and it is hardly to be believed that he would insist upon that view being entertained by us.

5. That, if the five-mill tax levied by the commissioners of the Fifth levee district for the year 1886 is maintained, plaintiff's property will be subjected to a double tax, inasmuch as, under act 44 of 1886, creating the Fifth Louisiana levee district, the general assembly levied a five-mill tax for the same year. Hence it is argued that our opinion is in error in holding the former valid, as the latter necessarily excludes it; or, if the former be maintained, the latter must be invalidated. As we understand plaintiff's petition, it was aimed at the five-mill tax that was levied by the commissioners on the 22d of January, 1886, and the constitutional power of the legislature to levy the tax indicated in act 44 of 1886 was drawn in question only in the alternative that we should hold the former was not enforceable. It was manifestly the intention of the plaintiff to resist the collection of but one tax, and our opinion was properly limited to its consideration. Rehearing refused.

(40 La. Ann. 474)

#### NEW ORLEANS GAS-LIGHT CO. v. HART.

(Supreme Court of Louisiana. May 7, 1888.)

#### 1. GAS COMPANIES—RIGHT TO ERECT LAMP-POSTS.

The rights conferred on the gas-light company by its charter, to lay mains in the streets of New Orleans, does not imply that of erecting lamp-posts at the corner of such streets, and of retaining them there indefinitely, when it does not furnish the city with gas, and there exists no contract between it and the city to that effect.

**2. MUNICIPAL CORPORATIONS—LICENSE TO ERECT ELECTRIC LIGHT POLES—WHO MAY CONTEST.**

The right granted by the city to a party to erect towers or supports to carry wires and cable for electric purposes, and to remove obstructions to such erections, cannot be contradicted by one who does not claim an exclusive or concurrent right.

**3. SAME—RIGHT TO REMOVE OBSTRUCTIONS FROM STREETS—DELEGATION OF AUTHORITY.**

The city of New Orleans, in the exercise of its police power, has the right of removing such obstructions for public convenience and benefit, and may delegate such power.<sup>1</sup>

**4. SAME—POLICE POWER—DELEGATION OF STATE AUTHORITIES.**

The police power is the right of a state, or a state functionary acting under delegated authority, to prescribe regulations for the good order, peace, protection, convenience, and comfort of the community, without encroaching on the like power vested in congress by the federal constitution. It is known when and where it begins, but not when and where it terminates. Under it, a man's property may be taken from him, his liberty may be shackled, his person and life imperilled, in cases of great public exigencies.<sup>2</sup>

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

Suit by the New Orleans Gas-Light Company against Maurice J. Hart, in which plaintiff seeks to prevent defendant from removing its lamp-posts in the execution of a certain contract which the latter has entered into with the city of New Orleans. From a judgment dissolving the preliminary injunction granted, and dismissing the suit, plaintiff appeals.

*Braughn, Buck, Dinkelspiel & Hart*, for appellant. *Farrar, Jonas & Kruttschnitt*, for appellee.

**BERMUDEZ, C. J.** The object of this suit is to enjoin perpetually the defendant from removing the lamp-posts erected by the plaintiff company in this city. In defense, it is alleged that the plaintiff has no right to oppose the removal when the same is necessary, and that the defendant has the right to take down the posts, under authority delegated to him by the city in the exercise of the police power. From a judgment dissolving the injunction issued *in limine*, and rejecting the demand, with recognition of the right to remove claimed by the defendant, the plaintiff prosecutes this appeal. The contention in this controversy arises under section 5 of ordinance No. 2145, C. S., adopted on March 8, 1887, by the city council of New Orleans, providing for the erection and construction, upon the streets, of a system of towers or supports for the purpose of carrying all wires and cables, whether for telephone, electric light, telegraph, or other electrical objects, and authorizing the defendant to put up such towers, and to remove obstacles to such erection. The ordinance provides that whenever, in the course of construction or erection of any of said towers or supports, it shall be found necessary to remove or displace any post, pole, awning, sign, support, or other thing in or upon the public places, *banquettes*, or streets, the said grantee, his heirs, agents, assigns, and successors, shall have the right to remove said posts, pole, awning, sign, support, or thing or things, and to occupy the place or places from which said removal shall have been made. There is no dispute about the facts. The plaintiff company has erected numerous lamp-posts at the corners of the sidewalks in the city, for the purpose of vending gas-light to it, and illuminating the streets and thoroughfares. The contracts for thus supplying this commodity have expired, and others entered into for electric

<sup>1</sup> See, also, that a municipality may delegate its police powers to persons and corporations, *City of Louisville v. Weible*, (Ky.) 1 S. W. Rep. 605.

<sup>2</sup> The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. *Gas-Light Co. v. Manufacturing Co.*, 6 Sup. Ct. Rep. 352. See, also, *Stein v. Supply Co.*, 24 Fed. Rep. 145, and note.

illumination. Testimony establishes the danger to life and limb, in cases of fire, from contact with electric wires with the apparatus of the fire department, both when they approach buildings and when they fall upon the ground. It also shows the infinite number of electric wires strung on posts about the streets of the city for different objects,—a fact so notorious that it may be judicially noticed. The plaintiff shows no contract with the city to put up and keep indefinitely the lamp-posts which it has erected for the purpose of supplying light to the city, when none is furnished for the use of the public. It alleges its charter from the state, granting it the right to lay gas-mains about the streets; but it avers no authority from the state to put up and keep lamp-posts upon the public streets or corners when the community is not actually benefited thereby. It is a fact that the defendant claims the right, and was about to exercise it, of removing such lamp-posts, erected by the plaintiff company, found at spots at which towers are proposed to be elevated. We understand the company to contend that the defendant has no such right, because it has a contract whereby it is entitled to put up and keep the posts; because the right claimed by the defendant would arise from a prohibited monopoly; because the city herself could not remove the posts, and even then delegate the power.

1. It is apparent from the charter of the company that the right to erect and keep lamp-posts on the corners of sidewalks in New Orleans was in no way granted it by the legislature, although that of laying mains on the streets themselves was formally conferred; but the privilege of laying such mains does not imply, unless *ex necessitate*, that of erecting posts at the corners on the sidewalks. The mains are designed to supply gas to all consumers,—whether the city, to corporations, or to individuals,—and may be and are used for those purposes; but it naturally occurs that, when the city ceases to be a consumer, the right of the company ceases to have lamp-posts on its sidewalks. Hence it cannot be claimed that the plaintiff has any absolute contract rights to preserve its lamp-posts at those particular spots, and that the action of the municipal authorities has impaired that right, although we do not propose to say that even then the city, in the exercise of her police powers, could not, in a proper case, have done by herself what she had authorized another to do.

2. The plaintiff contends, further, that the rights granted by the city to the defendant amount to a monopoly, which comes within the ban of article 43 of the state constitution. To this, it is sufficient to answer that it is a principle, well founded, that no one can be heard to complain of and charge the constitutionality of the grant of an exclusive right or privilege who does not assert a similar conflicting right. This rests upon the plain and common-sense reason that it must be to such persons a matter of utter insignificance who exercises that right or privilege, whether he be one that does so exclusively or not. If it be true that the city has the right to operate the removal, what is it to the plaintiff that the city does it by her immediate servants, or cause it to be done by some specially designated person, as in the instant case?

3. The last objection to be considered is whether the city could have exercised the right of removal of the obnoxious lamp-posts. That right the city possesses as an inherent concomitant of the police power. That power, so far, has not received a full and complete definition, but may be said to be the right of a state, or of a state functionary, to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in congress by the federal constitution. Of that power, it may well be said that it is known when and where it begins, but not when and where it terminates. It is a power in the exercise of which a man's property may be taken from him, where his liberty may be shackled, and his person exposed to destruction, in cases of great public emergency. See 1 Dill. Mun. Corp. (3d. Ed.) p. 166, 167, and *Bass v. State*, 34

La. Ann. 494, where numerous authorities are quoted. In a kindred case the United States supreme court said: "The supreme court of Indiana placed its decision, in support of the statute, principally upon the ground that it was the exercise of the police power of the state. Undoubtedly, under the reserved powers of the state, which are designated under that somewhat ambiguous term of 'police power,' regulations may be prescribed by states for the good order, peace, and protection of the community. The subjects upon which the state may act are almost infinite, yet, in its regulations with respect to all of them, there is this necessary limitation: that the state does not encroach upon the free exercise of the power vested in congress by the constitution. Within that limitation, it may undoubtedly make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require." *Telegraph Co. v. Pendleton*, 122 U. S. 359, 7 Sup. Ct. Rep. 1126. A similar question having been presented to the United States circuit court in Chicago, Ill., the learned court held that it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed, and put an end to such unsightly obstructions as those poles and wires are in the streets. There must be a power somewhere to cause them to be removed, and to regulate and control the manner in which telegraph lines shall enter or pass through the city. *Telegraph Co. v. Chicago*, 16 Fed. Rep. 309. The city of New Orleans has the undoubted right which a citizen would have, and has, who would have agreed with the gas company to illuminate his house for a stated time, and to furnish therefor the necessary appliances. Clearly, at the expiration of the contract, the citizen could require the removal of the appliances, not only because of their appearance, their proving an obstruction to his enjoyment of his property, but also and particularly if they proved dangerous some way or other. *Quia placet*, in the end, would be a sufficient reason for the removal. Now, in the present case, it is clear that the city has the transmissible right to require the removal, not only because the lamp-posts are no longer needed and used for public service, but also because the city needs the very spot on which they happen to have been erected, and it is proposed to utilize those places for other useful and beneficial purposes, and has the exclusive right, under her charter, to regulate the use of the streets and thoroughfares within her limits. It is unnecessary to enumerate the benefit expected to be derived from the towers mentioned in the ordinance, the legality of which is maintained, as they are no important factors in the case. Judgment affirmed.

(40 La. Ann. 344)

**WEYMOUTH v. CITY OF NEW ORLEANS et al.**

(*Supreme Court of Louisiana. March 26, 1888.*)

**1. MUNICIPAL CORPORATIONS—GRANT OF RIGHT TO RECEIVE MARKET REVENUES—LIABILITY OF GRANTEE TO REPAIR MARKET.**

Under a contract with reference to a public market, by which the sole right conveyed by the city to the third person is the right to collect and appropriate the market revenues, the market remaining subject to all the regulations, control, and authority of the city applicable to every other market, the thing let is not the market-house, but only the privilege or franchise of receiving the revenues, the market remains the premises of the city, and not of the lessee, and the latter does not incur the obligations of a tenant of property to keep the premises safe for those lawfully entering thereon.

**2. HIGHWAYS—ASSUMING OBLIGATION TO REPAIR—LIABILITY FOR DEFECTS.**

When, however, a person has, by contract with public authority, assumed obligations to keep a public highway or other public place in repair, he may be held liable to one who has been specially injured by reason of his failure to perform such obligation.

**3. SAME.**

In such case, plaintiff must prove—*First*, that defendant has been guilty of legal fault; *second*, that such fault was the cause of the accident.

## 4. SAME.

When the evidence fails to show that the fault imputed to the defendant was the cause of the injury, and makes it probable that the injury resulted from a different cause, which operated independently of the fault, defendant cannot be condemned.

## 5. WARRANTY—WHAT IS—LIABILITY FOR BREACH.

Warranty is a covenant, express or implied, arising out of a contract. A person sued for a *quasi* offense is responsible only on the ground that he has committed a fault, and he cannot call another to warrant him against responsibility for his own faults.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge. Suit by Mrs. Hattie E. Weymouth against the city of New Orleans and Jordan T. Aycock for \$25,000 damages. Complainant's two daughters met their death by falling into a well situated in a public market situated within the city limits, and institutes this action to hold defendants responsible. The case as to the city having been dismissed, Aycock appeals from a judgment condemning him to pay \$10,000.

W. H. Rogers, City Atty., and W. S. Benedict, for appellant. Jas. B. Guthrie, for appellee.

FENNER, J. The petition recites that Mrs. Hattie E. Weymouth was the mother of Leila and Alice Weymouth, aged nine years, and seven months, respectively; that her said two daughters were killed August 16, 1886, by falling into a well situated in the market-house on Magazine street, between Berlin street and Napoleon avenue, known as the "Upper Magazine Market;" that the death of these children resulted from the fault, and was caused by the negligence and lack of skill, on the part of the city of New Orleans and Jordan T. Aycock, their servants and agents; that said market and its approaches have been open to public use for years; that same was built by Thomas Carey under a contract with the city of New Orleans; that by said contract, in place of a fixed price, Carey was vested with the right of occupancy and possession of said market-house, buildings, and improvements, and the portion of ground whereon same is erected, and with the right of collecting and holding the revenues to be derived from said market-house, with the right of carrying on a market therein, for a period of 18 years, under the conditions of said contract, which is annexed to and made part of the petition; that Carey had the right to assign and transfer his rights; that since August 5, 1881, Jordan T. Aycock had been assignee of all Carey's rights under said contract; and that all the duties devolving upon said Carey, by virtue of said contract and the operation of law, have devolved and attached to said Aycock since the 5th of August, 1881; that the city was bound to maintain the market, its walks, approaches, and thoroughfares, in good and safe condition, and that a like duty devolved upon Aycock, as subrogee to the rights and obligations of Carey under the contract, wherein Carey specifically binds himself and assigns to keep said market in good order and condition, and to make all necessary repairs thereto; that at the end of said market property nearest Camp street, as an appurtenance to the market, exists, and has existed for years, a deep well or under-ground cistern; that said well is located upon or under a public thoroughfare, and on one of the walks and approaches to the said public market; that the opening down into said well consists of an iron tube or ring 15 to 20 inches in diameter,—said tube being set down into the ground, so that its upper rim is perfectly even with the surface of said walk; that no guard or railing is constructed around the mouth of said well to give a hint of its existence or location to wayfarers; that the well has been and is left without cover, or without adequate or secure cover, over its said mouth, and is a death-trap and a constant menace to life; that said contract provides "that a force and lift pump should be placed over said well, with necessary pipe and hose, and the well to receive the necessary repairs;" that said provision has never been com-

plied with, or, if it has, Jordan T. Aycock has removed same, leaving the mouth of said well unguarded and insecure and improperly covered; that on the 16th of August, 1886, her daughter Lella, carrying in her arms the baby, Alice, while walking through said market-house, fell through the mouth of and into said well, left open and unguarded or insecurely covered through the fault and negligence of Aycock and the city of New Orleans, their agents and employes. Under these allegations, coupled with appropriate averments as to the nature and amount of the damages, she claimed a judgment against the city and Aycock *in solido* for \$25,000. The city filed an exception of no cause of action, on which a final judgment was rendered sustaining the same, and dismissing the suit against the city. From this judgment no appeal has been taken, and it is now absolute. Aycock pleaded a general denial, and also filed a call in warranty against the city, which was cited as warrantor, and answered, denying its liability. The case was tried before a jury, and resulted in a verdict and judgment for \$10,000 in favor of plaintiff against Aycock, and in favor of Aycock against the city as his warrantor.

1. The judgment against the city as warrantor is so preposterous that Aycock's learned counsel hardly ventures to defend it in this court. Warranty is a covenant, express or implied, arising out of contracts. There is no allegation or pretense that the city has failed to comply with any of the obligations of its contract. The sole ground of this action is an alleged *quasi* offense; and, if Aycock is responsible at all, it must be because he has been guilty of some fault which occasioned the damage. If the damage resulted from the joint or concurring fault of the city and Aycock, they might both be jointly or solidarily liable to the plaintiff, as claimed in the petition; but the city's liability on that ground, so far as this action is concerned, was finally settled by the judgment in her favor. Nothing remained at issue except the question whether Aycock is liable by reason of his own fault, and certainly one party cannot be required to warrant another against the consequences of the latter's own faults. The city, therefore, passes entirely out of the case, and the sole question to be determined is whether Aycock has been guilty of any legal fault occasioning the damage; and rendering him responsible therefor.

2. It is first important to determine Aycock's precise relation to the market, by a critical examination of the contract between the city and Carey, in whose shoes, as his assignee, Aycock stands. The market-house, which has existed upon this *locus publicus* belonging to the city from an ancient date, was burned down. This contract embodies an undertaking on the part of Carey to build a new market-house, in conformity to elaborate specifications, in consideration of the right to receive the revenues of the market during the period of 18 years from the day the market should be completed and accepted by the city. The only right conveyed to Carey was, in the language of the contract, "the right and privilege of collecting and receiving, for his own use and benefit, the revenues of the market to be built by him," as to which the city subrogated him "to all and singular her rights, actions, and privileges to sue for and collect said revenues, but in nowise guaranties to the said Carey the payment of any of the fees or charges required to be paid by occupants of the stalls." The right so conveyed was accompanied by the following obligations, viz.: (1) Carey bound himself, "at all times, to abide by, conform, and comply with all and singular the terms, clauses, and conditions of any and all ordinances or regulations that are or may be enforced, or that may be hereafter adopted, by the city, touching or concerning the government of the markets of the city of New Orleans." (2) He bound himself "to keep the said market in good order and condition, and to make all necessary repairs thereto, and, at the expiration of the present contract, to return the said market to the city in good order and condition, and in thorough repair." It was further stipulated that the city would not, during the term of the contract, "alter, change, or modify the fees or charges that are now, by existing

ordinances, required to be paid by occupants of stalls." We have no occasion to examine the terms of the subsequent transfer by Carey, since he could transfer nothing but the rights which he acquired. From the foregoing we consider it clear that the thing let was not the market, but the privilege or franchise of collecting and appropriating the revenues; that the city accepted, owned, and held the market-house as a public market and *locus publicus*, subject to her own control, regulation, and police authority, precisely as was every other public market in the city; and that Carey and his assignees acquired no right, authority, or control over the same, except said right and privilege to receive the revenue. The market-house was and remained the premises of the city, and not the premises of Carey or Aycock. Hence Aycock cannot be held bound by the general obligations of a tenant of immovables under a contract of lease, or of any other controlling occupant, under which such an occupant of premises is bound to keep them safe for those lawfully entering upon them. Shear. & R. Neg. § 361; 1 Thomp. Neg. 316, 317. The execution of the contract conforms to the foregoing plain significance of its terms. Defendant never pretended to exercise any authority or control over the market, except to collect the revenue, and clean it up as often as required. The city had her commissary for this market, as for all others, and no difference is indicated between the authority she exercised over this and that over other markets.

3. There is, however, another well-settled principle of law, under which a person who has, by contract with the public authorities, assumed specific obligations to keep a highway or other public place in repair, is held liable to any one who is specially injured by reason of his failure to perform such obligation. Shear. & R. Neg. §§ 345, 353; *Wilson v. Jefferson*, 13 Iowa, 181; *Phillips v. Com.*, 44 Pa. St. 197; *Robinson v. Chamberlain*, 34 N. Y. 389; *Insurance Co. v. Baldwin*, 37 N. Y. 648. If Aycock is liable at all, it can only be under the application of the foregoing principle to the obligation assumed in the contract "to keep the said market in good order and condition, and to make all necessary repairs thereto." The well into which the children fell, was situated in the rear of the market-house, near the edge of its *banquette*, was built flush with the *banquette*, had an opening about 15 inches in diameter, and was covered by an iron lid, which moved by lifting it out of the place into which it fitted, and sliding it off like the top or lid of a common stove. This well had existed in the same place, and with the same covering, from the time when the market was originally established, very many years before the contract with Carey. It was not injured by the fire. It had never at any time been locked or guarded. It had always been regarded and used as a public well. It was situated in a part of the city to which the water-works did not extend. The neighbors came in dry seasons to get water from it for washing purposes, or to water their stock. Drivers watered their horses there, and used it for washing off their vehicles. Fire companies used it for testing or exercising their engines. At the very time when this accident occurred, there were some buildings in course of construction near it, and the masons came to this well for water to mix their mortar, and for like purposes. The surface of the water was only about three feet below the *banquette*, and this made access to it easy and convenient, by tying a short rope or string to vessels, and drawing up the water. It is plain that nothing in Carey's contract imposed the duty, or even conferred the right, to interfere with this original and continuous public use, or to lock up the well, or to erect guards around it. He was, at most, only bound to maintain it in the condition in which it was when the contract went into effect, and to suffer it to be used as it had always been used. There is evidence, however, to show that, by long use, the lid had become worn and loose, so that, when stepped upon by a passenger, it would tilt up, and slide off the opening, thus creating danger. It may possibly have been the duty of Aycock to have corrected this defect by

repairing the lid; and, if it were clearly proved that the accident had resulted from such defect, the question as to his responsibility might be more serious. But the evidence also shows that persons of the public using the well often forgot or carelessly omitted to close the lid. This was an incident of the public use, which Aycock had neither the duty nor power to prevent. It was equally likely to occur whether the lid was in good or bad repair, and the person injured by stepping into the well while thus left open by one of the public, who had the right to use it, surely could not hold Aycock responsible. There was no witness to the accident in this case. The elder child, with the infant in her arms, had parted with her companions, to go home; the nearest route being through the market. They were missed, and, after search, were found drowned in the well. The evidence does not indicate that the weight of such children in stepping on the lid would have been sufficient to tilt and open it, or that, if it had been, they would not have escaped falling into so narrow an opening. All the probabilities arising under the evidence strongly corroborate the theory that the well had been left open, and that the child having the infant in her arms, possibly in such position as to obstruct her vision, stepped into the opening, and fell through. The plaintiff necessarily carries the burden of proving two things: (1) Fault on the part of Aycock; (2) that the fault was the cause of the injury. Cases are cited holding that, in the absence of direct evidence, these facts may be sufficiently established by circumstances and presumptions clearly supporting them. See *Hays v. Gallagher*, 72 Pa. St. 189; *Allen v. Willard*, 57 Pa. St. 380; *Whitney v. Cityford*, 57 Wis. 158, 14 N. W. Rep. 927; *Seybolt v. Railroad Co.*, 95 N. Y. 562. But where, as in this case, the circumstances and presumptions point to a cause of the accident not occasioned by defendant's negligence, and for which he is not responsible, such authorities are not applicable. The verdict of the jury obviously indicated that they considered the city, and not Aycock, responsible. It is alleged in the petition, as one ground for Aycock's liability, that, under the specifications of Carey's contract for building, it was required that "a force and lift pump of suitable size be placed over the well, with necessary hose and pipes for cleaning the market; the well to receive the necessary repairs." The evidence shows that Carey built the pump, not over the well, but some feet from it, as it had previously existed. This was a matter exclusively between the city and Carey; and, as the city accepted the work, it is conclusively presumed that the variation was made with her consent and approval. It is further claimed in argument that Aycock's failure to keep the pump in repair was a cause of the public's opening the well. No such allegation of fault is contained in the petition. The evidence shows that, even when the pump was in repair, the public found it more convenient to draw from the well, and often did so, as it had always done. Moreover, the cause, even if it had been alleged, is too remote, and is not sustained by the evidence. On the whole, we feel bound to hold that the plaintiff has not made out such a case against Aycock as would justify us in throwing upon him the responsibility for this lamentable accident.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be judgment in favor of defendant and warrantor, rejecting plaintiff's demand, at her cost in both courts.

Rehearing refused, April 16, 1888.

(40 La. Ann. 373)

STATE *ex rel.* SINGER *v.* MCGUIRE *et al.*  
(Supreme Court of Louisiana. March 5, 1888.)

1. JUDGMENT—EFFECT—*RES ADJUDICATA*.

A party who has acquiesced in a judgment of the supreme court, which has acquired the force of *res adjudicata*, dismissing for want of jurisdiction an appeal in

a case in which he was a party, and virtually deciding that the matter in dispute comes within the exclusive jurisdiction of the court of appeals, cannot be permitted to question the exercise of that jurisdiction by the latter court; the less so where he has formally submitted himself to it.

**2. SAME—PROHIBITION TO RESTRAIN PROCEEDINGS.**

A prohibition in such a case does not lie.

(*Syllabus by the Court.*)

Application by G. A. Singer for writs of prohibition against J. P. Clinton and A. A. Gumby, judges Second circuit court of appeals, and J. A. McGuire, sheriff of the parish of Ouachita, to estop further proceedings in a certain suit wherein the State National Bank is interested.

C. J. & J. S. Boatner, for relator. John T. Ludeling, for respondents.

BERMUDEZ, C. J. The relator complains that the judges of the Second circuit court of appeals have entertained jurisdiction over a cause in which the State National Bank claimed of him the sum of \$2,011.17, and that said judge has rendered against him, a judgment for \$736, on which execution has issued in the district court, and is in the hands of the sheriff. He charges want of jurisdiction *ratione materiae*, and seeks a prohibition to arrest further proceedings, and asks other relief. The judges and the judgment creditor return as their defenses that in the suit of the *Bank v. L. B. Allen and garnishees*, in which the judgment rendered was brought up for review by the bank to this court, the appeal was dismissed for want of jurisdiction, and the latter was one of the garnishees, appellees in that case. *Bank v. Allen*, 89 La. Ann. 806, 2 South. Rep. 600. The judgment of dismissal is therefore invoked as *res judicata*, and as recognizing jurisdiction in the circuit court of appeals. The defense is well founded. There is nothing to show that the relator objected to the jurisdiction of the latter court, when the case was before it for hearing and determination. He must therefore be considered as having acquiesced in the judgment of this court dismissing the appeal, which constitutes *res judicata*, and is conclusive. Relator is estopped from questioning its correctness and validity. *Interest reprobicae ut sit finis litium*. It is therefore ordered and decreed that the restraining order herein made be rescinded, and that the application for a prohibition be rejected, with costs.

Rehearing refused March 26, 1898.

(40 La. Ann. 380)

LE BOEUF v. WEBRE *et al.*

(*Supreme Court of Louisiana. February 18, 1898.*)

**1. EXECUTORS AND ADMINISTRATORS—CONDUCT OF ADMINISTRATION—RIGHTS OF CREDITORS.**

A creditor of a succession has a right to require the administration thereof to be conducted according to law, and to that end to require that all its property shall be included in the inventory, and to prevent improper and illegal sales thereof.

**2. SAME.**

He is not bound, in order to maintain such action, to allege or prove the insolvency of the succession. Its solvency or insolvency depends on the result of the administration, on the value of its property, and the amount of the debts which may be presented against it; and the creditor is not bound and has not the means to solve this question in advance.

**3. SAME—JURISDICTION OF COURT.**

Our jurisdiction in such a case is governed by the amount of the "fund to be distributed."

(*Syllabus by the Court.*)

Appeal from district court, parish of St. James; HENRY L. DUFFEL, Judge.

Suit by A. Le Boeuf against Marie J. Webre and others, involving certain succession property. From a judgment of no cause of action plaintiff appeals.

*Sims & Poche*, for appellant. *Robert G. Dugud*, for appellees.

FENNER, J. We adopt defendants' own statement of the case: "The plaintiff alleges in substance that he is a creditor of the estate of B. S. Webre for \$1,197.66; that the administratrix, who is a daughter of the deceased, has caused an undivided half of certain real estate to be advertised for sale to pay debts, although the whole belongs to the succession, and that she has purposely excluded one-half thereof from the inventory and from the sale in order to shield it from the claims of his creditors; that the entire property is burdened with a Citizens' Bank stock mortgage, which is an impediment to a valid sale of one-half of the property; that the creditors are entitled to a new inventory and to a sale of the whole; and that the plaintiff will suffer irreparable injury by the contemplated sale. His prayer is for an injunction to arrest it, and for a judgment recognizing the succession as owner of the entire plantation, directing a new inventory and a sale of the whole to be made, and rescinding the order of sale already rendered. The defendants, after excepting to the petition as disclosing no cause of action and no ground for an injunction, answered by emphatically denying the truth of the plaintiff's allegations. The exception was sustained, the injunction dissolved, and the suit dismissed, with fifty dollars special damages for attorney's fees, and the plaintiff has appealed."

The ground upon which the judge acted was the absence of any allegation that the succession was insolvent, or that the sale as advertised would not realize enough to pay him and all other creditors. We do not think that such allegations were essential. The object of administration of a succession is to liquidate it by ascertaining the amount of its property and of its debts, and by appropriating the former to the payment of the latter, and distributing any resulting residue among those entitled to it. The fundamental basis of such administration is a correct and complete inventory of the property, which is made by law the measure of the administrator's bond, and exhibits the fund to which the creditors must look for the satisfaction of their claims. The solvency or insolvency of the succession depends upon the result of the administration, upon the price which the property brings when sold, and upon the number and amount of the debts which may be presented against it. Many successions, supposed to be solvent, prove to be the reverse. A creditor is not bound to solve this question in advance, and has not the means to do so. But he is entitled to require that the administration be conducted according to law, that all the property belonging to it shall be included therein, and that it shall not be sacrificed by improper and illegal sales. Obviously, if the whole of this real estate belongs to the succession as alleged, the sale of an undivided half of it would be both improper and illegal. Perhaps, under Civil Code, art. 1135, such a sale would not be warranted even if the succession only owned the undivided half; but certainly if it owns the whole, it could not sell an undivided half in the manner proposed. We think the petition sets forth a sufficient cause of action both for the completion of the inventory and for the injunction. The case is clearly one affecting the fund to be distributed, which greatly exceeds \$2,000, and the suggestion as to our lack of jurisdiction has no force. It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled; that the exception of no cause of action be overruled, and that the case be remanded to be proceeded with according to law,—defendants to pay costs of said exception in the lower court and of this appeal.

(84 Ala. 53)

## SNIDER v. BURKS.

*(Supreme Court of Alabama. May 16, 1886.)***1. WILLS—PROBATE—DEATH OF SUBSCRIBING WITNESSES—PROOF OF SIGNATURES.**

At the probate of a will, it appearing that the attesting witnesses are deceased, the genuineness of their signatures may be proved by witnesses who know their handwriting.

**2. SAME—PROBATE—PROOF OF GENUINENESS—EVIDENCE.**

At the probate of a will, the question being merely the genuineness of the execution, evidence that deceased was a person of reticent habits; that he owed larger debts than stated in the alleged will; also a note and mortgage held against deceased, and evidence as to money of deceased's estate claimed by the proponent of the will, having come into a witness' hand,—should all be excluded as irrelevant.

**3. SAME—PROBATE—INSTRUCTIONS—DUE EXECUTION.**

At the probate of a will a charge to the jury that if they believe from the circumstances that the will was executed, signed by the testator, and subscribed by two witnesses, they may find the will was duly executed, is defective, as omitting to state that the witnesses must have signed in the presence of the testator, such being required by statute.

**4. SAME—PROBATE—SUFFICIENCY OF EVIDENCE.**

The amount of proof as to the proper execution of a will, in the particulars required by statute, need only be such as is reasonably sufficient to satisfy the jury as to such fact.

**5. SAME—PROOF OF EXECUTION—COMPETENCY OF DEVISEE TO TESTIFY.**

Under Code Ala. 1886, § 2765, providing that interest shall not render parties incompetent as witnesses in civil suits, "except that neither party shall testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit or proceeding," etc., the proponent of a will, who is the sole devisee under the will, is a competent witness as to the fact of its execution.

**6. SAME—EXECUTION IN DUPLICATE—LOSS OF COPY—PRESUMPTION.**

Where, at the probating of a will, it appeared that the testator executed his will in duplicate, keeping one copy, and delivering the other to his wife, it not appearing what became of the latter copy, the inference is that the will sought to be probated was the one retained by the testator; and no presumption of a revocation, based upon the fact that he might have destroyed the copy retained, can therefore arise.

**7. SAME—VALIDITY—CAPRICE OF TESTATOR.**

A will, in other respects valid, is not rendered invalid by any mere partiality, caprice, or unequal distribution of property by the testator, or by his failure to provide for the payment of his debts.

**8. EVIDENCE—PROOF OF HANDWRITING—SUBMITTING OTHER PAPERS PURPORTING TO BE GENUINE.**

For the purpose of determining the genuineness of the signature of a deceased witness of a will, it is improper to exhibit to a witness papers not in evidence in the case, purporting to be signed by the deceased witness, for comparison with the attesting signature in the will.<sup>1</sup>

Appeal from probate court, Russell county; E. HERNDON GLENN, Judge.

The appellant, Mrs. Ida C. Snider, contested the probate of an instrument purporting to be the last will and testament of her brother, H. L. Tillman, deceased. The said instrument was offered for probate by the appellee, Mrs. Rosa F. Burks, who was the widow of the said Tillman. There were three grounds of contestation: (1) That the said Tillman was of unsound mind, and therefore incapable of making a valid will; (2) that undue influence was brought to bear upon and exercised over said Tillman in making and executing the said instrument; (3) that the said paper was not properly and duly executed by said Tillman. At the request of the proponent, Mrs. Burks, the court gave the three following charges, to the giving of which the contestant separately excepted: (1) "That although the law requires a will to be exe-

<sup>1</sup> As to the admissibility in evidence of writings for the purpose of comparison with a disputed handwriting, see *People v. Parker*, (Mich.) 84 N. W. Rep. 720, and note; *State v. Calkins*, (Iowa,) Id. 777; *Rowell v. Fuller's Estate*, (Vt.) 10 Atl. Rep. 853; *State v. Koontz*, (W. Va.) 5 S. E. Rep. 338; *Diets v. Bank*, (Mich.) 87 N. W. Rep. 420; *State v. Thompson*, (Me.) 15 Atl. Rep. 602.

cut in the presence of at least two witnesses, who must subscribe the same in the presence of the testator, yet it by no means follows that the testimony of these witnesses is the only evidence by which the will can be established. The jury may look to all the circumstances as shown by the evidence; and if they believe from the circumstances that the will was executed, signed by the testator, and subscribed by two witnesses, then they may find that the will was duly executed." (2) "If the jury believe from the evidence that H. L. Tillman, at the time of the execution of the will propounded, if he did execute it, was not influenced by fraud, or the exercise of any undue influence, and said testator was of sound mind and memory at the time of said execution, then no partiality, pride, caprice, or unequal distribution of his property, or his failure to provide payment of his debts, if there be such, could be regarded by them in any manner to set aside or vitiate said instrument." (3) "It is necessary to the proper execution of a will in this state that it should be signed by two witnesses in the presence of the testator, but it is not necessary that further proof of that fact be made than is sufficient to satisfy the minds of the jury as to the fact; and the jury, in determining the fact as to such signing, may look at all the facts and circumstances in evidence before them, including the proof of the signatures, to determine that fact." The contestant requested the court to give each of the following charges, which the court refused to do; whereupon the said contestant duly excepted to the refusal to give each of the charges, separately: (1) "In determining whether H. L. Tillman was indebted to W. L. Tillman in the sum of a far greater amount than five hundred dollars, (\$500,) they may look to the evidence of Berry Gibson and W. L. Tillman on that point; and if said witnesses swear to said indebtedness, and there is no evidence to the contrary, then they may find that said debt existed; and, if it did exist at the date of the paper offered as a will, then it makes no difference whether it was paid afterwards or not." (2) "The jury may look at the fact in this case, that the paper is so numerously signed by H. L. Tillman, as a peculiar and unusual fact, in deciding whether or not it is genuine." (3) "If the jury find from the evidence that H. L. Tillman executed his will in duplicate, then, if he destroyed one, the inference is that he intended to revoke it; and, if it could [not] be found after his death, the presumption is that he destroyed it." The issue was found in favor of proponent, and contestant appealed; assigning the several rulings of the court on the evidence, and the giving and refusal of the several charges, as error.

*J. B. Mitchell* and *W. J. Sanford*, for appellant. *L. W. Martin*, for appellee.

**SOMERVILLE, J** The proceeding is one seeking the probate of a will purporting to be executed by one H. L. Tillman, the validity of which was contested by the appellant. The main issue is as to the genuineness of the signature of the testator.

1. Two of the three subscribing witnesses who attested the execution of the paper were shown to be dead. When this is the case, as also where such witnesses have become incompetent to testify, or are insane, or absent from the state, it is allowed to prove the paper by evidence of a secondary nature. This may be either by proving the attestation to be in the handwriting of the deceased witness, or by proving the testator's own signature by some person who is acquainted with it. *Foot v. Cobb*, 18 Ala. 585; *Cox v. Davis*, 17 Ala. 714; *Guice v. Thornton*, 76 Ala. 466. The court properly permitted the signatures of the attesting witnesses, Glenn and Wicker, both of whom were deceased, to be proved by persons who knew their handwriting.

2. The court also properly refused to allow the contestant to exhibit to a witness the signatures of other papers, purporting to have been made by the subscribing witness Wicker, not in evidence in the case, for the purpose of

comparison with the alleged signature of Wicker to the will, and for the purpose of determining the genuineness of the latter. *Kirksey v. Kirksey*, 41 Ala. 626; *State v. Givens*, 5 Ala. 747; 1 Greenl. Ev. § 581; 1 Whart. Ev. § 712.

3. The question is raised in this case as to whether, in a proceeding of this kind, the proponent of a will, who is a party and interested as a legatee, is a competent witness, under the statute, to prove the execution of the paper. Code 1886, § 2765; Code 1876, § 3058. The case of *Kumpe v. Coons*, 63 Ala. 448, (decided by this court in 1879,) determines this question in the affirmative, holding that a legatee or devisee under a will, who was an attesting witness to the paper, was competent to testify to its execution in any suit or proceeding in which the validity of the paper as a will may be involved. It was said that the statute put under the ban of exclusion evidence only of a particular character, viz., transactions with or statements by any deceased person whose estate is interested in the result of the suit. The controversy, which was one to determine the *status* of the estate of the decedent, and the condition in which he died, whether testate or intestate, was one between living parties, affecting only their interests, and it was observed that in no proper sense was the estate of the testator interested in the result. We are deeply sensible of the bad results that may flow from such a rule of evidence, but this is for legislative rather than judicial correction. We are disposed to adhere to the case of *Kumpe v. Coons*, for the following reasons: (1) The section of the Code of 1876 (3058) which was thus construed to authorize the admission of such witnesses as legally competent, was re-enacted as section 2765 of the Code of 1886, without change; and this was a legislative sanction of the judicial construction previously placed upon it. (2) A sufficient time has elapsed, being some nine years since the decision was promulgated, to justify us in believing that it has been acted on by the legal profession and others, and that wills have been drawn and attested under its authority, and titles by devise to some extent acquired under it, which ought not to be disturbed by its reversal, even if we doubted the soundness of the decision. (3) It is often more important that a rule of law should be fixed, even though with less of reason in it, than subject to the uncertainty of fluctuating judicial decisions. "Certainty," said Lord HARDWICKE, "is the mother of repose, and therefore the law aims at certainty." *Shedden v. Goodrich*, 8 Ves. 497; *Morton v. Railway Co.*, 79 Ala. 616. The probate court committed no error in allowing Mrs. Burks, the proponent of the will, to testify as to the fact of its execution, although she was the sole devisee under its provisions.

4. The probate court erred in many of its rulings on the evidence in this case, for which we are compelled to reverse the judgment. It had no relevant bearing upon the issue in this case, which was the simple inquiry whether the paper in controversy was executed by H. L. Tillman, the decedent, that he was a person of reticent habits in his business, or that he owed debts to a larger amount than that stated in the alleged will. The latter fact, if true, rather tended to show that he neglected to pay or did not remember such other debts, or was not disposed to recognize them. The note and mortgage of January 15, 1880, held by the witness W. L. Tillman against the testator, should have been excluded, and also the statement as to how much money belonging to the decedent's estate had come into the witness' hands, and was claimed by the proponent; and so should the letter of May 31, 1883, written by this witness to the proponent on this subject, with all other evidence of a like kind bearing on these collateral points which was too remote to shed any light on the issues on trial.

5. The court correctly charged the jury that no mere partiality, caprice, or unequal distribution of property by the testator, or his failure to provide for the payment of his debts, could be regarded by the jury as a reason for setting aside or vitiating a will in other respects valid. The second charge

given at the instance of the proponent only asserted this proposition, in effect.

6. The third charge was correct if we construe it to assert that the measure of proof, as to the proper execution of a will, in the particulars required by the statute, need only be such as is reasonably sufficient to satisfy the minds of the jury as to such fact. The first charge was defective, in omitting as one of these requirements that the attesting witnesses should subscribe their names to the instrument in the presence of the testator. *Moore v. Spier*, 80 Ala. 130.

7. The general rule is that where the will of a testator is proved to have been in the testator's possession, and cannot afterwards be found, the *prima facie* presumption is that it was destroyed by the testator before his death, *animo revocandi*; but this presumption may be rebutted by proper legal evidence. 2 Greenl. Ev. § 688a. But, if the instrument is shown to have been out of his possession, the party asserting the fact of revocation "must show that it came again into his custody, or was actually destroyed by his direction." *Id.* § 681.

8. Where the will is executed in duplicate, as in this case, a somewhat different rule obtains. If, in such case, the testator destroys one of the duplicates, and this is the only one in his possession, an intent to revoke is to be presumed,—Mr. Greenleaf says, "is very strongly to be presumed;" but he adds: "If he was possessed of both copies, and destroys one, it is weaker; and if he alters one, and then destroys it, retaining the other entire, the presumption has been said still to hold, though more faintly; but the contrary," he adds, "has also been asserted." *Id.* § 682. We take this to be a correct enunciation of these general principles thus stated. The proponent testified that the testator executed his will in duplicate, and that he kept one copy himself, and gave the other to her. While it does not appear what she did with the one given to her, it certainly is not shown that it ever went back into the possession of the testator. There can therefore be no presumption of its revocation by him, under this state of facts. The fair inference from the evidence is that the will here sought to be probated was the one retained by the testator. As to this point, the evidence may, on another trial, possibly be made more clear, or at least less equivocal. The third charge requested by the contestant was, under this view of the case, misleading, and was properly refused.

9. The first and second charges were purely argumentative, and there was no error in the refusal of the court to give them. Charges of this character, asserting that the jury "may look to" this fact, or "may consider" that fact, or "are authorized to" infer certain formulated conclusions from the evidence, and especially from specified parts of it, have often been condemned by us as objectionable, and should never be given, although either the giving or the refusal of such instructions may not be a reversible error. They are legitimate arguments to the jury, not announcements of legal principles, proper to be in the forms of instructions by the court. The judgment is reversed, and the cause remanded.

STONE, C. J. I participated in the decision of the case of *Kumpe v. Coons*, 68 Ala. 448, and think it right.

(84 Ala. 264)

#### MIDDLETON v. WILSON et al.

(Supreme Court of Alabama. May 17, 1883.)

#### 1. TRIAL.—INSTRUCTIONS.—MISSTATEMENT OF EVIDENCE.

Where a sale of goods by an agent is consummated, except in regard to the time of credit to be allowed, that being left to the principal, and a "dating" of May 1st being asked by the purchaser, the principal refuses, and, in the ensuing correspondence, writes that he will deliver the goods upon guaranty of immediate payment,

refuses guaranty offered of future payment, and subsequently offers to accept the same, but the guarantor then refuses to continue his offer of guaranty, it is error to charge that the purchaser is entitled to recover if the principal wrote that he would deliver the goods if guaranty was obtained, and the purchaser obtained the same, as it misstates the evidence in ignoring the qualifications.

**2. APPEAL—REVIEW—HARMLESS ERROR.**

Where special pleas demurred to simply raise the question of plaintiff's ownership, and consequent right to maintain the action, and defendant rightfully has the benefit of his entire defense under the general issue, the special pleas, and the rulings thereon, are immaterial.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

Action of detainee, by Wilson & Lozano against Robert Middleton, to recover certain merchandise. Judgment for plaintiffs, from which defendant appeals.

*Oberall & Bestor*, for appellant. *G. L. & H. T. Smith*, contra.

STONE, C. J. Tefft, Weller & Co. were wholesale merchants, doing business in New York, and Sweeny was a salesman of theirs, having more than usual powers to negotiate sales, either as to a class of persons or within a certain locality. The record does not inform us as to the precise nature or extent of his powers. We infer that he was specially authorized to negotiate sales to customers, whose patronage of the house was procured through his instrumentality; and that Wilson & Lozano, retail merchants of Mobile, Ala., were of that class. It is not shown whether Sweeny was what is known as a traveling salesman or drummer, but it is fairly inferable that Wilson & Lozano had previously made purchases from the house, and that those purchases had been negotiated with Sweeny. It is also inferable, if not shown, that Sweeny had power or was in the habit of sending out drummers of his own appointment to negotiate sales of the merchandise of Tefft, Weller & Co. The testimony tends to prove, and there is no conflict, that the customary terms of wholesaling in New York were, on general merchandise, four months' credit, and, on special lines of goods, two months' credit. There was also testimony tending to show that special rates, called "dating," were sometimes granted, giving longer credit; but this was matter for special agreement, and without such agreement the general rates stated above were observed. If we correctly understand the word "dating," as disclosed in the testimony, its office and meaning are to adhere nominally to the terms of credit, two and four months, noted above, while in reality a longer credit is granted, by fixing a future agreed date from which the period of credit, two and four months, shall begin to run. There is testimony tending to show that Wentz or Allen, one of the members of the firm of Tefft, Weller & Co., had control of the matter of giving extended credit to customers,—of granting or withholding what are called "datings." The present suit was brought for the recovery of certain packages of merchandise which had been the property of Tefft, Weller & Co. The goods were in the possession of Middleton, who claimed to hold them on the title of Tefft, Weller & Co. Wilson & Lozano claimed that the title to the goods was in them, by virtue of a contract of purchase they alleged they had made. So the most important inquiry is whether such contract of sale and purchase had been agreed upon so as to pass title. The material parts of the negotiation were and are in writing, shown by letters and telegrams produced in evidence; and the question most controverted is whether the two contracting parties ever reached an agreement on the terms of credit. Wilson & Lozano wrote Sweeny, under date January 7, 1887, requesting samples to be sent them. Sweeny replied that he would send an agent, and did send Green, with samples. Wilson & Lozano and Green, about the middle of January, 1887, agreed on a bill of goods to be shipped, agreed on the prices of the several kinds of goods, aggregating something over \$3,000, but did not agree on the terms of credit. Wilson & Lozano asked for a dating of May 1st, which, as we understand it, would make the

bill for special lines of goods fall due July 1st, and the bill for the general merchandise, September 1st. Wilson & Lozano did not order the goods unconditionally, but on condition that these terms of credit would be granted them. Green did not agree to these terms, disclaimed all authority to grant such terms, and it was entered on the head of the order that these terms of credit were dependent on and subject to Sweeny's decision and approval. As we understand the record, no contract of sale had been concluded at this stage of the negotiation. There was an offer to purchase on condition that certain datings would be granted, but no agreement to grant these datings. Sweeny wrote Wilson & Lozano, January 25th, complaining of prices Green had agreed on, but saying nothing of terms of credit. Part of the goods, however, were shipped, but Sweeny insisted on raising some of the prices. Sweeny again wrote Wilson & Lozano, January 28th, as follows: "I [have] just received a letter from Green in regard to dating. Now, we are willing to give you the best dating any one gets here, but we certainly cannot entertain any such date as May. It is absurd to talk of such thing. Mr. Allen, our man, is away to-day,—our financial man. I would not have shipped your goods until everything was settled, but goods were shipped, except things we wrote you about, before I got the letter. As soon as we hear from you, the balance of the order—" (Seems to be something omitted.) To this Wilson & Lozano replied, January 31st, as follows: "Your two letters of 28th and 29th to hand, and contents noted. While we do not care to take advantage of any one, we do not care to let anybody get the advantage of us. So this time we were very careful in explaining matters to Mr. Green. If he failed to report to you the matter of dating, (which was very important that he should,) it is not our lookout, but yours and his. We are getting May 1st from everybody else we bought goods of, and we do not ask you for nothing [anything] extra. \* \* \* In regard to the other goods not shipped, if you choose to ship them at prices bought, you can. Otherwise do not." Following the foregoing, and commencing February 3d, is a telegraphic correspondence between Tefft, Weller & Co. and Wilson & Lozano, in relation to the financial condition of the latter firm. There is also a letter on same subject from T., W. & Co. to W. & L., bearing date February 3d. To this telegram there was a telegraphic reply from Pollock & Co., another mercantile firm of Mobile, dated February 4th, and saying of W. & L.: "We have always found them prompt in their payments, and sell them what goods they want." On same date, Wilson & Lozano sent telegram to Tefft, Weller & Co., containing the following: "We understand time of order to be as per duplicate left with us. Shall we receive them on these terms, or hold them subject to your order?" Tefft, Weller & Co., on February 5th, wrote Wilson & Lozano acknowledging receipt of above telegram from Pollock & Co., and also telegram from Wilson & Lozano of same date. They ask further explanation of an alleged shrinkage of W. & L.'s assets, as shown by their several reports, and continue as follows: "We should desire to have you favor us with a detailed explanation of the loss or difference; pending which we are frank to say we cannot accept the terms of your telegram, and shall hold the goods until we hear from you. Or, presuming that you have need of the goods, we shall be pleased to have them promptly delivered to you, if you can arrange with your friends to guaranty the sale, for which we are willing to pay the usual guaranty percentage; that is to say, in addition to our regular discount of two per cent. off on domestic goods, and 6 per cent. off regular goods, we will allow you two per cent. extra, to-wit 4 per cent. off on domestic, and 8 per cent. off on regular goods, for cash remittance New York exchange." On February 9th, Wilson & Lozano wrote or telegraphed to Tefft, Weller & Co., further explaining financial condition, and added: "If the statement is satisfactory, you can ship the goods, with the exception," etc. On February 11th, Wilson & Lozano telegraphed Tefft, Weller & Co. in these words: "As

yet we have received no reply to last telegram. We wish to know your decision in the matter. Telegraph us at once without delay. Answer." On February 12th the following telegrams were sent to Tefft, Weller & Co.; *First*, from Wilson & Lozano: "Telegraph to First National Bank the amount of your bill, and authorize agent here to collect same and release goods, so we can get them Monday morning." *Second*, from First National Bank: "We guaranty the payment, when due, of Wilson & Lozano's last purchase, to the extent of three thousand dollars, as per terms of their duplicate, if released to-day. If satisfactory, telegraph agent here to release goods at once. Answer." Tefft, Weller & Co. replied to First National Bank, same date, as follows: "We consider your guaranty abundantly good, but cannot deliver goods on terms they claim. Will allow four per cent. on cash goods, and 8 per cent. on regular goods, for cash remittance; or, upon message from you that cash has been sent, will release goods. Answer if accepted." In the afternoon of the same day, (12th,) the First National Bank repeated its telegram of the morning. On February 13th, Tefft, Weller & Co. dispatched Wilson & Lozano in these words: "Our credit man has been absent. We should prefer to have you return the goods." On February 14th, Middleton, in whose possession the goods had been detained, dispatched Tefft, Weller & Co. as follows: "Wilson & Lozano offer settlement as per your telegram. Will I deliver goods?" To which Tefft, Weller & Co. answered, same day: "Upon receipt of telegram from First National Bank that settlement remittance is made, we will deliver goods." Same day, February 14th, Tefft, Weller & Co. dispatched First National Bank: "By request of Wilson & Lozano, cash bills amount to twenty-four hundred and ninety-eight dollars (\$2,498.55) fifty-five cents, regular goods five hundred and eighty-four dollars ninety-one cents, (\$584.91.)" On February 15th, Tefft, Weller & Co. dispatched First National Bank: "Letter of guaranty in Wilson & Lozano matter received. Can deliver goods to-day on it. Answer if you wish delivery made to-day." To this the First National Bank replied, same date: "Would prefer not taking further action in the matter. Our guaranty was for one day, and expired." The foregoing expresses the substance of all that bears on the question of contract *vel non*. It should be stated that Middleton had no interest in the goods. He was the ship's resident agent in Mobile, and as such detained the goods, pursuant to an order from Tefft, Weller & Co., received before the goods arrived in port.

For reasons which we shall state further on, we found it necessary to arrange and classify the testimony in the present record before proceeding to consider the legal questions raised. We confess we did not and could not understand the facts, or apply legal principles to them, until, with great labor, we effected the classification. There are but two material questions of fact in this case that are not fully shown, and without conflict, by the letters and telegrams. The first of these questions was and is the condition on which Wilson & Lozano placed their order with Green, namely, that it was on condition that they could get a dating as of May 1st, and that condition was, by the agreement, left to the decision of Sweeny. This is testified to, in terms, by Lozano, one of the plaintiffs, and is not only not denied, but is fully confirmed, by the correspondence. There was, on this question, not a semblance of conflict in the testimony, and the correspondence treats this as a postulate or conceded fact. The second question was the stoppage of the goods in the hands of Middleton, the ship's agent, because the May dating had not been conceded, and that, on this account, the terms of credit had not been agreed on. In every instance where this subject is in any way referred to in the correspondence, it is treated precisely on this basis. Wilson & Lozano all the while claimed that they should have the goods on the May dating, and they did not pretend they had placed the order on any other terms. The guaranty offered by the bank was expressly placed on this condition, and it was refused expressly on this account. On these questions, as the testimony appears in

the record before us, the trial court might have charged directly without hypothesis, as upon written or documentary evidence. 1 Brick. Dig. p. 336, § 7; *Tyres v. Lyon*, 67 Ala. 1; 3 Brick. Dig. p. 109, § 44. On all the other questions bearing on the right of plaintiffs to recover, the testimony was written, and it was the duty of the court to interpret it. 1 Brick. Dig. p. 336, § 9; 3 Brick. Dig. p. 107, § 4. As we have said, we did not and could not understand the facts of this case until we classified them, nor could we feel safe in attempting to declare the legal principles involved without understanding the facts. The negotiations between Green and Wilson & Lozano did not amount to a finished contract of sale. One term, the dating, was not agreed on. That was to be determined by Sweeny. Till he determined to grant the term of credit, which was made a condition in Wilson & Lozano's offer to purchase, there was and could be no contract. Their minds had not come together on the one important element, the length of credit. Neither Sweeny nor Tefft, Weller & Co. ever agreed to the dating proposed by Wilson & Lozano, but repudiated it as soon as it was brought to their notice. Wilson & Lozano's telegram of February 4th proves that they recognized the question of dating as still open and undetermined. It is contended for appellees that, in subsequent negotiations, Tefft, Weller & Co. waived their objection to the enlargement of the terms of credit, and consented to the sale with a dating of May 1st. All the evidence bearing on this question is furnished in the correspondence copied above. It may be summarized as follows: On February 12th the First National Bank telegraphed to Tefft, Weller & Co. that it would guaranty Wilson & Lozano's purchase to the extent of \$3,000, when due. "When due" was intended and understood to mean that their guaranty was of the purchase, with the "dating" of May 1st. To this, Tefft, Weller & Co. promptly replied that they could not deliver the goods on the terms claimed. In the same telegram they submitted a proposition to sell them the goods for cash at an extra discount of 2 per cent. To this telegram we are not informed that any reply was made. On February 14th, Tefft, Weller & Co. telegraphed to Middleton substantially what they had previously telegraphed to the First National Bank. The last communication from Tefft, Weller & Co. was their telegram to the bank of February 15th. As we understand that telegram, they therein proposed to waive their objection to Green's conditional agreement to consummate the sale with a dating of May 1st if the bank would guaranty as proposed on February 12th. This is the first time they proposed to yield the matter of credit, and deliver the goods on the May dating; but the offer is put on the condition that the bank will guaranty payment. This the bank promptly declined to do; saying, "Our guaranty was for one day, and expired."

At the request of the plaintiffs, the court gave the following charge: "If the jury believe from the evidence that on the 4th day of February, 1887, Wilson & Lozano telegraphed Tefft, Weller & Co. that they understood terms of order to be as per duplicate with them, and asked if they should receive the goods on the terms or hold them subject to Tefft, Weller & Co., and that Tefft, Weller & Co. wrote in reply that they would accept the terms of their telegram, and hold the goods until they heard from Wilson & Lozano; or, presuming that they had need of the goods, they (Tefft, Weller & Co.) would be pleased to have them promptly delivered if they (Wilson & Lozano) could arrange with friends to guaranty the sale, and that after that, and before Tefft, Weller & Co. wrote any further letter or telegram to Wilson & Lozano, they (Wilson & Lozano) got the First National Bank to guaranty their bill to Tefft, Weller & Co.,—then Wilson & Lozano were entitled to have the goods delivered to them at that time." Defendant excepted to the giving of this charge. This charge is clearly erroneous, in leaving out a very important qualifying part of the letter of Tefft, Weller & Co. of February 5th. They did not make the naked offer to deliver the goods, "if they (Wilson & Lozano) could arrange with friends to guaranty the sale." Their exact language was as fol-

lows: "Presuming that you have need of the goods, we shall be pleased to have them promptly delivered to you, if you can arrange with your friends to guaranty the sale, for which we are willing to pay the usual guaranty percentage; that is to say, in addition to our regular discount of two per cent. off on domestic goods, and six per cent. off on regular goods, we will allow you two per cent. extra, to-wit, four per cent. off on domestic and eight per cent. off on regular goods, for cash remittance, New York exchange." Now, while the first clause, if it stood alone, would indicate that a guaranty of payment was all that Tefft, Weller & Co. sought, taking the whole sentence together, it shows what they meant by the word "guaranty." It was a guaranty that the purchase price should be presently remitted to them in New York exchange,—awkwardly expressed, we admit, but still so connected in its different members that we can give but one interpretation to the sentence. The second branch, commencing with the words, "that is to say," is but the writer's definition of what he obscurely expressed in the first. The offer was to allow 2 per cent. for the guaranty. They had all the while repudiated the May dating, and it is very improbable that they intended, not only to surrender that objection, but to submit to an additional loss of 2 per cent. to obtain guarantied performance of a contract they had never ceased to repudiate. And Tefft, Weller & Co.'s prompt refusal of the bank's offer to guaranty payment "when due, \* \* \* as per terms of their duplicate," is persuasive to show the sense in which they intended their offer to be understood. A charge which misstates the evidence, or ignores material, qualifying testimony, is ground of reversal. 1 Brick. Dig. p. 344, § 135; *Adams v. Thornton*, 78 Ala. 489.

If plaintiffs are entitled to recover, there is no testimony authorizing a recovery of any goods which had not been shipped and received by Middleton. Any goods withheld in New York must be excluded from the estimate, and no recovery had for them. This, for the obvious reason, if no other, that never having had possession, it is impossible that Middleton can have retained them. 3 Brick. Dig. p. 307 §§ 15, 16. The value should be fixed on the goods as they were,—in packages; in other words, the wholesale price in Mobile, less the freight. And while the jury may find the highest market value, as a means of coercing delivery, they cannot go behind the date of the detention,—the time when the right of action accrued. The jury may, not must, fix the highest value between the accrual of the right to sue and the trial. *Id.* p. 309, § 45.

We consider it unnecessary to pass on the rulings on demurrer. The special pleas simply raise the question of plaintiffs' ownership of the property sued for, and consequently of their right to maintain the action. Middleton held possession under Tefft, Weller & Co., and could and did defend on the strength of their claim. Having rightfully had the benefit of his and their entire defense under the general issue, the special pleas, and the rulings on them, were immaterial. *Mitcham v. Moore*, 78 Ala. 542.

There are many exceptions to the rulings on the admissibility of testimony, not necessary to be particularized. We are not aware that any errors were committed in this regard. Witnesses cannot, as a rule, testify to matters as facts whose very nature shows they could not know them as facts. Motives, intentions, want of knowledge or notice, are personal in their nature, about which one person cannot speak for another. We consider it unnecessary to notice any other questions raised by the record.

We regret that we feel called on to notice the form in which the record comes before us in this case. It will have been observed that most of the important testimony is documentary, and constitutes quite a lengthy correspondence. If chronology or narrative connection of subjects had been respected, we would have encountered no difficulty in mastering the facts. So far from that being so, we find the communications, some 80 in number, scattered pell-

meel through 66 pages of folio manuscript. In addition to this, the entire testimony is set out, when, as to a large part of it, its tendencies were alone necessary to a proper understanding of the questions sought to be presented. This has devolved great and unnecessary labor, which should not be required of us. And this record by no means stands alone in the objectional features pointed out. We have heretofore had occasion to make the same complaint we are now urging. *Harris v. Powers*, 57 Ala. 189; 8 Brick. Dig. p. 78, § 5. In framing bills of exceptions, if there are rulings on the admissibility of evidence which it is desired to have reviewed, in many if not most cases the question and answer sufficiently explain themselves, and raise the question without further explanation. If, however, explanation is necessary to show the pertinency or bearing of the question or answer objected to, a brief statement should be embodied, showing the connection and pertinency. We propose to say nothing of the principles which govern when charges are given. To attempt even a brief exposition of the rules relating to that question would swell this opinion beyond reasonable bounds. A single principle applicable to the rule as to charges refused, should be here stated, because of its frequent presentation. To raise such question it must be affirmatively shown that there was testimony tending to prove the facts on which the charge is based. All the record need show, however, is that there was testimony tending to prove the facts hypothesized or implied in the charge. It is never necessary to set out the testimony *in extenso*, except in cases where it is our duty to review the finding on the facts; and it is always improper to incumber the record with either testimony or rulings to which no exception is reserved, unless such testimony is necessary to a proper understanding of some question reserved. There can be no excuse for going beyond the rule stated above in the draft of a bill of exceptions; and when so drawn, fairly presenting the questions reserved, the trial judge cannot and will not refuse to sign the bill. Should he do so "he is guilty of a high misdemeanor in office," and, on proper proceedings, the bill can be established in this court. Code 1886, § 2762. The large increase of costs of appeal caused by the undue dimensions of bills of exceptions is an oppression to the party who fails in this court. In this case the injury falls on the appellees, who, at least *prima facie*, are not responsible for it. The clerk had no discretion, but must make a full and correct transcript of the record. He must not suffer in the loss of his costs. On an appeal from a law court, we have no power to apportion the costs. If the appellees have any remedy, it must be against the appellants for the needless expense unnecessarily imposed upon them. We simply throw out the suggestion, without intending to decide the legal question involved. We trust, however, that trial judges will see to it that bills of exceptions be not incumbered with needless matter, or with unnecessary details, which only tend to confuse. Reversed and remanded.

(84 Ala. 353)

**MOORER v. MOORER et al.**

(Supreme Court of Alabama. May 21, 1888.)

**PARTITION—WHEN LIES—MONEY DECREE.**

A bill in equity by the co-assignees of a solid money decree to obtain separate decrees for amounts proportionate to their respective shares will not lie.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Judge.

Fannie C. Moorer et al., complainants, filed a bill against Nelson J. Moorer, defendant, for a partition of a money decree against him. Decree for complainants, and defendant appeals.

Richardson & Steiner, for appellant. Whitehead & Norris, for appellees.

CLOFTON, J. The bill, which is filed by appellees, seeks to have partition of a money decree, which was rendered by the chancery court of Lowndes

county in favor of Jehu A. Tyson, as administrator *de bonis non* of the estate of James C. Johnson against the appellant, who was his predecessor in the administration. On the final settlement of the estate, Tyson transferred and assigned in writing the decree to the complainant Fannie C. Moorer and her sister, Elizabeth Alston, who were the only distributees of the estate. Elizabeth died, leaving the complainants her only distributees. The equity of the bill is sought to be maintained on the ground that a bill in equity will lie to obtain partition of personal property.

It may be admitted that the complainants are co-owners of the decree, each having equal right to enforce its collection by any of the modes authorized by law, and that they will become tenants in common of the proceeds when collected. But a judgment or decree is in the nature of a contract, and is an indivisible entirety. When assigned, suit thereon can only be brought in the name of the party in whose favor it is rendered. If assigned to two or more persons it cannot be partitioned so as to give each assignee a distinct cause of action for his part thereof. It may as well be said that a promissory note can be parceled out so as to render the maker liable to separate actions by the different assignees. On the allegations of the bill it is a suit in equity on a solid money decree, only seeking to obtain separate decrees for amounts proportionate to the respective shares of the co-assignees. We know no principle on which such suit can be maintained. From the nature of a judgment or decree it cannot be partitioned so as to allot distinct shares thereof to separate and several transferees, and is not subject to any proceeding for compulsory partition. The decree of the chancellor must be reversed, and a decree will be here rendered dismissing the bill.

(24 Ala. 108)

SAVAGE v. RUSSELL &amp; Co.

(Supreme Court of Alabama. May 21, 1888.)

**1. CORPORATIONS—ACTIONS BY FOREIGN CORPORATIONS—PROOF OF CORPORATE EXISTENCE.**

In a suit by a foreign corporation it must show not only the papers and proceedings of incorporation, but the statute of the state where it was incorporated, authorizing such incorporation.

**2. DETINUE—FOR ARTICLES HAVING SEPARATE VALUE—JUDGMENT.**

Where, in detinue, the evidence shows that the articles sought to be recovered have a separate, ascertainable value, a verdict and judgment are erroneous which do not ascertain their separate value.

**3. SALE—POSSESSION OF PROPERTY—ESTOPPEL TO DENY.**

Where defendant in an action of detinue has filed a forthcoming bond, and has notified plaintiffs before the suit that if they wanted the property they would have to get it "out of his possession," he is estopped from setting up the defense that it was not in his possession at the beginning of the suit.

Appeal from circuit court, Calhoun county; LEROY F. Box, Judge.

This was a suit by the appellee, Russell & Co., a corporation under the laws of the state of Ohio, against James H. Savage for the recovery of a saw-mill and steam-engine. The plaintiff undertook to prove that it was a corporation under the laws of the state of Ohio, and for that purpose introduced in evidence certified papers and proceedings of incorporation; but did not introduce any evidence of the laws of Ohio authorizing such proceedings, and declaring that they would constitute it a corporate body. All other matters are sufficiently stated in the opinion. Judgment for plaintiff, and defendant appeals.

*Brothers, Willett & Willett and Walden & Son*, for appellant. *Caldwell, Humes & Caldwell and H. L. Stevenson*, for appellee.

STONE, C. J. The present suit is prosecuted in the name of Russell & Co., claiming to be a corporation under the laws of Ohio. Corporate power is not a natural right. It is a franchise to be conferred by the law-making power.

It may be granted by direct legislative enactment, or it may be done under a general legislative system authorizing it. If the former course be pursued, the law not only defines the powers conferred, but it creates the corporation. Under that system the legislature itself does every act necessary to the creation of the artificial being, except that the incorporators must provide the capital stock, and organize by the election of officers. In modern times corporations have greatly increased, alike in their numbers, and in the objects to be accomplished by them. The tax on legislative bodies created by this increased demand for chartered privileges, and a desire to prescribe certain cardinal rules for the government of corporations organized for private emolument, have caused many of the states to establish, by their constitutions and by general laws, a method for obtaining private charters, and of compelling applicants for them to conform to that method. And these systems or methods are different in the different states. Hence, what may be termed the charter, or act of incorporation, obtained under a general law, is, if considered alone, very incomplete. It can neither be fully understood nor interpreted, without the statute which authorized it. Now, while it is clear that a foreign corporation, as a rule, may maintain actions in our courts, before they can recover they must prove their corporate capacity, unless defendant, by his contract or pleadings, has estopped himself from denying it. *McCreary v. State*, 73 Ala. 480; *Bank v. Williams*, 5 Wend. 478; *Bank v. North*, 4 Johns. Ch. 370; Ang. & A. Corp. § 682 *et seq.* The proof of incorporation in this case was wholly insufficient in the absence of the Ohio statute authorizing it. 1 Greenl. Ev. § 486 *et seq.*

The present suit was for the recovery of a saw-mill and steam-engine. The proof fixed a separate valuation on each, thus showing that they were separate things, and had ascertainable, separate values. The verdict and judgment are each imperfect and erroneous in not ascertaining the separate values. *Jones v. Pullen*, 66 Ala. 306; *Townsend v. Brooks*, 76 Ala. 308; *Jones v. Anderson*, Id. 427; *Same v. Same*, 82 Ala. 302, 2 South. Rep. 911; *Tatt v. Murphy*, 80 Ala. 440, 2 South. Rep. 317.

Under the testimony found in this record there can be no question that the property sued for belonged to Russell & Co. That corporation made an agreement to sell the engine and saw-mill to Lumpkin & White. The purchasers, Lumpkin & White, had the trade been consummated, would have acquired both the right and the possession from Russell & Co. Savage and his associates had had possession of the engine and mill, and had operated them, under an older agreement of purchase from Russell & Co., but which had been rescinded, or declared inoperative, thus leaving the title in Russell & Co. The engine and mill remained on the site where Savage and his associates had operated them. The sale to Lumpkin & White was defeated by a letter written by Savage to Lumpkin. In that letter Savage claimed the engine and mill as his property, described the lands on which he said they were situated, and notified Lumpkin not to go upon the lands, "nor to touch the saw-mill nor engine thereon," or he would be dealt with as a trespasser. He further claimed in said letter that the property was in his possession; that he had so notified Russell & Co., and had further notified them that if they set up any claim to the mill and engine they would have to bring suit to get it "out of his possession." This statutory detinue was then instituted by Russell & Co., the property seized by the sheriff, and Savage gave bond, with sureties, to have the property forthcoming to abide the result of the suit, if he (Savage) was cast in the action. Still he attempted to defend this suit on the ground that he (Savage) had not the possession of the mill and engine when the suit was instituted. The circuit court did not err in holding that he had estopped himself from setting up that defense. *Gamble v. Gamble*, 11 Ala. 966. There was no error in giving or refusing charges. Reversed and remanded.

(34 Ala. 36)

MOSES v. KATZENBERGER *et al.*

(Supreme Court of Alabama. May 31, 1888.)

1. **ASSUMPTIT—INSTRUCTIONS—FALSE REPRESENTATIONS—PARTIAL DEFENSE.**  
In *assumptit* for the price of a horse, buggy, and wheels, where the defense is false and fraudulent representations, on the sale of the horse and buggy, but not on the sale of the wheels, instructions predicated on such representations affirming defendant's right to a general verdict, and thus ignoring his liability for such wheels, are erroneous.
2. **SAME—INSTRUCTIONS—FALSE REPRESENTATIONS—EXPRESSIONS OF OPINION.**  
In *assumptit* for the value of a horse, where the defense is false and fraudulent representations by plaintiffs at the time of the sale, the instructions should submit to the jury the inquiry whether the representations, in evidence, are intended and mutually understood by the parties as the expression of mere opinions, or as the affirmation of facts.
3. **SAME—INSTRUCTIONS—WHAT ARE FRAUDULENT REPRESENTATIONS.**  
In *assumptit* for the price of a horse, where the defense is the false and fraudulent representations of plaintiffs at time of sale, an instruction that no representation can amount to a fraud which is not relied upon by defendant, is correct.
4. **SAME—INSTRUCTIONS—FRAUD—SUPPRESSION OF FACTS.**  
In *assumptit* for the price of a horse, where the defense is the false and fraudulent representations of plaintiffs as to such horse, at the time of the sale, an instruction assuming that the mere suppression of a fact, whether intentional or not, is fraudulent, and omitting the inquiry, whether the means of information as to such fact, was not equally open to both parties, is erroneous.<sup>1</sup>
5. **SAME—EVIDENCE—RES GESTÆ.**  
In *assumptit* for the value of a horse, affidavits inclosed in letters written by plaintiffs to defendant concerning such sale, and referred to in defendant's testimony, are admissible in evidence as a part of the *res gestæ*.
6. **FRAUD—INSTRUCTIONS—BURDEN OF PROOF.**  
An instruction that the *onus* of proving fraud, by a preponderance of the evidence, in civil cases, is on defendant, relying on such fraud as a defense, is correct.

Appeal from circuit court, Colbert county; H. C. SPEAKE, Judge.

This suit was brought by the appellees S. Katzenberger & Sons against A. H. Moses, the appellant, and sought the collection of the money for the purchase price of a horse, buggy, and wheels sold by the plaintiffs to the defendant. The defendant, by his various pleas, set up false and fraudulent representations made by the plaintiffs as to the age and soundness of the horse; the return in a reasonable time of the horse; his refusal to receive the buggy and wheels; and the entirety of the contract. The general nature of the evidence, and the objections thereto, and the merits and demerits respectively of the charges given and refused, appear in the opinion. Charge 6, given by the court, and referred to in the opinion, is as follows: (6) "If Katzenberger, at the time of the sale of the horse, stated to Moses that the horse was only seven years old, and made the statement as a matter of opinion, this constitutes no warranty on the part of Katzenberger, and no fraud that would vitiate the contract."

*Emmett O'Neal and Wats & Son*, for appellant. *J. B. Moore and James Jackson*, contra.

SOMERVILLE, J. 1. The affidavits, to which objection was taken by appellant, were admissible as a part of the correspondence between the parties to the suit. They were inclosed in letters written by the plaintiffs to defendant, and their contents were referred to by defendant in the rendition of his testimony on the trial. They were admissible on the same principle that a conversation between the parties would have been, which embodied the same

<sup>1</sup>On the general subject of fraud and false representations, see *Grindrod v. Wolf*, (Kan.) 16 Pac. Rep. 691, and note; *Whitworth v. Thomas*, (Ala.) 8 South. Rep. 781, and note; *Holcomb v. Noble*, (Mich.) 37 N. W. Rep. 497, and note; *Henkel v. Trubee*, (Conn.) 11 Atl. Rep. 723; *Morgan v. Dinges*, (Neb.) 38 N. W. Rep. 544; *Anderson v. Baine*, (N. C.) 5 S. E. Rep. 183; *Barns v. Mahannah*, (Kan.) 17 Pac. Rep. 819; *Salm v. Israel*, (Iowa.) 37 N. W. Rep. 337.

averments, not as evidence of the facts stated in the affidavits, which could only be proved by the witnesses themselves, but as a part of the *res gestae*, which in this case is the correspondence itself.

2. There is one phase of the evidence in this case which tends to show that, irrespective of the questions raised as to the alleged fraudulent representations made by the plaintiffs regarding the horse and vehicle purchased by defendant, the defendant was indebted to the plaintiffs in the sum of \$15, for which they were entitled to recover. This was claimed to be due for the set of buggy wheels purchased and shipped at the request of defendant, and for this item he nowhere denies his liability except upon the theory that the purchase of the horse, vehicle, and wheels was but one single transaction. It is not claimed that there was any fraud in the sale of the wheels if it was a separate and distinct purchase as alleged by the plaintiffs. The following charges requested by the defendant, viz., charges number 1, 6, and 9, entirely ignore this liability by affirming the defendant's right to a general verdict in his favor upon the facts hypothesized in these respective charges. For this reason, apart from other considerations, these charges were properly refused.

3. The present action is one for deceit, founded on alleged false representations made by the plaintiffs to the defendant as to the age and soundness of a horse sold by the former to the latter. The plaintiffs' counsel, upon the trial, expressly abandoned in his argument at the bar all right to recover based upon the idea of a mere warranty. This eliminated the question of warranty from the case and justified the refusal by the court of the fourth charge requested by the defendant, which related only to the subject of warranty.

4. In this case there was evidence from which the jury were authorized to infer that the representations made as to the alleged age and soundness of the animal sold may have been intended and mutually understood, either as the expression of a mere opinion on the one hand, or, on the other, as an affirmation of a fact. This was an important inquiry, and should have been submitted to the jury for their determination. The rule in these two several aspects of the case is different. The affirmation of a fact may constitute fraud, although the vendor, at the time, had no knowledge of its falsity. The expression of a mere opinion, to be fraudulent, must be shown to be knowingly false, made with the intent to deceive, and to have been accepted and relied on as true. *Brown v. Freeman*, 79 Ala. 406, and cases cited; *Tabor v. Peters*, 74 Ala. 90; *Jordan v. Pickett*, 78 Ala. 331. The second, third, seventh, and eighth charges requested by the defendant were defective in failing to submit to the jury the primary and important inquiry as to whether the representations in controversy were intended and mutually understood by the parties as the expression of mere opinions, or the affirmation of facts. The second, third, and fourth charges, given at the request of the plaintiffs, are reasonably susceptible of a construction conformable to the above views, and are free from error.

5. The fifth charge correctly announced the rule of evidence for establishing fraud in civil cases. The *onus* in such cases is on the defendant, who sets up the fact of fraud as a defense to the action, to establish it by a preponderance of the evidence, to the satisfaction of the jury. *Adams v. Thornton*, 78 Ala. 439; *Insurance Co. v. Moog*, 81 Ala. 335, 1 South. Rep. 108.

6. The tenth charge incorrectly assumed that the mere suppression of the age of the horse, or of the alleged fact of her unsoundness, would be fraudulent, whether intentional or not, and without regard to any inquiry as to whether the means of information as to such facts was not equally open to both parties, which one phase of the evidence tended to show. This charge was properly refused. *Jordan v. Pickett*, 78 Ala. 332.

7. No representation can amount to an actionable deceit or fraud which is not relied on by the party claimed to be defrauded. If he has an opportunity to make an examination of the article purchased as to quality, and does so, and

acts on his own judgment, there is no room for deceit. The first charge given at the request of the plaintiffs went no further than to establish this principle, and was correct. The sixth charge was also free from error when construed in reference to the evidence in the case.

We discover no error in the rulings of the court, and the judgment is affirmed.

(84 Ala. 363)

MURRAY v. MURRAY.

(*Supreme Court of Alabama. May 28, 1888.*)

1. DIVORCE—ALIMONY—WHEN ALLOWED AS INDEPENDENT RELIEF.

In Alabama alimony may be decreed on a bill not seeking a divorce, but praying alimony alone.

2. SAME—DECREE FOR ALIMONY—HOW ENFORCED.

In carrying into effect a decree for the temporary maintenance of the wife, where the separation is caused by the husband's fault, the court of chancery may attach the husband's person, and failing in this may then place his property in the hands of a trustee or receiver, and out of the income thereof raise the alimony; but it has no power to devert the husband of the fee simple title to his property, nor to compel him to labor and earn an income out of which to decree such maintenance.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge. Bill in chancery by Catherine Murray against John Murray praying alimony. Decree for plaintiff. Defendant appeals.

*Pillans, Torrey & Hanau*, for appellant. *G. L. & H. T. Smith, contra.*

STONE, O. J. The present bill is by the wife against the husband, and prays for alimony, but does not seek a divorce. Many, probably a majority of the adjudged cases and elementary books, hold that the relief here prayed cannot be granted, except as an incident to divorce proceedings instituted. This court, obeying an instinct of humanity, and following the lead of several adjudged cases, declared a different doctrine nearly 40 years ago, and has steadfastly maintained it. *Glover v. Glover*, 16 Ala. 440; *Hinds v. Hinds*, 80 Ala. 225. The case last cited refers to most of the authorities supporting the doctrine. We need not repeat them here. The case made by the bill before us presents a case of harshness, cruelty, and almost unparalleled brutality on the part of the husband, alike to his wife and to his children. And this most unnatural conduct is alleged to have been kept up, almost without intermission, for a series of years; not in paroxysms, but a frequent, if not an every-day occurrence. And yet, unnatural and inhuman as his conduct is alleged to have been, he not only did not deny the charges, though personally served with summons, but entirely failed to answer the bill. And he neither introduced testimony, nor cross-examined complainant's witnesses, in reference to these charges, so damaging to his reputation. The proof fully sustains the charges, made, and presents, in strong light, the claims of the suffering wife to all the protection and relief the chancery court can give her. But we must not lose sight of the nature and object of the proceedings before us. It is not an application for a severance of the nuptial bonds. That can not be granted under the present bill. They are still to remain husband and wife, with the rights and disabilities attaching to, and consequent on, that relation. And, improbable as it may appear, time may bring calmer and better counsels, and reunite the family. At all events, we must deal with the case on the postulate that such consummation is possible. We have statutes which provide for alimony, temporary and permanent, but they make no provision for cases in which no divorce is sought. Code 1886, § 2831 *et seq.* They do not provide for such a case as this, except possibly in the analogies they furnish. Treating these parties, then, as husband and wife, and having no ground for anticipating a dissolution of that relation so long as they both shall live, we feel that we have no power to take the title of property of one and vest it in the

other. Nor should we make or sanction any order which may result in a transfer of title from one to the other. *Bacon v. Bacon*, 43 Wis. 197; *Quisenberry v. Quisenberry*, 1 Duv. 197; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Adams v. Adams*, 100 Mass. 365; *Barber v. Barber*, 1 Chand. 280; *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Amer. Dec. 781; *Methvin v. Methvin*, 60 Amer. Dec. note, 668, 669. The only duty owed from the husband to the wife, in the case before us, which we have power to enforce, or aid in enforcing, is that of maintenance. And, in accomplishing this, we feel authorized to deal only with his income. We hold we cannot compel him to labor and earn an income, although some authorities assert that doctrine, (60 Amer. Dec. 680, in note to *Methvin v. Methvin*;) nor should we permanently divest him of the use of any property. We should, if possible, so deal with him, as to cause his interest and duty to point to the same end,—the maintenance, protection, comfort, and happiness of his family. The duty of the husband to provide maintenance for his wife is much more binding than mere contractual obligation. And it is not only a duty to her, but he owes it to the public, lest she become a charge upon it. And the measure of this duty is graded by his means and position in society; but the extent of its obligation—the style of living—is not a matter of judicial cognizance. Maintenance, not beyond the husband's means, is all the law can enforce. We have said this duty and obligation are not merely contractual. Their disregard and breach partake largely of the nature of a tort. The chancery court may and does enforce their observance by attachment of the person of the husband, and this is not imprisonment for debt, within the prohibition of our constitution. *Lyon v. Lyon*, 21 Conn. 185; *Ex parte Hardy*, 68 Ala. 320; *Chase v. Ingalls*, 97 Mass. 524; *Logan v. Logan*, 2 B. Mon. 142; *Wightman v. Wightman*, 45 Ill. 167; *Grimm v. Grimm*, 1 E. D. Smith, 190. The remedial instrumentalities pointed out above, it is believed, will generally be found sufficient to secure to the wife such rights as the law can enforce. Should they fail, can the court take any further step? We hold it can. If the husband disobey the order of the court, and refuse to provide maintenance for his wife driven from his home, and if attachment of his person fails to obtain compliance with the court's order, there is no other remedial agency, save through the husband's property. If necessary, it may be placed in the hands of a receiver or trustee in order that the maintenance decreed to the wife, or some ascertained portion of it, may be raised from the income of the property. *Lovett v. Lovett*, 11 Ala. 763; *Quisenberry v. Quisenberry*, 1 Duv. 197. The foregoing measures may seem harsh, but it is believed that nothing less than we have declared can be made effective. It is believed further that by forcing the interest and duty of the offending husband to run in the same channel, the chances of reformation and reconciliation will be promoted. Maintenance in a case like the present should not be fixed or permanent. It should be so far left open as that changes or modifications may be made as circumstances may render proper. Of course the maintenance, as such, ceases when the marriage is dissolved by death or otherwise. Nor should the property be so tied up as that no change in the investment can be allowed. The property should not be suffered to remain out of repair. All these questions should be kept within the control of the chancellor, so that a change of investment or repairs may be ordered, when deemed necessary or beneficial, if desired by the parties interested. We confine the rules declared above to cases of separation caused by the fault of the husband. The decree of the chancellor of June 18, 1887, is reversed so far as it orders the sale of real estate, and of the schooner. And the decrees of December 2 and 9, 1887, are reversed. Reversed and remanded.

(20 LA. ANN. 375)

HEIRS OF LEONARD v. CITY OF BATON ROUGE.

(*Supreme Court of Louisiana.* May 21, 1886.)

1. **RIPARIAN RIGHTS—ALLUVION—RIGHT OF RIPARIAN OWNER.**  
In order that recovery be had under Rev. St. § 818, the following conditions must concur, viz: *First*, the evidence must show that the plaintiff is a riparian proprietor of the property in dispute; *second*, that there has formed an accretion or *batture* in front of same, more than is necessary for public use; *third*, that defendant withholds the accretion or *batture*.
2. **SAME—BATTURE—WHAT IS.**  
*Batture* is an elevation of the bed of a river, under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface.
3. **SAME.**  
The term "*batture*" is applied, principally, to certain portions of the bed of the Mississippi river which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.
4. **SAME—SALE OF LAND ABUTTING ON RIVER—RIGHT TO THE BANKS.**  
The banks of a river are not sold; they pass as an accessory of the contiguous land when sold, and the property of the bank belongs to the adjacent proprietor.
5. **SAME.**  
When the sovereign grants land contiguous to the river without mentioning the bank, it passes as an accessory, and it must do so by the deeds of private citizens.  
**SAME—BATTURE—RIGHT OF CITIES TO, AS RIPARIAN OWNERS.**  
Under the laws of France and Spain, *batture* did not belong to the cities and towns as riparian owners, in the sense of actual and indefeasible ownership, but solely for the purposes of administration.
7. **SAME.**  
The possession of the *locus in quo* by a city simply for administration, and not inconsistent with the ownership of the riparian proprietor, and destined in its nature to terminate upon the happening of a certain contingency, cannot be pleaded against the latter as a basis for prescription.
8. **SAME.**  
A city or town is not authorized to construct permanent edifices upon the *batture*, to the detriment of the riparian proprietor, or to the injury or inconvenience of the public; but it may construct those which may be of public utility and advantage.
9. **SAME—LEASE OF BATTURE BY CITY.**  
*Held*, that the use of the property as a landing and wharf for the reception of coal-boats and coal is a public use, the public character of which is not destroyed by the fact that it is temporarily farmed out to particular parties.
10. **SAME—LEASE OF BATTURE BY CITY—RIGHT OF PROPRIETOR TO RECOVER REVENUES.**  
*Held*, that the original proprietors are not entitled to recover the revenues paid by such parties as a consideration for the privileges, because such revenues result from the exercise of the public easement itself, and not from use independent thereof.
11. **DEDICATION—ESTOPPEL TO DENY—SUBSEQUENT ACQUISITION OF INDIVIDUAL RIGHTS.**  
Land, being set apart for public use, and enjoyed as such, and private and individual rights being acquired with reference thereto, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from denying the dedication.
12. **SAME.**  
The validity of dedication to public use affirmed.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Baton Rouge; J. W. BURGESS, Judge.

Plaintiffs, heirs of Gilbert Leonard, alleging that their ancestor purchased certain tracts of land in 1810, and laid out the same into town lots, institute this action against the city of Baton Rouge for the recovery of said land. They appeal from a judgment rejecting their demand.

*James Wilkinson, C. D. Favrot, and K. N. Cross*, for appellants. *T. Jones Cross and Favrot & Lamon*, for appellee.

**WATKINS, J.** Plaintiffs, alleging themselves to be the heirs of Gilbert Leonard, instituted this suit for the recovery of a tract of land purchased by their ancestor, in 1810, of Celestine de St. Maxent, and which he caused to be laid

off and divided into town lots; and averred that same constituted one of the environs of the city of Baton Rouge, and is designated upon the map of the city as Leonardtown, and which extends along the Mississippi river, between the terminal points of Convention and North Boulevard streets, in that city. They charge that Leonardtown was laid off to Front street, but the control and administration of the property on the river side of said Front street has been assumed and retained, on the ground that it was necessary for public use; and that for many years a large strip of *batture*, between the river landing and North Boulevard and Front streets, has not been required for any public use, but, on the contrary, the defendant has continuously, for a period of five years, rented said property to private parties, and has been deriving a revenue therefrom. They claim \$6,000 accrued revenues, and \$1,000 per annum accruing revenues. They join the lessees as defendants, and ask judgment against them *in solido*. There is in the records an exhibit from the official map of the city, showing the extent of *batture* and location of the Louisville, New Orleans & Texas Railroad west of square No. 1, of that part of the city of Baton Rouge known as "Leonardtown," certified by the parish surveyor. The track of this railroad traverses the vacant space between square No. 1 and the water's edge, denominated by the plaintiffs as "*batture*," in a somewhat diagonal direction; so that at the point of its intersection of North Boulevard street it is 134 feet from the latter and 50 feet from the former; while at the point of its intersection with Convention street it is only 100 feet from the water's edge and 80 feet from the square. The vacant space thus traversed by the railroad is on the map denominated "Front Street." It is this property that plaintiffs claim to be exempt from public use. This suit appears to have been brought under the provisions of the Revised Statutes of 1870, § 318, and which reads as follows, viz.: "Whenever the riparian owner of any property in the incorporated towns or cities of this state is entitled to the right of accretion, and *batture* has been formed in front of his land more than is necessary for public use, which the corporation withholds from him, he shall have the right to institute suit against the corporation for so much of the *batture* as may not be necessary for public use; and, if it be determined by the court that any portion of it be not necessary for public use, it shall decree that the owner is entitled to the property, and shall compel the corporation to permit him to enjoy the use and the ownership of such portion of it." In order that plaintiffs be entitled to recover, in our opinion the following conditions must concur: (1) The evidence must disclose that they are the "riparian owners" of the property in dispute; (2) that there has formed an accretion or *batture*, in front of their land, more than is necessary for public use; (3) that the defendant city withholds this accretion or *batture* from them. In answer, defendant claims possession, since 1810, of all that portion of ground above described as being traversed by the railroad track, and that the map or plan referred to by plaintiffs shows plainly that the land claimed by them was dedicated to public use by their ancestor, from whom they claim to derive title. The city also urges that said dedication having been made prior to the 27th of October, 1810, when President Madison ordered Gov. Claiborne to take possession of western Florida, wherein the town of Baton Rouge was then situated, the city is fully protected in the enjoyment of all the rights of use and property therein as same existed under the laws of Spain, to which government that territory belonged at the time, and that under said laws the river bank in front of Baton Rouge, and particularly that part of it in front of Leonardtown, belonged to the defendant. The city contends that her right to said vacant space was recognized by France in the treaty of Ildefonso in 1800, whereby Spain conveyed the province of Louisiana to that republic; and again in the treaty between France and the United States, in 1803, whereby same was ceded to the latter; and that judgment in plaintiffs' favor would be in violation thereof. Defendant expressly denies that there is any increase in

alluvion, in front of that portion of the town divided into lots by Gilbert Leonard, since said division was made; and avers that the works erected by the Mississippi Valley Railway Company prevent the inundation of Front street, and the lots fronting thereon, and theretofore occurring. The city admits that in the exercise of her corporate powers, and to provide a revenue, lessen the burden of taxation, and to increase her facilities of trade in the article of fuel, which is one of prime necessity, she permitted a landing for coal in front of said Leonardtown, where boats and barges are moored, and that for this privilege she has charged an annual rental. She pleads in bar of plaintiff's right of action the prescription of 10, 20, and 30 years, and prays judgment sustaining same, and decreeing the city entitled to the ownership, use, and possession of the property in controversy.

1. The word "*batture*" has a precise legal signification. *Vide* Bouv. Law Dict. *verbo* "*batture*": "An elevation of the bed of a river under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface. The term '*battures*' is applied principally to certain portions of the bed of the Mississippi river which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells." *Hollingsworth v. Chaffe*, 33 La. Ann. 548. Abbott's Law Dictionary is the same. In *Morgan v. Livingston*, 6 Mart. La. 216, the rights of riparian owners to *batture* formations on their river front was thoroughly examined by Judge MARTIN, and from which the foregoing definitions were extracted. The bank of a river is that space the water covers when the river is highest in any season of the year. The banks are not sold. They pass, rather, as an accessory of the contiguous land when sold, and the property of the banks belongs to those whose fields are contiguous. They must be the property of the riparian owners, without being included or mentioned in their grants; for, if they were only when included, there would be no use for the provision of the law. "If," says the learned judge, "therefore, when the sovereign grants land contiguous to the river, without mentioning the bank, it passes, it must do so as an accessory. If the bank passes as an accessory in the grant of the sovereign, it must, also, in the deeds of private persons."

But defendant contends that the city of Baton Rouge occupies an exceptional position; and her counsel cite in their brief several paragraphs from the *Partidas* to show that under the laws of Spain prevailing at the date of the treaty of Ildefonso, when the province of Louisiana was ceded to France, "the alluvion of said deposits on the banks of rivers" belonged to the commons of cities and towns that were incorporated. In the opinion above quoted, (page 236,) the court said, on this question: "Under the Spanish government, no town or city seems to have been erected by legal authority. That of New Orleans was the only one that existed. It is true that in it the owners of the lots nearest the river have no part of the bank as accessory thereto. These lots are not charged with any of the burdens attending rural riparian estates. The levees, roads, and streets were made and kept in repair at the joint expense of every lot in the city; the furthest from the water contributing as much thereto as the nearest. No riparian duties are imposed on a lot in New Orleans, either by the law, or any clause in its grant. Not so with regard to rural estates. The law and a clause in the original grant burden those contiguous to the river with the confection and repair of roads, ditches, bridges, and levees." In *Municipality v. Cotton Press*, 18 La. 123, this question was exhaustively considered in a very elaborate opinion. The court said: "Cities may acquire *jure alluvionis*, but it must be as owner of the front, or as riparian proprietor; for the alluvion is but an accessory to the principal estate or land." Again: "The mere act of incorporation of the city in 1805, changing the name of this property from rural to urban, neither made the city a front proprietor, so as to acquire *jure alluvionis*, or deprive the front lots of the right to such accretion." Again: "The public, through

the agency of the corporation, has the sole use of the levee and the bank of the river." In *Kennedy v. Municipality*, 10 La. Ann. 55, the court said: "The next point made by defendants, namely, that the *batture* is *locus publicus*, and belongs to the city by destination, is a renewal of the pretensions set forth by the city in the case just quoted of *Municipality v. Cotton Press*, and which were overruled after the fullest argument and the most mature consideration." *Weems v. Boyle*, 17 La. 237. This question was thoroughly considered in *New Orleans v. U. S.*, 10 Pet. 709; *Cincinnati v. White*, 6 Pet. 431; and in *Barclay v. Howell's Lessee*, Id. 498. In the opinion in the first case, the history of Louisiana is traced from the 26th of September, 1712, when the king of France granted a charter of right to Crozat; and whereby the laws, edicts, and ordinances of the realm, and the custom of Paris, were extended thereto; and the lands, coasts, harbors, and islands were granted to him. In that case the principles above quoted were recognized and applied. We conclude that the claim of ownership set up by defendant is not well founded.

2. This brings us to the consideration of the pleas of prescription urged in behalf of the city. In *Kennedy v. Municipality*, 10 La. Ann. 54, the court said: "As to the claim by prescription, it results very clearly from the authorities above invoked that the possession of the *locus in quo* by the city was a possession simply for the purpose of administration, not at all inconsistent with the right of ownership in the riparian proprietor, and destined, in its nature, to terminate upon the happening of a certain contingency. Such a possession cannot be pleaded against the riparian proprietor, as the basis of an adverse title in the city. This suit is very different from a petitory action." *Remy v. Municipality*, 11 La. Ann. 148; *Gaiennie v. Municipality*, Id. 738. The plea must be overruled.

3. This brings us to the consideration of the question of dedication to public use of the property in question. From the map to be found in the record, it appears that the space between the lots Nos. 1, 2, 3, 4, 5, in square No. 1, in that part of the city of Baton Rouge designated thereon as "Leonardtown," and the river, is about 180 feet in depth; that in this space is laid out and in use a street called "Front Street," of the mean width of 53½ feet, and between it and the river the track of the Mississippi Valley Railroad is constructed. The front of Leonardtown, from Convention to North Boulevard street, is 820 feet, and the *batture* is used by Wood, Widney & Co., as a coal-yard and coal-chute. The railroad track is on *batture*. The chute rests on trestles, and is used to load coal on the cars. The locomotive and machinery to raise the coal is on a barge in the river. The judge, in his opinion, says: "The witnesses agree that, if the embankment or breakwater made by the railroad company was removed, the whole front of Leonardtown square would be under during high water in the river. The whole of the front of the square has been filled up by the railroad company." In *Barclay v. Howell's Lessee*, the court said of the city of Pittsburgh: "From the plan of the town, it does not appear that any artificial boundary, as the southern limit of Water street, was laid down. The name of the street is given, and its northern boundary, but the space to the south of it is left open to the river. All of the streets leading to the south terminate at Water street, and no indication is given on the plat \* \* \* that it did not extend to the river. \* \* \* And it appearing that the commerce of the town required the extension of the street to the river, and there being no statement or line marked on the plat of the town opposed to it, and as the public for thirty years or more, in some parts of the town, had used this street, and that property had been bought and sold in reference to it in this form, it was held to be sufficient dedication to public use." In the record we find an ordinance of the city of Baton Rouge, of date May 22, 1847, in which it is declared "that from and after the 1st day of September next the steam-boat landing will be extended to the lower line of

Convention street." We also find another ordinance, of date April 25, 1860, which declares "that the space comprised between the lower line of Convention street and the lower line of North Boulevard street shall be exclusively reserved for all landings not otherwise provided for." After being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais* which precludes the original owner from denying such dedication. 2 Dill. Mun. Corp. § 598. While a mere survey of land by the owner into lots defining streets, squares, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such plat, when bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding on both the vendor and vendee. Id. § 508. In *Saulet v. New Orleans*, 10 La. Ann. 81, the court said: "To support a dedication to public use, it must appear that the property has been so used with the assent of the owner; or else it must appear unequivocally, by some plan or writing, that the owner had made a dedication, to violate which would involve a breach of good faith." In *Arrowsmith v. New Orleans*, 24 La. Ann. 194, the court said: "It is manifest, from the evidence in the record, that plaintiff sold the greater parts of the lots in 1835; and his acts of sale refer to the plan, and have been located according to the conditions imposed by the city council. He has acquiesced in this respect for thirty years, with full knowledge of the facts, and by adopting the changed location. By the act of selling lots in accordance with it, we think the purpose to dedicate to public use may be fairly inferred. In *Ottinnati v. White*, 6 Pet. 431, the following principles were settled: (1) That it is not essential to a dedication that the legal title should pass; (2) nor that there should be any grantees of the use to take the fee; (3) nor that a deed or writing is necessary to a valid dedication. Upon the foregoing compilation of authority, as applied to the evidence, we have no hesitancy in saying that the dedication of the space in controversy is fully made out. It is unnecessary, for the purposes of this inquiry, for us to adjudge plaintiffs' title, because the public has the use irrespective of the question as to where the fee resides. 2 Dill. Mun. Corp. § 524.

4. The question left for decision is whether, conceding, for the argument, that plaintiffs are "riparian proprietors," the defendant city has in her possession and under her administration more of the accretion or *batture* than is necessary for public use. We are of the opinion that the plaintiffs have not, in this respect, made out a case. The weight of testimony is to the effect "that there is no more *batture* in front of the square included between Convention street and North Boulevard now than there was many years ago." The level of the bank was raised by the railway company. Its present improved condition is not referable to accretion. The plaintiffs complain that the city has for several years leased this front for purposes of a coal-yard, and have made of it a coaling station, and that this is not "a public use." Their counsel cites, in support of that view, *Railroad Co. v. Winthrop*, 5 La. Ann. 36; *Duverge v. Salter*, 6 La. Ann. 450; *Lyons v. Hinckley*, 12 La. Ann. 657, —but we do not regard this case as falling within the provisions of either. The defendant has not built, nor permitted to be constructed, upon the space in controversy, any permanent structure. The city claims that she only permitted and allowed certain constructions and embankments to be made from the bed or sloping bank of the river, between high and low water, in the interest of the commercial prosperity of the city, and to meet the actual wants of the people. It appears that, if those artificial embankments had not been made, this property would not have been susceptible of occupancy. It also appears that wharfage dues are now and have been collected from steamboats and other crafts that land in front of this space. This right was well recognized under the laws of France and Spain. *New Orleans v. U. S.*, 10 Pet. 727. In her answer the city claims "that in the exercise of her corporate

powers, and to provide a revenue for the city, lessen the burden of taxation, and increase the facilities of trade in the article of fuel, which is of prime necessity, she has permitted a landing for coal in front of Leonardtown square, where boats and barges are moored." Such rights and privileges as the city claims were well recognized by the civilians, as well as by common-law writers; and their allowance is specially sanctioned by our Code. Rev. Civil Code, art. 863. The judgment of the lower court is therefore affirmed.

## ON REHEARING.

(March 7, 1887.)

FENNER, J. 1. We granted the rehearing in this case, not because we had discovered any error in our former decision, but because the cast appellant complained that the author of the first opinion had not been a member of the court at the time when the cause was submitted, and had not heard the oral arguments. We have, however, attentively considered the arguments and authorities which have been advanced on the new hearing. We remain fully convinced that the evidence in the case establishes a valid dedication to public use of the *locus* in controversy, under the principles established by the following authorities: *Railroad Co. v. Municipality*, 19 La. 71; *Carrollton v. Jones*, 7 La. Ann. 233; *Saulet v. New Orleans*, 10 La. Ann. 81; *Arrow-smith v. New Orleans*, 24 La. Ann. 194; *Cincinnati v. White*, 6 Pet. 431; *New Orleans v. U. S.*, 10 Pet. 662; 2 Dill. Mun. Corp. §§ 499, 500.

2. Plaintiffs have failed to bring their case within the purview of section 318, Rev. St., because it is not showing that "*batture* has been formed in front of the land more than is necessary for public use." The context shows that the statute refers to *batture* formed by accretion. In this case it fully appears that the land in controversy has been reclaimed by artificial works erected under the authority of the city; and it is, moreover, necessary for public purposes, and is used for purposes of a public character, though through the medium of private parties, who act under the city's authority, only temporarily granted. The uses are as a landing wharf and storing place for coal, for the purpose of facilitating the reception and distribution of fuel to the inhabitants at reasonable prices, which are regulated, to a certain extent, in the ordinance. The public character of such uses is not destroyed by the fact that they are temporarily farmed out to particular individuals. Cities exercise, without question, the right of designating particular portions of their wharves and landings for the use of certain lines of vessels, or for the reception of certain kinds of commodities, and the power here exercised is of that general character. If the parties benefited are willing to pay for such privileges, plaintiffs have no cause to complain.

3. The right claimed by plaintiffs to recover these revenues has no support in the authority quoted from Dillon, who merely says: "The proprietor \* \* \* retains his exclusive right in the soil for every purpose of use or profit, not inconsistent with the public easement." This has no application to a case like the present, where the use and profit result from a direct exercise of the public easement itself by the public authority in which it is vested. It is therefore ordered that our former decree remain undisturbed.

(40 La. Ann. 446)

## FORMAN v. NEW ORLEANS &amp; C. R. CO.

(Supreme Court of Louisiana. April 16, 1888.)

## 1. HORSE AND STREET RAILWAYS—POWER OF NEW ORLEANS TO GRANT FRANCHISES TO—REGULATION OF FARES.

Under the constitution and laws of the state of Louisiana the city of New Orleans is clothed with full and exclusive power to grant franchises for the construction and operation of passenger street railways, by steam or horse power, within her corporate limits, including the right of regulating the rates of fare to be exacted by said corporations for the transportation of passengers.

## 2. SAME.

The city's discretion in regulating such matters is not subject to judicial control or interference, unless arbitrarily or unlawfully exercised.

## 2. SAME—REGULATION OF RATES—UNJUST DISCRIMINATION.

That feature of the contract between the city and the New Orleans & Carrollton Railroad Company which exacts from the public a fare of ten cents from Carrollton to Canal street, except from actual residents above Napoleon avenue, who can, on certain conditions, make the trip for five cents, is not subject to attack as an unreasonable discrimination prohibited by the law governing the obligations of common carriers.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; W. T. HOUSTON, Judge. Plaintiff, B. R. Forman, institutes this action against the New Orleans & Carrollton Railroad Company for \$5,000 damages, for an alleged ejectment from one of defendant's cars. Judgment for defendant. Plaintiff appeals.

*E. Howard McCaleb and Wm. F. Mellen, for appellant. John M. Bonner, for appellee.*

POCHÉ, J. Plaintiff complains that he was illegally ejected from one of defendant's cars, for which he claims damages in the sum of \$5,000; and he prosecutes this appeal from a judgment which rejected his demand. The following are the salient facts in the case: The contract under which the defendant obtained its present franchise was framed under the provisions of two ordinances of the city council of New Orleans, which contained the specifications under which the right of way was to be sold to the company, among which was the following: "*Fare.* The rates of fare from Canal street to the head of Jackson street and the Napoleon avenue station, and points between, shall be (5) five cents, and (5) five cents beyond Napoleon avenue station, between the hours of 4 A. M. and 12:30 P. M., except to actual residents above Napoleon avenue, who shall have the privilege of purchasing through tickets at the rate of ten for fifty cents. The fare between 12:30 P. M. and 4 A. M. to be charged shall be (10) ten cents to Napoleon avenue, and (10) ten cents from there to Carrollton." In compliance with that stipulation, the company procured tickets in bunches of 10 each, which it has been selling exclusively—at least knowingly—to actual residents above Napoleon avenue; designed as explained in the opinion of this court in the case of *De Lucas v. Railroad Co.*, 38 La. Ann. 981. It appears that plaintiff, who does not reside above Napoleon avenue, obtained a bunch of such tickets from a person who was an actual resident above that street, and attempted to ride on one of those tickets from the corner of Second and St. Charles streets to Carrollton. At Napoleon avenue, where the change of cars is effected, he tendered for his fare thence to Carrollton one of the coupons of the tickets in question, which was refused by the collector, on the ground, as acknowledged by plaintiff, that he was not a resident above that avenue. Being called upon to pay the regular fare, and persisting in his claim to pay the same by means of the ticket, plaintiff was ejected from the car. It appears that on two previous occasions plaintiff had tendered similar tickets for his fare at the same point, which had been refused, but that, in order to avoid an unpleasant contestation, the employe of the company had himself paid plaintiff's fare in currency, as required by the rules of the company.

The crucial point in the case is the contested right of the company to make the discrimination hereinabove described in favor of actual residents above Napoleon avenue, which is alleged to be unjust, unreasonable, and violative of the legal obligations of the defendant company as a common carrier. Hence the main relief claimed by plaintiff is a decree condemning the defendant to sell to him, and other persons residing below Napoleon avenue, tickets on the same terms and conditions which are extended to actual residents above Napoleon avenue. It appears, as above stated, that the discrimination complained of does not emanate from the railroad company; but that

it was imposed on it as a condition of its franchise by the city. The leading feature of that stipulation is a limit of the maximum rate which the company can exact for fare between the points therein designated. Under its requirement the company cannot obtain a higher rate than ten cents between Canal street and Carrollton, or five cents between Carrollton and Napoleon avenue, and between Canal street and Napoleon avenue, or the foot of Jackson street and intervening points. It is shown that during the existence of a previous corporation which operated a road on the same street, between Carrollton and "Lee Circle," several blocks above Canal street, the rate of fare was 25 cents each way. Hence the complaint is not that the rate which is charged to plaintiff, and to the public in general, is excessive or unreasonable, but the contention is that plaintiff, and all persons who do not reside in this city above Napoleon avenue, are placed at a disadvantage in comparison with actual residents above that avenue. Under our law touching the powers of the city of New Orleans, as expounded in jurisprudence, it clearly appears, and it is not even disputed, that the city is clothed with the full and exclusive power of granting franchises for the construction, operation, and running of railroads over its streets, as well as the power of fixing a tariff of rates to be enacted by all such corporations. Act No. 20 of 1882, which was the city charter then in force, gives to the council the power "to authorize the use of the streets for horse and steam railroads, and to regulate the same; to require and compel all lines of railway or tramway to use any one street, to run on the same track and turn-table, to compel them to keep conductors on their cars," etc. *Brown v. Duplessis*, 14 La. Ann. 842; *Board v. New Orleans*, 32 La. Ann. 917; *Harrison v. Railway Co.*, 34 La. Ann. 462; *Tilton v. Railroad Co.*, 35 La. Ann. 1068; *Railroad Co. v. New Orleans*, 39 La. Ann. 709, 1 South. Rep. 434. But, conceding all these powers to the city of New Orleans, plaintiff contests the right of the city to make the discrimination complained of. That argument suggests the question of the right of the judiciary to interfere with the discretion of the city in dealing with matters which the laws of the state have placed within its exclusive control and management. The question came up in the case of *Watson v. Turnbull*, 34 La. Ann. 856, in which the court, after a full review of all previous authorities bearing on the point, said: "Within the corporate limits, the city of New Orleans, under her charter, and under the general law, has the right to control, manage, and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect works, and provide facilities for the use of vessels and water-craft; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a subject for judicial control or interference." The views of that opinion, which are supported by numerous previous adjudications, were reaffirmed in the cases of *Pickles v. Dock Co.*, 38 La. Ann. 412, and *Villavase v. Barthet*, 39 La. Ann. 247, 1 South. Rep. 599. Plaintiff's argument, that the question must be tested under the general law governing and determining the obligations of common carriers, is grounded on the provisions of article 244 of the constitution, which reads: "Railways heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and railroad companies common carriers." Without deciding that street-railroad companies are not common or public carriers, in the general sense of the term, we feel very certain that they were not within the contemplation of the convention in adopting that article. As streets of a city are, and have at all times been, known to be public highways, it cannot be supposed that because railroad tracks were laid thereon it required a constitutional declaration to the effect

that they were public highways. But, construing that article in connection with articles 243, 245, and 246 of the same constitution, it is manifest that the article was not intended to have the slightest reference to street railways, and that as to them the municipal power to regulate, manage, and control their construction and operation was not intended to be affected, altered, or modified by any provision of the constitution. Article 243 recognizes the general power of building railroads in the state, and of connecting them with railroads of other states; and regulates the manner of one road intersecting another, and of transporting each the other's passengers, etc., without delay or discrimination. Article 245 requires all railroad corporations doing business in this state to have and maintain public offices in the state for the transfer of stock, and for the transaction of other dealings connected with their stock. It requires no argument to show that in all these references to railroad corporations the convention did not intend to include street railroads. But the intention to leave the subject-matter to the municipal authorities, to which they had always been relegated, is removed beyond the domain of discussion by article 46, which provides: "The general assembly shall not pass any local or special law on the following specified objects: \* \* \* Authorizing the construction of street passenger railroads in any incorporated town or city." Now, as no legislation has yet been enacted in furtherance of any of the articles above referred to, so as to subject street railroads to the same rules, it is absolutely safe to conclude that nothing therein contained can fairly be construed as impairing the exclusive control of the city of New Orleans over all the street railroads heretofore constructed or that may hereafter be constructed within her limits, and that such power includes the right of fixing the tariff of fares to be charged for the transportation of passengers. No one is heard to complain of the act of the city in fixing the maximum rate which can be charged for fare on all the street railroads, including the defendant, which are now under operation in the city. The complaint would be as fruitless as is that of plaintiff in the present controversy. It is an undeniable proposition that the authority of the city council in the premises is as effectual and binding as would be a similar provision emanating from the legislature itself.

Now, in our examination of the numerous authorities quoted by counsel, and in which unreasonable discriminations made by common carriers were rebuked and avoided, we find that none of the acts complained of had any direct or indirect legislative authority, but that, on the contrary, they antagonized either the general or common law governing the obligations of common carriers, or some special law applicable to the subject-matter. The regulation which is here charged to be an unreasonable discrimination, far from being violative of a special law, is directly sanctioned by legislative authority. More than that, it is embodied in, and forms part of, a solemn authentic contract between the city and the defendant company. And the court is urged to cancel and abrogate a contract which the city had the undisputed power to make, and in a proceeding in which she is not even a party. According to the contract the established rate of charges for all persons is 10 cents between Canal street and Carrollton, each way; the exception being in favor of actual residents above Napoleon avenue. Hence it follows that if any unreasonable discrimination can be charged to the scheme it must be attributed to the exception, and not to the general rule; and therefore the judgment rendered could not benefit plaintiff, but would materially injure a class of people which the city intended to protect. It was unquestionably within the discretionary power of the city council in regulating the defendant's road to consider that, as the commercial center of the city, the great majority of churches, schools, banks, courts, and other institutions were clustered in the neighborhood of the center of the city, and almost all below Napoleon avenue, it was simply an act of justice to actual residents above Napoleon avenue, in the pursuit of their daily avocations, and for other equally necessary purposes,

to enable them to reach the central portion of the city with the same facilities, and at the same cost, which were afforded to all other residents of the city.

It is settled in jurisprudence that all discriminations are not unjust, unreasonable, or oppressive, and that they are therefore not all reprehensible. In the case of *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 811, cited by plaintiff, it was said: "But what an unjust and unreasonable discrimination? No rule can be formulated to apply to every case that may arise. It may, however, be said that it is only when the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in." A similar distinction is made in another case cited by plaintiff, wherein the court said: "The common and equal right is to reasonable service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. \* \* \* This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A. receives, as a charity, transportation service without price, or for less than a reasonable price, from B., who is a common carrier, A. does not receive it as his enjoyment of the common right; B. does not give it as a performance of his public duty; C., who is required to pay a reasonable price for a reasonable service; is not injured, and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B. is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price (is given) which is the common right." *McDuffee v. Railroad Co.*, 52 N. H. 451, 452. See, also, *Shipper v. Railroad Co.*, 47 Pa. St. 340; *Shivary v. Gas-Light Co.*, 1 Ry. & Corp. Law J. 339; 1 Wood, Ry. Law, p. 565, § 197. So, in this case, if we subject the act of the city to the test of the general law on the subject of discriminations, as though she herself owned and operated the road, we find that plaintiff and all other persons have a reasonable service at an avowedly reasonable price, and that the difference made in favor of actual residents above Napoleon avenue is simply an act of liberality, resting on a sense of justice and fair play to a class of people who are all treated alike in the matter of that service, and who would, in default of that exception, be placed at a great disadvantage from all other residents of the city. Hence we conclude that, under these circumstances, the public cannot complain, and that plaintiff's action cannot be maintained. Judgment affirmed.

(40 La. Ann. 467.)

**YATES v. BRUSH ELECTRIC LIGHT & POWER CO.**

(*Supreme Court of Louisiana. May 7, 1888.*)

**DAMAGES—LIABILITY FOR—PERSON CAUSING THE INJURY.**

This is an action for damages occasioned to a policeman, while on duty at the New Orleans National Bank, in this city, by an explosion of a part of the apparatus appertaining to its electrical installation. It comes fairly within the principle of the Code that is to the effect that every one is responsible, not only for the damage occasioned by his own act, but for that which is caused by the things which he had in his custody or control.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; A. L. Tissor, Judge.

Suit by John B. Yates against the Brush Electric Light & Power Company for \$3,000, for injuries received through fault of defendant. The latter appeals from a judgment allowing plaintiff \$2,500 damages.

*E. M. Hudson*, for appellants. *Braughn, Buck, Dinkelspiel & Hart*, for appellee.

**WATKINS, J.** The plaintiff seeks to recover \$3,000 damages from the defendant company on account of certain injuries he received while in the performance of duty in the building and property of the New Orleans National Bank, situated on the corner of Camp and Common streets, in the city of New Orleans, he being a member of Boylan & Farrell's police force at the time. The averments of his petition are that the accident of which he complains took place on the morning of the 26th of February, 1887, at the hour of 6 o'clock, and that it was occasioned by the explosion of a metal pipe through which an electric wire passed, conveying electricity into the building, for the purposes of incandescent lighting; and, by the force of the explosion, fragments of the pipe were driven violently against his head, just behind the right ear, whereby he was felled to the floor, stunned and senseless for the time, and from which he received serious and permanent injury. The defendant's answer was a general denial. The case was tried by a jury, who found for the plaintiff \$2,500, and the defendant has appealed.

1. From the record we have gleaned the following facts in regard to the manner in which the accident occurred, the causes which superinduced it, and the injuries the plaintiff sustained by it. It appears that on the morning in question the plaintiff went on duty at the bank at 5 A. M., and, about an hour afterwards, his attention was arrested by an electrical illumination which appeared over the door which opens into the president's room, and which is situated on the Camp-Street side of the building, facing Common street. He was standing about midway of the floor, and between this room and the desk of the paying teller. A moment afterwards, a blaze was discovered on the wood-work over the desk of the paying teller, which he hastened to extinguish, and while thus engaged the brass pipe, through which the electric wire connected with the electrolier, exploded, and a blow was inflicted on his head, and one on his back, which was turned towards the desk. The shock was attended with a sound like that of the firing of a pistol, and the illumination it produced had the appearance of rockets or fire-works; and it continued, at intervals, for 15 or 20 seconds. The chandelier in the paying teller's apartment, into which the electric wire was introduced, was at the time of the explosion about 12 inches from his head. This wire was insulated, and passed through a metal pipe, and it was exploded, and the pipe also, by means of an unusual exertion of electric force. This was occasioned by a connection that was formed outside of the bank, on some part of the pole line, with a wire carrying a higher tension of electricity than that which fed the incandescent lamps within the bank; that is to say, there was a contact, on the outside of the bank, of the wire which supplied the incandescent light inside, with the wire carrying an arc current of high tension, outside. The effect of this contact was to pass the arc current into the bank, and this current being beyond its capacity, an electrical explosion was produced, and the heat fused the metal and burst the pipe. In every electrical installation there is necessarily a safety-fuse or safety-catch, which is a mechanical contrivance which interpolates into the line of electric conductors a small piece of lead wire, the effect of which is that, when an abnormal amount of electricity flows over the wire of the circuit, it becomes melted, by the excessive heat engendered, and breaks the current. These devices are intended to secure additional safety to persons using incandescent light. The one over the desk of the paying teller had, in this instance, lost its cover, and its internal part was charred and defaced. The metal was melted and the wood-work burnt. It had operated,

out not in the right way. There were evidences of burning in the electrobar as well as the fuse-catch. There is no reasonable doubt of the fact that the proximate cause of the accident was the insufficiency of fuse-catches, either in number or capacity, to break the circuit, and cut off the flow of electricity from an arc wire on the outside of the bank. The brass tube containing the insulated wire was of about 1-20 of an inch in thickness, and  $\frac{1}{2}$  of an inch in diameter; and the fragments of it which inflicted the wound on the plaintiff's head were about  $2\frac{1}{2}$  inches in length. Their edges were jagged and rough, and the metal was tarnished and discolored. The tension of an arc current of electricity passing through a tube of such dimension was quite sufficient to have exploded it, and sent the fragments against the plaintiff's head with sufficient violence to have produced the injuries he received. The immediate effect of an arc current of the voltage this one appeared to have, when exercised upon an individual, would be that of a heavy blow, and might cause at least temporary insensibility. From the blow inflicted there was a knot raised on plaintiff's head which is described by one witness as being of the size of a hen's egg. He was stunned and felled to the floor, and rendered insensible for a time. He became quite sick from the effects of it, and vomited considerably. He became, on that account, unfitted for duty, his hearing in his right ear being seriously impaired. Since the happening of the accident, attacks similar to those described have occurred frequently, though at irregular intervals, and last three or four hours at a time; and the plaintiff states that he experiences from them a great pressure on the right side of the head, above and behind his right ear, coupled with an intense pain and dizziness. One of his medical attendants states that, upon making an examination of the plaintiff's ear, he discovered *tinitus*, i. e., a buzzing or humming in the ear, and the ear-drum congested, which was likely to produce inflammation of the ear-drum, and impair the hearing. Having heard the plaintiff's testimony, he gave it as his professional opinion that, while the plaintiff may be comparatively free from trouble at times, his affliction will continue during life-time. Since the accident the plaintiff has lost considerably in flesh, and has not been able to perform much work; and, indeed, it was stated by his counsel, in argument, and not disavowed by counsel of the defendant company, that on account of his being unable to perform satisfactory service he had been discharged from employment at the bank. At the date of this occurrence, he was about 52 years of age, but strong, athletic, and in perfect health. He is, and has always been, a laboring man. He has resided in the city ever since 1878, and has been regarded as faithful and efficient in the performance of any service assigned to him. He has a family dependent on him for support. At the time of the occurrence he was employed at a stated salary of \$45 per month; i. e., \$540 per annum. Manifestly this accident and consequent injury to the plaintiff was caused by the failure of the party establishing the electric installation in the bank to provide a means so essential to the safety of those using electric lights as the proper fuse-catches.

The happening of such an accident as the one under consideration may frequently occur in a large city like New Orleans, lighted externally and internally with electricity, which is generated by machines of different size, and which differ greatly in tension. Indeed, the difference in the polarity of the metals brought in contact would naturally produce combustion and explosion at the great risk of the population and hazard of property. To pass these differing currents of electricity from the generating machines to the various customers on its circuit, and to the lamps on the streets, a number of wires are employed, and they are strung on posts; and it is the plain duty of the persons exercising so dangerous a franchise to have special care in their adjustment and installation, that their patrons, their servants, and agents, be protected from loss and danger. Such care was not taken in this instance. The proof shows that there was provided in the electric installation of the

bank what is termed a "switch," the purpose of which is to enable a customer who is desirous of discontinuing a current at any time, to cut it off. But it appears that this switch was placed on the wall at the head of the staircase leading to the second floor; that in order to reach it one had to pass out of the bank into Common street, thence to the rear of the building, and thence up the stairs. There was no other way of reaching it. In addition, the proof shows that neither the plaintiff, the janitor, nor officers of the bank had been advised of its existence, much less of its use or locality.

2. Under the general issue the defendant sought to prove that the defendant company did not establish the electric installation in the New Orleans National Bank, and was not responsible on that account; and that if any one was responsible it was the Storage Battery Company, by whom the installation was erected in the bank. On this issue the testimony took a very wide range, and is, unfortunately, in conflict in many particulars. We can only cite a few of its leading features as illustrating the view it has given us. At the solicitation of certain persons, an officer of the defendant or Brush Company visited Rotterdam, Holland, in the summer of 1886, and purchased the right to sell and operate the de Kotinski patent for storing electricity of high tension, designed for distribution in low-tension currents, for purposes of incandescent illumination. In October of that year the Storage Battery Company was organized by the election of a board of directors, and a secretary, treasurer, superintendent, and president, all of whom except the last being like officers in the Brush Company. The patentee furnished the accumulators for use as reservoirs in storing electricity. The original contract and the company's charter are of this general tenor as to the object of their organization. The officers of the New Orleans National Bank claim to have made the contract for electric lighting with the Brush Company, and state that after the accident they gave notice to that company, and that they at once had it inspected and repaired without protest or objection. The bills for installation, as well as for lighting the bank during January and February, 1887, were made out on the blanks of the Brush Company, and were presented for payment by their collector. The installation was directed by their superintendent. During these months the Brush Company operated incandescent lights from its own generating machine. The Storage Battery Company kept neither ledgers, journals, nor stock-books, and no certificates of stock were ever issued. Its accounts were kept in the books of the Brush Company. There is no receipt showing payment to it of any bill for incandescent lighting. Its minutes show that during its brief potential existence no contract was consummated with any company for incandescent lighting; and it had no system of its own. The notes for the rent of No. 18 Royal street, where the accumulators were stored, were executed by the Brush Company. The cash-book of the Storage Battery Company shows that its total revenue, up to the 9th of May, 1887, the date of its suspension, was \$400.90. It shows that the total amount expended for materials, antecedent to the accident, was \$450.65; that nothing was expended for lamps or electricity, or the power to generate it. There are sundry invoices in the name of the Storage Battery Company for goods purchased of the Westinghouse Electric Light Company, in March and April, 1887, aggregating \$10,000 in amount, while the cash-book shows disbursements on that account of \$398 only. The minute book of that company shows that the president was only authorized, on the 24th of February, 1887, to contract with the Westinghouse Company for the purpose of supplying it with their system of incandescent lighting; and that on the 7th of May following it had not been consummated. But, on the contrary, it appears that the Brush Company was operating the Westinghouse system in April and May, 1887, and they did not purchase from the Storage Battery Company. These and various other *indicia* satisfy us that the Storage Battery Company was merely an auxiliary of the defendant; that it never owned or used any system of in-

candescant electric illumination; and that its only object was to furnish storage for electricity of high tension, for distribution in low-tension currents, for the greater convenience of the Brush Company. On this theory the manifold incongruities in the evidence can be harmonized and reconciled. The contention of the defendant in this regard cannot be sustained. The liability of the defendant is clearly made out.

8. This action is brought under those provisions of the Code which declare that "every act whatever of man that causes damage to another obliges him through whose fault it happened to repair it," (Rev. Civil Code, art. 2315;) and "every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or want of skill," (Id. art. 2316;) and "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by \* \* \* the things which we have in our custody." (Id. art. 2317.) These articles need no elaboration. The text is concise and of easy appreciation. The instant case comes fairly within the principle of *Barnes v. Belrne*, 38 La. Ann. 280, and *Howe v. New Orleans*, 12 La. Ann. 481, in each of which a person passing along a street of this city was awarded damages for injuries inflicted by a falling wall. The plaintiff is evidently entitled to remuneration at the hands of the defendant; but we think that the amount allowed is excessive, and should be reduced to \$1,250.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment of the court *a quo* be amended and reduced to \$1,250, and that, as thus amended, the same be affirmed, with cost of appeal taxed against the plaintiff and appellee.

(40 La. Ann. 593)

#### Succession of VOLLMER.

(Supreme Court of Louisiana. May 7, 1883.)

##### 1. ADOPTION—BEFORE A NOTARY—CONSENT OF MOTHER.

An act of adoption executed since 1872, before a notary public, by husband and wife, with the consent of the widowed mother of the child, is valid, though not authorized by judicial sanction.

##### 2. SAME—JUDICIAL PERMISSION—ACT LA. 1872, No. 81.

The act of 1872, No. 81, providing for the manner of adopting children, dispenses with the judicial permission previously required by the act of 1865, No. 48. A notarial act is the only act now required.

##### 3. WILLS—NUNCUPATIVE WILLS—COMPETENCY OF WITNESSES—HOW SHOWN.

The recital, in a nuncupative will, by public act, that the officiating witnesses are competent, does not satisfy the exigency of the law, which requires the statement in the act that they are residents of the place wherein the will is executed.

##### 4. SAME.

The act must, on its face, make full proof of the facts constituting the competency of the witnesses in that respect, and show the observance of all the essential formalities required to be fulfilled.

##### 5. SAME.

The notary is not authorized to judge of the competency of the witnesses, and dispense himself from stating the facts constituting that competency. He must state those facts, and express in what manner the required formalities were fulfilled.

##### 6. SAME.

The omission to declare those facts cannot be supplemented, and renders the will invalid.

##### 7. SAME—RIGHTS OF HUSBAND AND WIFE.

Husbands and wives cannot prescribe against each other.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; W. T. Houston, Judge.

This action involves the legality of a certain will left by decedent, Mrs. Johanna Vollmer. From a judgment declaring the will to be a nullity, Tobias Vollmer, husband of testator, and her universal legatee, prosecutes this appeal.

*Jos. H. & J. Zach. Spearing*, for appellant. *Braughn, Buck, Dinkelspiel & Hart*, for appellee.

BERMUDEZ, C. J. The object of this suit is to recover the entirety of the succession of the deceased. To that end the plaintiff alleges that she was legally adopted by the deceased and her husband, Tobias Vollmer, and thus acquired all the rights vested by law in legitimate descendants; that Johanna Vollmer has departed this life without issue or forced heirs, leaving a will by public act, by which she institutes her husband her universal legatee; that said will is a nullity, in not stating that the officiating witnesses are residents of the place; that she is consequently entitled to all the property of which Johanna Vollmer died possessed. The defenses are that the plaintiff has no standing in court, in this: that the act whereby she claims to have been adopted is a nullity, for the reason that it was executed without judicial authority, which was an essential condition precedent; that the will is valid, as it recites that the witnesses are competent; and that the plaintiff has no greater rights than the deceased, through whom she claims, and who had forfeited all claims against the community, for reasons which it is needless to state. From an adverse judgment, Tobias Vollmer appeals. It appears that on August 11, 1875, by authentic act, Tobias Vollmer and Johanna Brestenheim, his wife, adopted Margaret Ann Kelly, born on July 15, 1867, conferring expressly upon her all the rights of a legitimate child in their respective successions, subject to the rights of forced heirs, and that the mother of the child, Widow Michael Kelly, consented. The act does not recite that judicial authority was previously obtained for its execution, and hence it is charged that the failure to have procured the permission is destructive of the adoption.

1. The question, therefore, arises, was this omission fatal to the validity of the act? or, in other words, has the act of 1865, No. 48, which stipulated that such authorization should be obtained, been or not repealed in that respect. Several acts were subsequently passed on the subject of adoption, before and after the Revised Code, which itself contains legislation on the matter. The act of 1865 was expressly amended by act 17 of 1867, which provides that persons having legitimate children may adopt any other child, provided the adoption shall not interfere with the rights of the forced heirs. It was again expressly amended by act 64 of 1868 to confer exclusive jurisdiction on parish courts outside of the parish of Orleans, and to authorize, when the person adopted is a minor, the surrender of the entire paternal authority to the adopter. This act of 1865, with its amendments, was incorporated in Rev. St. §§ 2320-2323, both inclusive. The Revised Code contains supplemental provisions. Rev. Civil Code, art. 214. It prohibits the adoption of illegitimate children, whose acknowledgment it forbids; such adoption not to interfere with the rights of forced heirs. It provides that the person adopting shall be at least 40 years of age, and at least 15 years older than the person adopted. It confers on the person adopted all the rights of a legitimate child in the estate of the person adopting him, except as above stated. It requires the concurrence of married persons to adopt a child; saying that one cannot adopt without the consent of the other. In 1872, by act No. 31, it was provided that any person above the age of 21 years shall have the right, by act to be passed before any recorder or notary public, to adopt any child under the age of 21, provided that, if such child have a parent, or parents, or tutor, the concurrence of such shall be obtained, and who, as evidence, shall be required to sign the act. It is apparent, from an inspection of those various laws, that, at the date of the last act, there must have existed some confusion in the mind touching the forms to be followed in cases of adoption, and it must have been for the purpose of dispelling all doubt on the subject that the legislature passed the just-mentioned act. That act, surely, had some object in view; otherwise it would not have been passed. It evidently contemplated a change of the provisions in the Revised Code, art. 214, in this: that it does

away with the condition that the adopting person should be at least 40 years of age, and 15 years older than the adopted one, by providing that any person above 21 years may adopt any one under that age. It further contemplated some legislation on the subject of the consent to be given by the parents, parent, or tutor of the minor to be adopted. That act consists of one section only, and does not contain any repealing clause of anterior laws in conflict with it or on the same subject-matter. The absence of such clause is easily accounted for. The legislature did not intend to modify anterior laws on adoption, in all respects. It proposed to leave intact all that portion of the legislation concerning the substance as the right of the adopted person, or the qualifications of the adoptors, except the question of age; and designed, beyond this, to simplify the matters of form to be gone through, by requiring merely a notarial act, and dispensing with the judicial sanction previously enacted as indispensable. The constitution of 1868 required that the object or objects of an act should be expressed in its title. Hence it is natural enough, in order to ascertain what the object of the act of 1872 was, to consider its title, which is "An act providing for the manner of adopting children." The word "manner" is clearly demonstrative that the purpose of the law was to provide for the form to be used for the adoption of minors. It is, then, apparent that, as the act does not allude to the judicial authority previously demanded, that ceremony was abandoned and suppressed, and another one—plainer and less expensive—was substituted for it. In the case presented in *Succession of Hosser*, 37 La. Ann. 840, there was no issue as to the form of the act. It was passed in 1866, in the year following the act of 1865, which required judicial sanction. It obtained since 1872. Judicial authority would be surplusage. The act of adoption leveled against here must therefore stand.

2. The second question presented relates to the validity of the will, which is in nuncupative form, by public act. The charge against it is that it was not set forth that the three witnesses are residents of the parish of Orleans, but that they are competent witnesses. The omission is fatal. The notary is required by law, under pain of nullity of the act, to express specifically every material fact constituting the competency of himself and of the officiating witnesses under the law in that respect, and also every formality observed in the execution of the will. The act must make full proof on its face of every element necessary to its validity, as no evidence is admissible to supply any deficiency. The notary is not constituted a judge of the legal fulfillment of the formalities. Otherwise it would suffice for him to state that the will was executed after observance of all legal exigencies; but this would be a plain violation of the law. Rev. Civil Code, arts. 1578, 1595; *Le Blanc v. Baras*, 16 La. 80; *Swift v. Swift*, 9 La. Ann. 118; *Shannon v. Shannon*, 16 La. Ann. 9; *Succession of Whittington*, 26 La. Ann. 89; *Succession of Carroll*, 28 La. Ann. 888; *Devall v. Palms*, 20 La. Ann. 208; *Succession of Wilkin*, 21 La. Ann. 115; *Thibodeaux v. Voorhies*, 25 La. Ann. 480; *Laurent*, 23, No. 262; *Duranton*, 9, 112; *Touillier*, Inst. 5, No. 451. The will, being deficient in an essential particular, is a nullity, and must be so regarded and treated.

3. The plaintiff having established that she was legally established by Mrs. Vollmer, and that the will left by her is a nullity, it follows that she has inherited all the property which she died owning, as completely as if born of her body. *Succession of Hosser*, 37 La. Ann. 840.

4. Questions have been raised antagonistical to the rights of the deceased in the community which existed between her and her husband, to the effect that she did not, within the time fixed by law, (30 or 60 days,) accept that community, and that, by such failure, she has forfeited all claims to what might have been her share therein otherwise. It appears that Tobias Vollmer and Johanna Brethrenheim, the deceased, first contracted marriage in December, 1858; that they were subsequently divorced June 10, 1858; and that

shortly afterwards, in July following, but within 30 days, they married again, —the wife dying some time later, without having, before her second marriage, accepted the community. We deem it unnecessary to pass upon these questions to any considerable extent. It suffices to say that the second marriage having been contracted within the time during which it is claimed that the community should have been accepted, after the judgment of divorce, it has suspended all prescription, as husbands and wives cannot prescribe against each other. Rev. Civil Code, art. 8523. Judgment affirmed.

(55 Miss. 401)

**VAUGHAN et al. v. POWELL et al.**

(*Supreme Court of Mississippi. April 23, 1883.*)

**1. MORTGAGES — APPLICATION OF MORTGAGED PROPERTY TO SUBSEQUENT DEBTS TO MORTGAGEE — RIGHTS OF MORTGAGOR'S WIDOW.**

A husband and wife executed a deed of trust of land and crops to secure an indebtedness to defendant, and the husband subsequently made arrangement with defendant for supplies, and delivered cotton in payment for the same. *Held*, that after the death of the husband and foreclosure by defendant, in an action by the wife for an accounting of the amount due, that the husband had the right to devote the cotton to payment for supplies, and that his wife had no claim, inviolable as against his acts, to have the cotton applied to the debt secured by the deed of trust.

**2. SAME — DEED OF TRUST — POWER OF SALE — VALIDITY — ENTRY BY TRUSTEE.**

Under a deed of trust, with power of sale as follows: "If default be made, \* \* \* said trustee shall, at the request of the third party, take possession, \* \* \* and, after giving notice, \* \* \* proceed to sell," a sale is valid without entry or demand of possession by the trustee.

Appeal from chancery court, Yazoo county; E. G. PEYTON, Chancellor.

Plummer Vaughan, and his wife, Angeline Vaughan, executed a deed of trust, covering the land in controversy, the crop, mules, etc., to secure an indebtedness due in January following to Henry Powell. Afterwards, Plummer Vaughan made arrangements himself with Powell for supplies; and Plummer Vaughan delivered cotton to Powell to be applied to payment for supplies. Plummer Vaughan died. The debt secured by the deed of trust not being paid, Powell directed the trustee to sell under it, which was done, and Powell became the purchaser; and now Angeline Vaughan, the widow, for herself and children, exhibited this bill to get rid of Powell's title to the property, and alleges that nothing is due, prays for an accounting; and, if she is mistaken in this, that Powell shall be required to pay the difference between his bid and what is actually due. She further claims that the arrangement of her husband for supplies was in derogation of her rights, and that the cotton delivered to Powell should have been applied to the payment of the debt covered by the deed of trust. And, finally, she claims that the trustee did not demand possession and take charge of the property covered by it as required by the deed of trust, which contained a power of sale in the following terms: "Now, if said Plummer Vaughan, one of the parties of the first part, shall pay off and discharge the above-named indebtedness at maturity, then this conveyance to be void; but if default be made in the payment of the same, or any part thereof, at maturity, said trustee, or his successor, shall, at the request of said party of the third part, take possession of all the property conveyed under this deed; and after giving ten days' notice of the time, place, and terms of sale, by posting notices thereof in three or more public places in said county, to be designated in said notices, proceed to sell to the highest bidder for cash all of said property, or a sufficiency thereof to satisfy said debt, interest, and costs," etc. The bill was dismissed, and complainants appeal.

*Bowman & Bowman*, for appellants. *D. R. Barnett*, for appellees.

CAMPBELL, J. We agree with the chancellor in his conclusion against the complainants as to the debt due to Powell, and that Plummer Vaughan had the right to devote his cotton, incumbered by the deed of trust, to payment  
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for supplies, and that his wife had no claim, inviolable as against his acts, to have the cotton applied to the debt secured by the deed of trust. Taking possession of the land or demanding it was not a condition precedent to the exercise of the power of sale. It was authorized but not required by the deed of trust. *Kiley v. Brewster*, 44 Ill. 186. The contrary view of the supreme court of Massachusetts in *Roarty v. Mitchell*, 7 Gray, 248, is not maintainable. In that case the deed provided that the donee of the power to sell "may enter and take possession, \* \* \* and may sell and dispose of the same." Because no entry was made, nor demand made, the court held no valid sale could be made. Manifestly, if the deed made entry and possession a condition precedent, it could not be satisfied by anything short of that. Such conditions must be strictly complied with, and do not admit of substitutes or equivalents. Demand of possession cannot take the place of possession where the latter is expressly required as a condition of the exercise of power. **Affirmed.**

(84 Ala. 138.)

**GASTON et al. v. WEIR.**

(*Supreme Court of Alabama.* March 22, 1883.)

1. **EJECTMENT—PLEADING—DESCRIPTION OF PREMISES.**  
In ejectment for  $9\frac{3}{4}$  acres of land, described as lying in "the south-east corner of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of sec. 1," a description in a deed calling for "47 $\frac{1}{4}$  acres of the west part of the N.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of sec. 1," is sufficient to embrace the land sued for.
2. **DEED—REQUISITES—FAILURE TO NAME GRANTOR IN BODY OF DEED.**  
A deed formal in all respects, except that the grantor is not named in the body of the instrument, is ineffectual to convey the legal title to real estate.
3. **HUSBAND AND WIFE—DEED FROM HUSBAND TO WIFE—EFFEOT.**  
A husband cannot convey the title to real estate by a deed executed directly to his wife.
4. **EVIDENCE—DOCUMENTS—OBJECTIONS TO DEEDS—WAIVER.**  
Objection to the admission of deeds in evidence on the ground of insufficient description is a waiver of all other grounds of objection.
5. **SAME—PAROL—TO EXPLAIN DEED.**  
Parol evidence of the intent of the grantor is inadmissible to explain a deed void on its face for uncertainty of description.

Appeal from circuit court, Wilcox county; JOHN MOORE, Judge.

This was a statutory real action in the nature of ejectment brought by Hugh G. Weir against the appellants, David F. Gaston, Sr., and David F. Gaston, Jr., for the recovery of 40 acres of land described in the complaint. The defendants pleaded not guilty; disclaimer except as to  $9\frac{3}{4}$  acres of the lands sued for; and possession of ten years. Issue was joined on all of these pleas, and judgment was rendered in favor of the plaintiff. The defendants take the appeal, and assign as error the several rulings of the lower court, as shown by the opinion of this court.

*John Y. Kilpatrick*, for appellants. *Alex. D. Pitts*, for appellee.

STONE, C. J. The present suit, as narrowed down by the pleadings, is a statutory real action for the recovery of  $9\frac{3}{4}$  acres of land. It is described as lying and being in the south-east corner of the north-west quarter of the north-west quarter of section one, (1,) township fourteen, (14,) range six, (6,) Cahaba land district. Such is the description in the pleadings. Each party claims to be a derivative purchaser from Spiva as a common source. Plaintiff's chain of title is as follows: Spiva conveyed to Ballard in 1859; Ballard to Oxford in 1860, and Oxford to plaintiff, Weir, in 1870. The description in each of these conveyances is substantially the same. Its language is, "forty-seven and a fourth acres of the west part of the north half of the north-west fourth of section one." It is objected for appellant, defendant below, that this description does not embrace the lands sued for. We cannot assent to this. The north

half of the north-west quarter (eighty acres) necessarily includes the north-west quarter, (forty acres.) Forty-seven acres of the west part of north half must be that much taken off the west end of the eighty acres, and, unexplained, must be marked off as a parallelogram. *Wilkinson v. Roper*, 74 Ala. 140. The deeds not only convey all of the north-west quarter (N. W.  $\frac{1}{4}$ ) of north-west quarter, (N. W.  $\frac{1}{4}$ .) but *prima facie* they convey seven acres off the west side or part of the north-east quarter (N. E.  $\frac{1}{4}$ ) of the north-west quarter, (N. W.  $\frac{1}{4}$ .) Each of the deeds embraces the land sued for. After the three deeds were put in evidence, and after the defendant had introduced his testimony, he moved to exclude the said three deeds constituting plaintiff's chain of title, "because said  $9\frac{1}{4}$  acres of land is not sufficiently described in either of said deeds, and because the land described in each of said deeds does not embrace the  $9\frac{1}{4}$  acres of land in dispute." This was the sole ground stated for the exclusion. We have shown this ground is untenable, and the circuit court did not err in overruling the motion.

It is urged before us that the deeds were inadmissible in evidence, on account of defects in the certificates, and on some other grounds. The exclusion having been moved for on a single specific ground, this was a waiver of all others, and we cannot consider them. *Jaques v. Horton*, 76 Ala. 238; 8 Brick. Dig. p. 444, § 574; *Floyd v. State*, 82 Ala. 16, 2 South. Rep. 683. The plaintiff made a *prima facie* case for recovery. The defense is placed on two grounds: *First*. That Weir, the plaintiff, had divested himself of all title, and therefore could not maintain the suit. In January, 1873, Hugh G. Weir attempted to convey the land directly to his wife, Sarah G. Weir, and executed a deed to her for that purpose. This had no effect or operation as a conveyance of the legal title, but left it in Hugh G. Weir, the husband. *McMillan v. Peacock*, 57 Ala. 127; *Meyer v. Sulzbacher*, 75 Ala. 423; *Powe v. McLeod*, 76 Ala. 418. *Second*. Another attempt was made to convey the title in October, 1882. The attempted conveyance in this instance was signed by Sallie G. Weir, the wife, and Hugh G. Weir, the husband, M. C. Weir being named as grantee. This deed is formal in all respects, except that Hugh G. Weir is not named in the body of the instrument as a grantor. This paper is ineffectual to divest title out of H. G. Weir. *Harrison v. Simons*, 55 Ala. 510; *Hammond v. Thompson*, 56 Ala. 589; *Blythe v. Dargin*, 68 Ala. 370; *Madden v. Floyd*, 69 Ala. 221.

The defense, in its second form, attempted to trace title to Gaston, the defendant, from Spiva, the common source of title. The conveyance from Spiva is dated in December, 1859, and there were regular subconveyances down to Gaston. The description, under which it is claimed the land in controversy was conveyed, is in substance the same in each of the deeds constituting this chain. Its language is, "nine and three-quarters of an acre lying in the north half of the north-west quarter of section one, (1.) township fourteen, range six, in Wilcox county, Ala." These deeds, on the objection of the plaintiff, were not allowed to be put in evidence. They were then offered in connection with oral proof "that the  $9\frac{1}{4}$  acres of land in dispute was the land which it was intended to convey in said first deed. The court sustained the plaintiff's objection, and refused to permit defendant to show by parol that the land in dispute was the land intended to be conveyed by said first deed." There can be no question that the deeds, as offered, unaided by other identifying testimony, are void on their faces, on account of the uncertainty of the description of the land intended to be conveyed. *Pollard v. Maddox*, 28 Ala. 321; *Wilkinson v. Roper*, 74 Ala. 140. An imperfect description of the subject of the conveyance may frequently be aided and made certain by oral proof of attendant explanatory facts; but proof of mere intention is always inadmissible. *Hughes v. Wilkinson*, 35 Ala. 453; *Chambers v. Ringstaff*, 69 Ala. 140; *Meyer v. Mitchell*, 75 Ala. 475; *Driggers v. Cassady*, 71 Ala. 529; *Clements v. Pearce*, 63 Ala. 234. Affirmed.

(84 Ala. 74)

*HARMON et al. v. JENKS.*

(Supreme Court of Alabama. May 18, 1888.)

**ATTACHMENT—MOTION TO DISSOLVE—QUESTION FOR THE COURT.**

A motion to dissolve an attachment for rent is for the court, and not for the jury, to decide; but where the jury, instructed by the court, finds thereon, and also on certain immaterial issues raised by consent of parties on formal but superfluous pleadings and redundant evidence, defendant cannot claim such irregularities as grounds to set aside the order dismissing the motion.

Appeal from circuit court, Bullock county; J. M. CARMICHAEL, Judge.

Appellee, L. W. Jenks, sued in attachment for the rent of a store-house. The judgment entry recites: "Came the defendants, by their attorneys, and move the court for a rule against the plaintiff to show cause why the lien created by the levy of the attachment upon the personal property described in the said levy should not be dismissed and said attachment quashed, which rule being granted, the plaintiff, being in court, waived notice thereof, and filed his answer to said rule, to which defendants filed their replication, and to the replication plaintiff rejoined, and to the said rejoinder defendants demurred; and now, upon consideration, it is ordered and adjudged that said demurrer be, and the same is hereby, overruled; whereupon defendants took issue with plaintiff upon the averments contained in said rejoinder, and, issue being joined upon said rejoinder, then came a jury of lawful men, \* \* \* who do say upon their oaths, 'We, the jury, find for the plaintiff upon said issue.'" Here follows an order of court that the lien be not dissolved, the levy be not dismissed, and the attachment be not quashed. The judgment entry then recites: "And defendants now come by their attorneys and plead the general issue, \* \* \* and issue being joined on said plea," etc.,—and then follows verdict and judgment rendered for plaintiff. In the replication to the plaintiff's answer to show cause why the attachment should not be dissolved, defendants set up that before the rent note became due plaintiff by deed conveyed the store-house in fee-simple to defendants, and thereby ceased to be their landlord. Plaintiff rejoined "that at the time of the deed of conveyance, \* \* \* in addition to the consideration named and expressed in said deed of conveyance, and as a part of said consideration thereof, it was expressly agreed and understood by and between plaintiff and defendants that the plaintiff should have certain machinery not named and expressed in said deed, but then in possession of plaintiff, and that plaintiff should hold and retain said rent note, and as a security for the payment thereof the landlord's lien, created by said rent contract, should be and remain the landlord of defendants, and that defendants should be and remain tenants of plaintiff, and should hold such premises as such tenants for and during the then unexpired term of said lease." Plaintiff demurred on the grounds (1) that this agreement was not shown to be in writing; (2) that it sought to add to, vary, or explain the terms of the conveyance; (3) that the agreement was not in writing, and would vary the legal effect of the conveyance. This demurrer, as appears from the judgment entry was overruled. The bill of exceptions recites: "Issue being joined upon the trial of the question raised by the rule to show cause why the attachment should not be dissolved," etc. The plaintiff was the only witness, and his testimony sustained the averments of the rejoinder. The assignment of error in regard to this testimony by appellant is the refusal of the court to exclude from the jury plaintiff's testimony, that "defendants agreed that he should be landlord until the maturity of said [rent] note." The other errors assigned are the overruling of the demurrer, the general charge for the plaintiff, and the refusal to give the general charge for defendant.

*E. H. Cabaniss*, for appellants. *Norman & Son*, for appellee.

CLOXTON, J. This suit originated in an attachment issued to enforce a landlord's lien for rent. The defendants moved for a rule on the plaintiff to

show cause why the attachment should not be dissolved on the ground that it was sued out on a cause of action for which an attachment was not authorized by law, and that plaintiff did not have a lien as landlord on the goods levied on. The rule is well settled that when an attachment is issued on a cause of action for which such process is not authorized by law, as when sued out by a landlord to enforce a lien for rent on a demand or debt other than for rent, the remedy is by a rule on plaintiff to show cause why it should not be dissolved. The motion made was proper, if the ground existed on which it was based, whether apparent from the face of the proceedings, or established by extrinsic evidence. The proceedings on the motion were irregular, and immaterial issues were presented by the replication to the plaintiff's answer to the rule and by the rejoinder. The issues of fact thus joined were submitted to a jury, who returned a verdict, under the instruction of the court, in favor of the plaintiff.

A motion to dissolve an attachment is for the decision of the court, and not of the jury. If the defect does not appear from the proceedings, evidence may be received in support or discharge of the rule, but the sufficiency of the evidence should be passed on by the court. Whether or not the defect appears from the proceedings, the court must determine the motion. The sole issue triable on the motion made by the defendants was whether the attachment was sued out on a cause of action for which such process could lawfully issue. While the court may hear evidence relevant to this issue, it was irregular to submit to a jury the trial of the issue. Extraneous evidence is only admissible for the purpose of showing the real nature and character of the demand,—whether a claim for rent. If the claim arises from a rental contract, in the making of which the relation of landlord and tenant originated, the termination or dissolution of such relation by subsequent events and transactions is a question which does not arise, and the fact of indebtedness cannot be tried on a motion to dissolve the attachment. It is immaterial whether the relation exists when the attachment is sued out, if such relation had previously existed. *Bell v. Allen*, 76 Ala. 450. The termination or dissolution of the relation during the term of the lease is pleadable in bar on the trial of the attachment suit, and of consequence that there is no debt which can be recovered in that suit. *Tucker v. Adams*, 52 Ala. 254; *Adair v. Stone*, 81 Ala. 113, 1 South. Rep. 768. The issue joined on the replication and rejoinder that the relation had terminated, and that the rent passed to the defendants by the conveyance of the property by plaintiff to them during the term of the lease, and before the rent accrued, was an immaterial issue on the motion to dissolve the attachment, and should have been regarded by the court as frivolous. The result was to try the cause on a collateral issue. *Reiss v. Brady*, 2 Cal. 132. It is undisputed that the note on which the attachment issued was given for the rent of the store-house; that the relation of landlord and tenant was thereby created; and that the plaintiff had a lien on the goods for the rent. Code 1886, §§ 3069, 3070. If it were conceded that the relation was dissolved by the subsequent conveyance of the property to defendants, and that the claim for rent was thereby extinguished, these were questions which could only be properly raised and tried on pleas to the complaint. The issues on which the motion was tried being immaterial, and found against the defendants, no errors in the rulings of the court relating to them will avail the defendants, or can be assigned. If the evidence, which was admitted to the jury, had been addressed to the court only, and its effect determined, as it was by the jury under the instruction of the court, the motion to dissolve the attachment should have been overruled on the undisputed facts, and the defendants put to their pleas in bar of the action. The judgment of the court refusing to dissolve the attachment is correct, though irregular and unauthorized proceedings may have been adopted and pursued by the consent of the

parties, and immaterial issues tried on formal but superfluous pleadings, and redundant evidence. There is no error of which the defendants can complain. Affirmed.

(35 Ala. 37)

HERSTEIN v. WALKER.

(*Supreme Court of Alabama.* May 24, 1888.)

INSOLVENCY—RIGHT OF CREDITOR TO FILE CLAIM—WHEN BARRED—CODE ALA. 1886, § 2238.

A creditor who has failed to file her claim against the estate of her deceased insolvent debtor according to Code Ala. 1886, § 2238, providing that claims not filed within nine months after the declaration of insolvency or accrual of the claim, shall be forever barred, cannot recover against the insolvent's estate, though the estate may have been transferred by the deceased debtor to a fraudulent donee.

Appeal from chancery court, Madison county; S. K. McSPADDEN, Judge. Bill filed by Rosa Herstein against Leroy P. Walker to subject certain land to the payment of a debt due her testator. Judgment for defendant, and plaintiff appeals.

*Humes & Sheffy* and *Watts & Son*, for appellant. *Cabaniss & Ward*, for appellee.

SOMERVILLE, J. The bill is filed by the appellant to subject to the payment of a debt due the estate of her testator certain real estate in the city of Huntsville formerly belonging to the deceased debtor, L. P. Walker, and alleged to have been transferred by him, without any valuable consideration, to his wife, Mrs. Eliza Walker, and by her devised to the defendant, L. P. Walker, Jr. It is a bill by a creditor, in other words, to reach assets in the hands of a fraudulent donee of a deceased debtor, or, what is the same thing, a volunteer holding under such a donee. The defense interposed the insolvency of the donor's (L. P. Walker, Sr.'s) estate, and the failure of the complainant, as a creditor, to file the claim in suit against said estate within nine months after the declaration of insolvency, or after the accrual of the claim, as required by the statute, which declares all such claims not so filed to be forever barred. Code 1886, § 2238; Code 1876, § 2568. The chancellor overruled a demurrer to the plea of the statute of non-claim, and held the plea to be a complete defense to the suit, and the assignments of error are based on this action of the court alone.

The precise question upon which this case is made to turn, arose in the case of *Halfman v. Ellison*, 51 Ala. 543, (decided by this court in the year 1874.) It was there held that the theory of such a suit is that a fraudulent donee is to be deemed an executor *de son tort*; and that, this being the capacity in which he holds, he could interpose any defense to the debt which the decedent in his life-time, or a rightful representative, could do. It was held, after full consideration, that the creditor had no such specific lien created in his favor by the filing of his bill as to confer on him any such title or estate in the property fraudulently transferred as would take his claim out of the operation of the statute of non-claim, under the principle applicable to mortgagees, vendors with a lien, and other analogous cases. *Smith v. Gillum*, 80 Ala. 296. That case bears the marks of a patient and thorough consideration. Two opinions were rendered in it by different judges; the last upon an application for a rehearing after holding the case under advisement until another term. It is to be taken as a judicial interpretation by this court of an important statute which operates largely upon titles to real property in this state. Thirteen years have now elapsed since it was announced. The legal profession have, no doubt, given advice to clients upon the faith of its being a proper construction of the statute. The general assembly have since twice readopted it without amendment, and titles to property have probably been

acquired under the rule thus established. It must be to cases of this kind, if to any, that the rule of *stare decisis* must be held to apply. Said Lord MANSFIELD, more than a hundred years ago: "When solemn determinations, acquiesced under, have settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute." *Windham v. Chetwynd*, 1 Burrows, 419. "It is by the notoriety and stability of such rules," observes Chancellor Kent, "that professional men can give safe advice to those who consult them, and the people generally can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property." 1 Kent, Comm. 475. This principle cannot be ignored by this or any other court having a conservative regard for established legal precedents; and it has been often recognized. *Bennett v. Bennett*, 34 Ala. 53; *Gee v. Williamson*, 1 Port. (Ala.) 818, 27 Amer. Dec. 628, and note, 631. And it receives special emphasis where the statute construed has been readopted without change by the law-making power; this being regarded as a legislative sanction of such construction. *Railroad Co. v. Bayliss*, 74 Ala. 150; 3 Brick. Dig. p. 749, § 16. We have carefully examined the able and elaborate argument of appellant's counsel, in which they contend for the principle that the statute of non-claim is not applicable to claims of this kind, sought to be enforced against property transferred by the debtor to fraudulent grantees or donees,—a contention directly in conflict with the principle settled in *Halfman v. Ellison*, 51 Ala. 543, *supra*, and upon which that case was decided. We are not unmindful of the force of these arguments, but, for the reasons stated above, we adhere to that decision as an established rule of property now having prevailed for over 18 years. The record raises no other question, and we therefore decline to consider the other question argued.

The decree of the chancellor overruling the demurrer of the complainant to the defendant's plea of the statute of non-claim is free from error, and is affirmed.

(84 Ala. 289)

POWERS *et al.* v. ANDREWS.

(*Supreme Court of Alabama*. May 23, 1883.)

MORTGAGES—STATUTORY RIGHT TO REDEMPTION—WHO MAY EXERCISE.

Under Code Ala. 1886, § 1879, providing that real estate sold under a power in a mortgage may be redeemed by the debtor within two years; sections 1883, 1885, extending the right to creditors in certain cases; section 1888, to a child who was a grantee of his parent; and section 1891, to heirs, devisees, and personal representatives of the debtor,—the right of redemption can only be exercised by the persons named in the statute, and not by an assignee of the equity of redemption in the mortgaged premises. Overruling *Batley v. Timberlake*, 74 Ala. 221. STONE, C. J., dissents.

Appeal from chancery court, Lauderdale county; THOMAS COBBS, Judge.

This was a bill filed by the appellee, Robert Andrews, and sought to redeem the land in controversy. The ground upon which relief is asked by the bill is that the complainant, as trustee, being an assignee of the equity of redemption, was entitled to exercise the statutory right of redemption as given under the provisions of the Code governing the redemption of real estate. The terms of the statute are sufficiently set out in the opinion. The defendants interposed a demurrer to the bill on the ground of the want of equity. The chancellor overruled the demurrer, and decreed that the complainant was entitled to redeem the land. This ruling of the chancellor is now assigned as error in this court.

*Simpson & Jones*, for appellants. *Emmett O'Neal*, for appellee.

SOMERVILLE, J. The question of principal importance is the right of the appellee, Andrews, who was complainant in the court below, to exercise the

privilege of redeeming the land in controversy, consisting of a lot in the town of Florence. The land, being owned by McAlister and Jackson, was, on March 4, 1882, mortgaged to Mrs. Irvine. Subsequently, on February 2, 1885, the mortgagors, becoming insolvent, made an assignment for the benefit of their creditors, by which they conveyed certain property, including all their right, title, and interest in this mortgaged lot, to Robert Andrews, the appellee, who was named in the assignment as trustee. The mortgage of Mrs. Irvine was duly foreclosed under a power of sale contained in the instrument; and on the 9th of August, 1886, at the sale, Mrs. Powers, one of the appellants, became the purchaser. Upon this bill being filed by the trustee on April 4, 1887, the chancellor held that, being an assignee of the equity of redemption, he was entitled to exercise the statutory right of redemption, under the provisions of the Code regulating the redemption of real estate sold under execution, decree, mortgage, or deed of trust. Code 1886, §§ 1879, 1891; Code 1876, §§ 2877, 2889. In *Bailey v. Timberlake*, 74 Ala. 221, (decided in 1888,) it was held, apparently without consideration at any length, that a junior mortgagee who acquired his interest in the land before the sale by the prior mortgagee was entitled to redeem from a purchaser at a sale made under the power contained in such prior mortgage. No reason was given for this conclusion, and we are now asked to reconsider it, upon the ground that the decision is not only inconsistent with the view taken by this court in other cases of the statutory right of redemption, but it is by strong implication repugnant to the terms of the statute itself. It has often been said by this court that this right of redemption under the statute is purely the creature of legislation, and has no existence without it. It is essentially different from the equity of redemption recognized by the common law. That right is property capable of sale by transfer or under execution or decree of a chancery court. It can only be exercised before a foreclosure of the mortgage under a decree of a court of equity, or before a sale under a power in the mortgage. It cannot be exercised after a valid foreclosure, either under a power of sale or under a decree, unless in the case of voidable sales, where the mortgagee has acted as both seller and purchaser without the consent of the mortgagor, so as to justify the court in setting aside the sale for constructive fraud. *Cramer v. Watson*, 73 Ala. 127. The statutory right of redemption, on the contrary, comes into existence only after the equity of redemption proper has been cut off by sale or foreclosure. Until then, it would seem, it cannot spring into life. And we have uniformly decided that this privilege is neither property, nor the right of property; that it is not subject to levy or sale as such under execution; and that it is a right or privilege personal to the debtor. *Parmer v. Parmer*, 74 Ala. 285; *Otis v. McMillan*, 70 Ala. 46, 62; *Childress v. Monette*, 54 Ala. 317; *Mewburn v. Bass*, 82 Ala. 626, 2 South. Rep. 520; *Cooper v. Hornsby*, 71 Ala. 62; *Seals v. Pfeiffer*, 77 Ala. 278. It necessarily follows from these principles, which are now too well settled to be disturbed, that the statutory right of redemption can only be exercised by the persons named in the statute, in the mode, within the time, and upon the conditions therein prescribed, although in construing the statute it must be interpreted liberally in favor of the debtor, to prevent the oppressive sacrifice of his estate. The statute itself provides, in detail and very fully, for the mode in which the right may be exercised, and the circumstances which authorize it, and the remedy for enforcing it. The right is conferred only on the following-named classes of persons: (1) The debtor himself; (2) any judgment creditor of the debtor whose judgment has not been obtained by fraud, collusion, or confession; (3) the executor or administrator of the debtor; (4) the heirs or devisees of the debtor; (5) the executor or administrator of any judgment creditor of the debtor; (6) a child who was the grantee of his parent, who owned the land sold. Code 1886, §§ 1879, 1883, 1887, 1891. It will be observed that there is no mention among these, in general terms, of the as-

signed, mortgagee, or vendee of the debtor. There is singled out but one particular class of assignees or grantees. These are the children of the owner of the land to whom he may have conveyed it. The only allusion to a mortgagee anywhere in the statute is found in section 1887, which declares that a mortgagee, or beneficiary in a deed of trust, shall be considered as "a creditor," within the meaning of the statute, when he has become the purchaser of the debtor's property at a sale under his mortgage or deed of trust, and then only to the extent to which his mortgage remains unsatisfied; thus placing him upon the same basis with a plaintiff in execution who has become a purchaser under his judgment. *Id.* § 1887. The purpose of this provision is manifestly to enable him to resist a redemption from himself to the extent authorized in section 1884, and to confer on him the right to recover the premises by an action of unlawful detainer, which is conferred on creditors in section 1886. *Id.* §§ 1884, 1886. We repeat that it is nowhere said that a mortgagee, vendee, or other assignee of the debtor may redeem from any one after a sale of the land under execution, or by any of the other modes of sale specified, except in the single instance of a child of the debtor. If we look for the legislative intent in the words which the legislature has embodied in the statute,—the only safe rule of construction where the language of the act is explicit,—we cannot conclude that they intended to confer the right to redeem upon any other assignee of the debtor than the one named, whether he be a vendee or a mortgagee. The enumeration of the six classes specified in the statute is by irresistible implication an exclusion of other classes not named. This implication is rendered more forcible by section 1891 of the Code, which particularly enumerates the vendee of the purchaser among those against whom the right of redemption may be exercised. The omission to state that the right may also be exercised in favor of the vendee of the debtor cannot be unintentional, or without some signification. The maxim forcibly applies, *expressio unius est exclusio alterius*. If the courts can remould the statute, under the idea of supplying one *casus omissus*, they can, on a like principle, insert any number that may be deemed fit, under the colorable pretext of liberally construing a humane and beneficial enactment. This conclusion is strengthened by section 2616 of the Code of 1886, which constituted section 3227 of the Code of 1876, and provides a limitation of five years on the bringing of "all actions founded on equities of redemption, where lands have been sold under a decree of the court of chancery, existing in any person not a party to the proceedings, who claims under the mortgagor or grantor in the deed of trust." Code 1886, § 2616. The established rule is that a junior mortgagee or other incumbrancer who is not made a party to a suit brought by a senior mortgagee to foreclose his mortgage, is not bound in any manner by the decree of foreclosure. *Bradley v. Snyder*, 58 Amer. Dec. 564; *Hunt v. Acre*, 28 Ala. 580; *Haines v. Beach*, 3 Johns. Ch. 459. In the absence of some statutory limitation, therefore, the right of a second mortgagee to redeem, under the principles of the common law, where he has been omitted to be made a party to such a proceeding, would continue as long as his mortgage was operative, and might therefore, in some cases, last 20 years. The sole purpose of this section of the Code is to reduce this time, in such a case, to a limit of five years. *Cooper v. Hornsby*, 71 Ala. 62; *Wiley v. Ewing*, 47 Ala. 418. The assignee of the equity of redemption, Andrews, had the common-law right to redeem the land in controversy, as a junior mortgagee, at any time before the sale under the power of sale contained in Mrs. Irvine's prior mortgage. But this sale, under the power, as effectually cut off this equity of redemption, and destroyed all rights incident to it, as if there had been a strict foreclosure by judicial procedure in a court of chancery, and the junior mortgagee had been made a party to it. When a regular sale is made under a power contained in the instrument, not only the mortgagor, but all persons claiming any interest in the equity of redemption by privity of estate with him, are

considered as parties to the proceeding, and are precluded by it as fully as if they had been made parties defendant by regular subpoena in an ordinary foreclosure suit. *Childress v. Monette*, 54 Ala. 317. The sale, in other words, destroys the equity of redemption, and in this state transmutes it into a naked statutory right of redemption, limited to two years, with new incidents, privileges, and liabilities, which are particularly set forth in the statute. *Harris v. Miller*, 71 Ala. 26; *Sloan v. Frothingham*, 72 Ala. 589. The supreme court of Tennessee have given a more liberal construction to their statutes of redemption than has been given to the Alabama statute, holding, as they do, in that state, the right of redemption to be property, and transferable by the debtor as such, either before or after the sale of the debtor's land. *Graves v. McFarlane*, 2 Cold. 167; *Hepburn v. Kerr*, 9 Humph. 726. Their decisions are not, in our opinion, consistent with the views of this court as to the personal nature of the right to redeem, as created by our statute, nor with the expressed intention of the law-making power as to the particular classes of persons who are specially authorized to exercise the right. The case of *Bailey v. Timberlake*, *supra*, being inconsistent with these views, is hereby overruled.

The chancellor erred in holding that the complainant was entitled to redeem the land in controversy. His decree is accordingly reversed, and a decree will be entered in this court dismissing the bill. Reversed.

STONE, C. J., (*dissenting*.) The statutory right to redeem is not property, but a mere privilege conferred by law. This naked right or privilege is not the subject of bargain and sale. A mortgagor, or defendant in a judgment or decree, whose land has been sold under one or the other, may exercise this statutory right at any time within two years, provided the right remains in him when the sale is made. It is, however, a mere incident to ownership; and if, before the sale, he has parted with his interest,—in one case the equity of redemption, and in the other the title to the land,—he has then lost his statutory right to redeem. There can be no incident without a principal, and the former cannot exist after the latter—ownership—has ceased to exist. The one is dependent on the other, and the statutory right cannot survive its severance from the property right. Construing the statute remedially, I would prefer to hold that the incident follows the principal—the ownership—whithersoever it may go; and that whoever owns the equity of redemption or title, as the case may be, at the time of foreclosure or sale, has the statutory right to redeem as an incident of that ownership. This would lead to a different result in this case from that which my brothers have reached.

(84 Ala. 295)

**AIKEN *et al.* v. BRIDGEFORD *et al.***

(*Supreme Court of Alabama. May 22, 1888.*)

**1. MORTGAGES—STATUTORY RIGHT TO REDEEM—WHO MAY EXERCISE.**

Under Code Ala. 1886, § 1879, providing that real estate sold under a power in a mortgage may be redeemed by the debtor within two years; sections 1883, 1885, extending the right to creditors in certain cases; section 1888, to a child who was a grantee of his parent; and section 1891, to heirs, devisees, and personal representatives of the debtor,—the right of redemption can only be exercised by the persons named in the statute, and not by an assignee of the equity of redemption in the mortgaged premises. Following *Powers v. Andrews*, *ante* 263.

**2. SAME—RIGHT OF JUNIOR MORTGAGEE TO REDEEM—WHEN BARRED.**

A bill to redeem, filed by a junior mortgagee more than two years after the foreclosure of a mortgage under a power of sale, is barred by the limitation of Code Ala. 1886, § 1879.

**3. SAME—FORECLOSURE UNDER POWER OF SALE—EFFECT.**

The effect of a regular foreclosure under a power of sale in a mortgage is equivalent to a strict foreclosure by a court of equity, to which the mortgagor, and those claiming by privity of estate with him, were made parties.

Appeal from chancery court, Etowah county; S. K. McSPADDEN, Judge.

This was a bill filed by Bridgeford & Co., the appellees in this court, against James Aiken as trustee and others, for the purpose of redeeming certain lands described in the bill. The facts, as shown by the bill, are as follows: One Douthit owned the lands in controversy, and, for the purpose of securing an indebtedness due to one Mary E. Moody, executed in December, 1882, a deed of trust, containing the lands in controversy, to James Aiken as trustee, with a power of sale. In June, 1884, the said Douthit executed a mortgage to the complainants upon the said lands. In February, 1885, the said Aiken, as trustee, sold, under the power contained in the deed of trust, the lands in controversy, and the said Mary E. Moody became the purchaser. Bridgeford & Co. now file this, their bill, and seek to redeem the said lands as junior mortgagees. The bill was filed more than two years after the sale under the deed of trust. The defendants interposed demurrers to the bill on the ground that the complainant was not entitled to redeem; the bill not making out a case for equitable relief. The question, as raised by the demurrers, was, "Has the junior mortgagee the right to bring his action for redemption within five years after a sale under a power in a senior mortgage?" The chancellor overruled the demurrers, and the defendants (appellants here) now assign this ruling of the chancellor as error.

*Aiken, Dorech & Martin*, for appellants. *W. H. Denson*, for appellees.

SOMERVILLE, J. In the case of *Powers v. Andrews*, ante, 263, (decided at the present term,) we held that, under our statute regulating the redemption of real estate sold under execution, decree, mortgage, or deed of trust, (Code 1886, §§ 1879, 1891,) an assignee, or junior mortgagee, of the equity of redemption of a prior mortgagor, was not entitled to exercise the statutory right of redemption after a regular foreclosure of the mortgage under a power of sale contained in the instrument had taken place; nor after foreclosure by a court of chancery, except where such mortgagee had not been made a party to the proceeding, in which case he might redeem at any time within five years. Code 1886, § 2616. The principle there settled requires the reversal of the chancellor's decree in this case.

But, independent of that view of the case, there is another which leads to the same result. The present bill was filed by the appellee more than two years after the foreclosure of the deed of trust by Aiken under the power of sale contained in the instrument, and this was a bar of the right to redeem; admitting such a right to exist in a junior mortgagee after foreclosure of a prior mortgage. The statute allows the mortgagor, as debtor, the right to redeem at any time within two years after such sale under the power. Code 1886, § 1879. It is axiomatic that he cannot transfer to another any greater or more extensive right than what he may himself possess. Hence no assignee, or junior mortgagee, of his, could have more than the two years within which to exercise this right, even were these classes construed to come within the statute, which, as we have said above, is not so. The effect of a regular foreclosure under a power of sale is equivalent to a strict foreclosure by a court of equity in a proceeding to which the mortgagor, and those claiming by privity of title under him, were made parties. It cuts off the equity of redemption, not only as existing in the mortgagor, but also in any assignee holding under him, and reduces it to a statutory right. *Childress v. Monette*, 54 Ala. 317. As said in *Powers v. Andrews*, supra: "When a regular sale is made under a power contained in the instrument, not only the mortgagor, but all persons claiming any interest in the equity of redemption by privity of estate with him, are considered as parties to the proceeding, and are precluded by it as fully as if they had been made parties defendant by regular subpoena in an ordinary foreclosure suit." "The sale, in other words," it is added, "destroys the equity of redemption, and, in this state, transmutes it

into a naked statutory right of redemption limited to two years, with new incidents, privileges, and liabilities, which are particularly set forth in the statute."

The complainants were not entitled to redeem in any aspect of the case, and the chancellor erred in so holding. The decree is reversed, and a decree will be rendered in this court, dismissing the complainant's bill, at their costs in this court and in the court below.

(24 Ala. 298)

COMMERCIAL R. E. & B. ASS'N v. PARKER *et al.*

(*Supreme Court of Alabama. May 22, 1888.*)

1. MORTGAGES—STATUTORY RIGHT TO REDEEM—WHO MAY EXERCISE.

Under Code Ala. 1886, § 1879, providing that real estate sold under a power in a mortgage may be redeemed by the debtor within two years; sections 1883, 1885, extending the right to creditors in certain cases; section 1888, to a child who was a grantee of his parent; and section 1891, to heirs, devisees, and personal representatives of the debtor,—the right of redemption can only be exercised by the persons named in the statute, and not by an assignee of the equity of redemption in the mortgaged premises. Following *Powers v. Andrews*, *ante*, 263.

2. STATUTORY RIGHT TO REDEEM—ASSIGNMENT OF INTEREST—WAIVER OF RIGHT.

The statutory right to redeem, conferred upon a mortgage debtor by Code Ala. 1886, § 1879, exists only as an incident to ownership; and a debtor who has parted with his interest in the property by transferring his equity of redemption waives his right to redeem.

3. SAME—REDEMPTION—FAILURE TO TENDER PURCHASE MONEY.

On a bill to redeem certain property after mortgage sale, it appeared that complainant made no tender of the purchase money, or offer to redeem, as required by the statute, and that the attorney who made the offer for him had no authority to act in the matter. *Held*, that complainant cannot recover.

4. SAME—FORECLOSURE—PARTIES—MISJOINDER.

An assignee of a mortgagor's equity of redemption, and an assignee of the statutory right of redemption, not being entitled to the statutory right of redemption, are improperly joined as parties complainant in a bill to redeem.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Judge. This was a bill filed by James Parker, W. H. Jackson, David Blakey, and T. R. Parker, the wife of the said James Parker, and seeks to redeem the lands in controversy from the defendants, appellants in this court. Mrs. Parker prayed for the right to redeem on the ground that she was the assignee of the mortgagor's equity of redemption, which she had purchased before the mortgage sale. The complainant Blakey sought to redeem on the ground that he was the assignee of the statutory right of redemption, which he purchased after the mortgage sale. The complainant James Parker asked for the right of redemption under the statute; he having been the original mortgagor, but had disposed of his equity of redemption to his wife, Mrs. Parker, one of the complainants. There was no contest as to the complainant Parker. The defendant demurred to the bill on the ground of the want of equity, and for the misjoinder of parties, but the chancellor overruled the demurrer, and decreed that the complainants be allowed to redeem. This ruling and decree of the chancellor is here assigned as error.

*Troy, Tompkins & London*, for appellant. *Brickell, Semple & Gunter*, for appellees.

SOMERVILLE, J. 1. In the case of *Powers v. Andrews*, *ante*, 263, (decided at the present term,) we have held that the vendee or assignee of a mortgagor's equity of redemption, not being named in the statute among those to whom is accorded the statutory right of redemption,—by which is meant the right to redeem after sale under execution, or foreclosure of a mortgage by decree or under a power of sale,—is by necessary implication excluded from the exercise of such privilege, with the single exception, specified in the statute itself, of a child of the debtor and owner, to whom his parent had con-

veyed the land. Code 1886, §§ 1879 *et seq.*, 1888. This ruling was affirmed in the case of *Aiken v. Bridgeford*, *ante*, 266, (present term,) where a junior mortgagee sought to exercise the statutory right of redemption, and was held not to be entitled to it.

2. The same course of reasoning adopted in these cases would preclude the assignment by a debtor of his statutory right of redemption, which is but the bare right of repurchase after sale. The statute names the persons who are authorized to exercise it, and it excludes from this enumeration the assignee of the debtor. If the debtor can transfer such right, why may not the judgment creditor do the same, without assigning his judgment? The reason is that the right is neither property nor the right of property, but a mere personal privilege, the essential nature of which is that it is confined to the person of the party within whose option its exercise rests. Our decisions fully commit us to the personal nature of the right, and are therefore logically inconsistent with the idea of its assignability. *Parmer v. Parmer*, 74 Ala. 285; *Childress v. Monette*, 54 Ala. 317; *Otis v. McMillan*, 70 Ala. 46. No liberality of construction can authorize us, on sound principles, to incorporate in the statute a new class of persons as entitled to exercise the right who have not been named by the law-making power, which has for the last 40 years amended the statute from time to time by extending its benefits to others not previously enumerated. *Posey v. Pressley*, 60 Ala. 243. This power is a legislative not a judicial function, and we are content to remit to the general assembly the policy or impolicy of including within the provisions of the law the assignee or vendee of the debtor's right to redeem under the terms prescribed by the statute. The chancellor, in holding to the contrary, bases his opinion, in some measure, upon an intimation in *Carlin v. Jones*, 55 Ala. 624. But the question was in that case expressly left open for future consideration, and was not decided. Under these rulings, neither the complainant Blakey nor Mrs. Parker had the right to redeem the property in controversy. The former claimed to be the assignee of the statutory right of redemption, purchased since the mortgage sale, and the latter the assignee of the mortgagor's equity of redemption, acquired prior to the mortgage sale. They were, therefore, both improperly joined as parties complainant in this bill. The demurrer for such misjoinder should have been sustained, and the chancellor erred in overruling it.

3. Jackson and one James Parker were the original mortgage debtors, and are also made parties complainant to the bill. The offer to redeem, and the accompanying tender, was also made in their names jointly and severally. The question may arise upon another trial as to their rights in the premises. So far as Jackson is concerned, there is no difficulty presented. The evidence shows, without conflict, that he made no tender or offer to redeem. The attorney who acted in the matter had no authority to represent him, and the offer made must therefore be held to be unavailing to divest title out of the defendant, and vest it in one who neither asks it, nor has complied with the requirements of the statute regulating the subject of real estate redemption.

4. We next consider the right of James Parker. It is insisted, as to him, that he has lost his statutory right of redemption in two ways: (1) By transferring his equity of redemption to his wife, Mrs. Parker; (2) by the sale of his statutory right of redemption to Blakey. We have seen above that this personal privilege does not pass to an assignee of the mortgagor's equity of redemption. *Powers v. Andrews*, *supra*. Nor does it pass to a purchaser by assignment of the debtor, because such a sale of it is not authorized by the statute which creates and regulates the right, and enumerates those to whom it is given. The inquiry is, can the debtor still exercise it, although he has no interest in the property sold at the time of the sale? Does the statute contemplate that he shall redeem property in which he has no interest or estate? The very idea of redemption necessarily involves the correlative idea of an

interest in the thing sought to be redeemed. It is the rescuing from sacrifice of the debtor's property,—not the property of another: We construe the statute to confer the statutory right of redemption upon debtors only for the purpose of redeeming their own property,—property in which they have some interest at the time of sale. If the debtor has parted with this interest, he has abandoned the right to redeem, because the right cannot exist except as an incident of ownership. Any other construction of the statute would lead to incongruities that would seem to be inharmonious with the general legislative intention as apparent from the context of the entire law. Under this view, James Parker had lost his right to redeem, at the time the bill was filed, by the transfer of his entire interest in the property to his wife.

The other questions raised need not be considered, as the conclusions above announced are fatal to the equity of the bill, and to any recovery by complainants either under the pleadings or the proof. The decree will accordingly be reversed, and a decree will be entered in this court dismissing the bill.

(34 Ala. 303)

THOMAS v. JONES.

(*Supreme Court of Alabama. May 23, 1883.*)

**1. MORTGAGES—SALE UNDER POWER—PURCHASE BY MORTGAGEE—RIGHTS OF MORTGAGOR'S GRANTEE.**

Where a mortgagee, unauthorized thereto, through the intervention of a third person, purchased at his own sale under a power in the mortgage, equity will construe the transaction as a fraud on the right of a *cestui que trust*, and will set it aside at the request of the mortgagor's grantee, who files his bill within a reasonable time offering to do equity.

**2. SAME—SETTING ASIDE FRAUDULENT SALE UNDER POWER—EFFECT ON EQUITY OF REDEMPTION.**

Where a sale under power contained in a mortgage is set aside for fraud, the equity of redemption is restored to its original status, subject only to the costs of redemption.

**3. SAME—REDEMPTION—PLEADING—OFFER TO PAY AMOUNT DUE.**

An averment of tender before filing a bill to redeem is only material as affecting the question of costs, and is not essential to the equity of the bill; and an offer, made in the bill, to pay all that may be found due upon the taking of the account prayed, is sufficient.

**4. SAME—REDEMPTION—PARTIES—ASSIGNMENT OF MORTGAGOR'S INTEREST.**

A mortgagor who has transferred his entire interest in the mortgaged property to the complainant should not be made a party to a bill to redeem.

**5. SAME—FORECLOSURE—"EXPENSES OF SALE"—ATTORNEY'S FEES.**

A provision in a mortgage containing a power of sale, for the "expenses of sale," does not include attorney's fees.

Appeal from chancery court, Conecuh county; JOHN A. FOSTER, Judge.

The appellee, James F. Jones, who was the complainant in the chancery court, filed his bill for the purpose of redeeming the land described in the bill from the appellant, Joseph H. Thomas. The bill showed that the complainant was the assignee of the mortgagor's equity of redemption, and that the defendant, who was the mortgagee, sold the land under a power of sale contained in the mortgage, and became the purchaser at his own sale, without having authority, as given by the mortgage or otherwise, to become such purchaser at his own sale. The mortgagor was not made a party to the bill. The bill was demurred to for this non-joinder, but the chancellor overruled the demurrer. The chancellor held that the complainant had the right to redeem, and the defendant appealed, and now assigns this ruling of the chancellor, and his ruling on the demurrers, as error.

*G. R. Garnham and J. W. Posey*, for appellant. *Stallworth & Burnett and John Gamble*, for appellee.

SOMERVILLE, J. 1. The mortgagor, George M. Jones, having disposed of his entire interest in the mortgaged property by sale and conveyance to the

complainant, James F. Jones, there was no necessity for making him a party defendant to the bill. The demurrer, based on the fact of his non-joinder as a party defendant, was properly overruled.

2. The defendant, Thomas, who was the mortgagee, is shown to have been, by indirection, the real purchaser at the mortgage sale; he having made a deed to Hickox, and the latter having reconveyed to him without consideration. At the time of this sale and purchase by the mortgagee, the land belonged to the complainant. He owned the equity of redemption, which was cut off by the mortgage sale, and purchased in by the trustee, and therefore had a right to avoid the sale by the bill filed to redeem in proper time. *Downs v. Hopkins*, 65 Ala. 508; *Ezell v. Watson*, 83 Ala. 120, 3 South. Rep. 309; 2 Jones, Mortg. § 1876. This is not a case of the exercise of the statutory right of redemption. If it were, and any other person than the mortgagee himself were the purchaser, under the rule declared in *Powers v. Andrews*, ante, 263, (present term,) and other cases following that decision, the bill would be entirely devoid of equity, on the ground that an assignee of the statutory right of redemption cannot redeem, under the statute, after a valid foreclosure of the mortgage either under a decree of a court of chancery, or under a power of sale contained in the instrument. But the rule is clearly settled to be otherwise where the mortgagee, when unauthorized, purchases at his own sale; not that the sale, so long as it is permitted to stand, is ineffectual to cut off the equity of redemption, for such is undoubtedly its legal effect, but the court, construing the transaction as a fraud on the right of a *cestui que trust* by the trustee, will set aside the sale at the request of the injured party who files his bill to redeem within a reasonable time, offering to do equity. When the sale is thus set aside, the complainant's equity of redemption is restored to its original status, subject only to the lawful charges incident to redemption; but otherwise it is completely disembarassed of the sale.

3. The offer made in the bill to pay all that might be found due on the taking of the account prayed, was clearly sufficient. An averment of a tender before the filing of the bill is only material as affecting the question of costs, and is not essential to the equity of the bill. *McGuire v. Van Pelt*, 55 Ala. 344; *Adams v. Sayre*, 70 Ala. 318.

4. The court properly disallowed the item of \$25 claimed for attorney's fees expended in foreclosing the mortgage under the power. The mortgage did not specially authorize such a charge; and the term "expenses of sale," occurring in the mortgage, would include nothing more than the ordinary expenses or costs of foreclosure,—not extraordinary charges, such as attorney's fees for services rendered in making the foreclosure. We discover no error in the record, and the decree is affirmed.

(84 Ala. 305)

#### HANNA v. STEELE.

(Supreme Court of Alabama. May 22, 1888.)

#### 1. EXECUTION—SALE OF UNDIVIDED INTEREST IN LAND—RIGHT OF PURCHASER TO POSSESSION.

Under Code Ala. 1886, § 1880, requiring a debtor to deliver land sold under execution to the purchaser within 10 days, where the levy was upon an undivided interest, the purchaser is not entitled to sole possession.

#### 2. SAME—REDEMPTION OF LAND FROM SALE—WHEN ALLOWED.

Code Ala. 1886, § 1880, requiring a debtor on his bill to redeem land sold under execution to show a delivery to the purchaser within 10 days of the sale, does not require the delivery of land not levied on as a condition precedent to redemption.

Appeal from chancery court, De Kalb county; THOMAS COBBS, Judge.

The appellee, Steele, filed this bill to redeem certain real estate sold by the sheriff under the power of an execution. Upon a portion of the land, levy had been made on the entire interest therein; on the other portion, levy was made on the undivided interest. The purchaser demanded possession of the

entire interest in all the lands so sold, claiming that the undivided interest not sold was his from another source of title than that obtained at the sheriff's sale, and about which there was a controversy between him and the appellee. Appellee surrendered the portion, the entire interest in which had been sold; and offered to give joint possession of that portion, the undivided interest in which had been sold. The appellee's right to redeem that property which was sold by the sheriff is the question determined in the opinion. The chancellor, on final hearing, decreed that the appellee was entitled to redeem; and this decree is here assigned as error.

*Samuel F. Rice* and *L. A. Dobbs*, for appellant. *R. A. Dunlap*, for appellee.

CLOPTON, J. A bill to redeem land sold under an execution must allege that possession was delivered to the purchaser within 10 days after the sale on his demand, and also that the debtor paid or tendered to the purchaser the purchase money, with 10 per cent. per annum thereon, and all other lawful charges. Code 1886, §§ 1880, 1881; *Stocks v. Young*, 67 Ala. 341. These facts are distinctly alleged in the present bill, and the evidence establishes a sufficient tender. The only question really controverted is whether possession was delivered to the purchaser as required by the statute. The entire interest in a part, and an undivided interest in another part, of the lands, were levied on. At the time of the sale by the sheriff, the complainant, who was the defendant in execution, was in possession claiming the entire estate in all the lands, and was living in a house situated on that part of the land of which only an undivided half interest was levied on and sold. Complainant delivered possession of the part of the land, the entire estate in which was sold; and offered to admit the defendant, who was the purchaser, into joint possession of the part of which an undivided half interest was sold; but defendant demanded that complainant should move out of the house, and deliver sole possession of the entire lands. There was a controversy between complainant and defendant as to the title to the half interest not levied on and sold. A purchaser at an execution sale of land acquires no greater or other interest therein than is levied on. If the levy is general upon the entire estate, all the right and title of the defendant in execution passes to the purchaser by the sale and sheriff's deed; but, if the levy is upon a partial, or limited and defined, interest,—an undivided half interest,—this is an equivalent of a negation that the entire estate and interest is levied on, and in such case the purchaser only acquires the undivided half interest. If the complainant had title or estate in the other half interest, he was not divested thereof by the levy, sale, and sheriff's conveyance. *Carrington v. Richardson*, 79 Ala. 101. The defendant, as purchaser, was only entitled to the possession of the estate or interest which was levied on and sold, which is all he could recover in an action of ejectment. It was not intended by the statute to require the debtor, as a precedent condition to redemption, to deliver possession of any land, or interest in land, not levied on. On a bill by a debtor to redeem, a court of equity will not suffer itself to be made an instrument to try and determine disputed and controverted titles or claims; nor will it require the debtor to deprive himself of the vantage-ground of possession, on which to try his right to an estate or interest of which he was not divested by the levy and sale. The complainant offered to deliver to the defendant all the possession which he was entitled to demand. Affirmed.

(84 Ala. 283)

CHAPMAN v. PEEBLES.

(*Supreme Court of Alabama. May 30, 1898.*)

1. VENDOR AND VENDEE—VENDOR'S LIEN—WAIVER—EVIDENCE.

On a bill to enforce a vendor's lien, one of the defendants testified that she made the contract of sale, and paid part of the purchase money, and that the vendor's lien was waived. Another person, not interested, testified that he made the contract of sale with defendant's husband, who executed a note, stating that it was for the unpaid balance of the purchase money on the land, and the deed was made to the wife and son of the maker of the note, an insolvent. *Held*, that the evidence was insufficient to repel the presumption that a vendor's lien was intended to be reserved; the land being conveyed without further security for the purchase money than the note of defendant's husband.

2. SAME—VENDOR'S LIEN—BILL TO ENFORCE—PARTIES.

On a bill to enforce a vendor's lien, a demurrer was filed on the ground that the personal representative of a deceased insolvent vendee, who had disposed of his interest in the land, was not made a party. Leave to amend was given, which the record shows was done, without disclosing the particular amendment. *Held*, that the court properly proceeded to trial and decree 12 months afterwards, no further objection being made, without such personal representative being made a party.

3. EVIDENCE—PAROL TO VARY WRITING—ADMISSIONS.

Admissions of a defendant regarding an unpaid note, and a vendor's lien thereunder, may be proven when they are not used to contradict the terms of the note.

4. WITNESS—PRIVILEGED COMMUNICATIONS—WHAT ARE—TRANSACTION BETWEEN ATTORNEY AND CLIENT.

An attorney may be compelled to testify that he wrote a note, which was signed in his presence by his client, and that, as attorney, he paid, the same day, a certain sum of money to the client; such evidence being a statement of facts, and not communications made in professional confidence.<sup>1</sup>

5. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW—TRANSACTIONS WITH DECEASED PERSON.

The testimony of a party as to transactions with a deceased person, if not objected to in proper time, will be considered, and given such weight as his interest in the result of the suit, and other surrounding circumstances, will allow.

Appeal from chancery court, Pickens county; THOMAS W. COLEMAN, Chancellor.

The appellee, Emory B. Peebles, filed this bill to enforce a vendor's lien on land sold by his father, W. B. Peebles. The said W. B. Peebles having died, the note given him for the unpaid purchase money, in the division and distribution of the estate, became the property of his son, the complainant in this suit.

*Green B. Mobley*, for appellant. *M. L. Stansel*, for appellee.

CLOPTON, J. Appellee brings the bill to enforce a vendor's lien. It alleges that W. B. Peebles, the father of the complainant, sold the lands mentioned therein to John R. Chapman, who gave the note set forth in the bill for the unpaid balance of the purchase money, and that the vendor, at his request, made the conveyance to the defendants, one of whom was his wife, and the other his minor son. The defense set up by the answer is that the lands were purchased by the defendants, who made the cash payment with their own money, and that it was distinctly understood and agreed that the vendor would look solely to the maker of the note for its payment, and that the land should be discharged of any lien. The contestation between the parties is whether there was a waiver, or an agreement to relinquish the vendor's lien.

It is proper, before proceeding to consider the case on the merits, to notice objections to the testimony which were taken by the defendants, and thus determine what evidence should be considered in deciding the case. It is objected that the witness Cooke is incompetent to testify to the facts stated by

<sup>1</sup>As to what communications to an attorney are privileged, see *Manufacturing Co. v. Frawley*, (Wis.) 32 N. W. Rep. 768, and note; *Appeal of Goodwin Co.*, (Pa.) 12 Atl. Rep. 786; *Michael v. Foll*, (N. C.) 6 S. E. Rep. 264; *Hall's Adm'r v. Rixey's Adm'r*, (Va.) 1d. 215.

him, on the ground that he was the attorney of Chapman, and that they were communicated to him in professional confidence. Notwithstanding he was his attorney in other matters, and the retained adviser in his general business, it is admissible for him to testify to the facts that he wrote the note for the purchase money; that Chapman executed it in his presence; and that he paid him, on the same day, money, which was in the hands of witness as his attorney. These were acts, not communications in professional confidence, and do not come within the rule which excludes privileged communications. 1 Greenl. Ev. § 240, note *a*; *Railway Co. v. Yeates*, 67 Ala. 164. The chancellor did not err in overruling the objection to the testimony of the complainant in respect to the admissions and declarations of the defendants relating to the unpaid note, and the reservation of a vendor's lien. The evidence does not explain or vary the legal effect of the note, nor contradict the written terms. The chancellor considered the testimony of Mrs. Chapman in regard to transactions with the deceased vendor, for the reason that no objection to her competency was taken in proper time. We shall also consider it, and give it such weight as her relation to the suit, and interest in the subject-matter, and its corroboration or contradiction by the other testimony, may authorize.

There is no dispute that the note was given for the unpaid balance of the purchase money. In the absence of an agreement to the contrary, a vendor's lien is presumed to exist when land is sold and conveyed, and no security taken for the purchase money other than the personal obligation of the vendee, unless the nature of the contract or the attendant circumstances satisfactorily show that the reservation of the lien was not intended. It cannot be successfully claimed that there is anything in the peculiar nature of the contract or the attendant circumstances, other than is shown by the evidence of Mrs. Chapman, which shows a waiver of the lien. The mere fact that the deed was executed to the defendants is not sufficient to overcome the presumption. The lien is not waived or abandoned when the vendor accepts the individual note of the purchaser for the unpaid balance of the purchase money, though the conveyance may be made at his request to his wife and son. *Stringfellow v. Ivie*, 73 Ala. 209; *Moore v. Worthy*, 56 Ala. 163. The claim of defendants is that the lien was waived or relinquished by the express agreement of the vendor, which is sought to be established by the unaided testimony of Mrs. Chapman. On them rests the burden of establishing such agreement; and, if it remain in doubt, the lien must be held to attach. It is true that Mrs. Chapman testifies that she made the contract of purchase with the vendor; but this is inconsistent with the evidence of Cherry, who is disinterested, and who was examined on the part of defendants. He testifies that he saw the vendor about selling the land, at the instance of John R. Chapman, and sold the land to him, though he was not present when the note and deed were executed. Mrs. Chapman further testifies that she made the cash payment of \$2,000 with her own money, and the money of the minor son, each contributing one-half. John R. Chapman was the guardian of his son, and Cooke testifies that on October 13, 1880, at the time he wrote the note, he paid Chapman, as guardian, over \$1,500, and over \$200 of his individual money, making in the aggregate about \$1,800. The note and deed are both dated October 15, 1880. It appearing that Chapman had the note written, and obtained the money from Cooke, contemporaneously, and closed the purchase within two days thereafter, there can be but little, if any, doubt that he used this money in making the cash payment, a part of which belonged to his son, and a part to himself. The note recites on its face that it was given for the balance of the purchase money of the land. The question of the waiver of the lien is one of intention, and such recital in the note is regarded as impliedly evincing a strong intention that the vendor's lien shall be retained. *Tedder v. Steele*, 70 Ala. 347. The retention of the lien is further shown by the admissions of the defendants to complainant, as testified by him, whose

testimony in this regard is uncontradicted. It is clearly shown that John R. Chapman was insolvent, and it is not reasonable to suppose that the vendor would have discharged the land, and look solely to an insolvent debtor, who had already claimed his exemptions. Unless there was an intention to reserve the lien, there could have been no meaning or purpose for stating in the note, which was so written by direction of Chapman, that it was for the balance of the purchase money of land "which he [the vendor] has this day conveyed to Oscar Chapman and Mary B. Chapman." Other inconsistencies between the testimony of Mrs. Chapman and the other evidence could be noticed, but it is unnecessary. Her evidence, which stands alone, unsupported, and is opposed by proof made by the other witnesses, and the internal evidence of the writings, fails to satisfactorily show an agreement to discharge the land. The preponderance of evidence is that John R. Chapman was the purchaser, though he bought it for his wife and son. It may be that, if the money of the defendants was used by him in paying for the land, they could, in a proper case, have avoided the contract; but they will not be permitted to reap its benefits, and escape its burdens.

The bill alleges that the purchaser was insolvent, and that there was no administration of his estate. A vendee who has parted with all his interest in the land, though a proper, is not a necessary, party to a bill to enforce a vendor's lien. *Wilkinson v. May*, 69 Ala. 33. A bill to enforce such lien merely is distinguished in this respect from a bill to foreclose a mortgage, in which case an equity of redemption resides in the mortgagor. Also, in this case, the chancellor sustained the ground of demurrer to the bill that the personal representative of Chapman is an indispensable party, and gave complainant leave to amend, which the record recites was accordingly done in open court, but the particular amendment is not disclosed; and, 12 months thereafter, the parties, without further objection, proceeded to try the case. Under these circumstances, and as the estate of John R. Chapman has no material interest in the issue necessarily affected by the decree, we cannot say that the chancellor erred in proceeding to a decree without his personal representative being a party. Affirmed.

(84 Ala. 13)

## BIBB v. STATE.

(Supreme Court of Alabama. May 24, 1888.)

## 1. CRIMINAL LAW—VERDICT—ASSESSMENT OF PENALTY BY JURY—CODE ALA. 1886, § 4500.

Under Code Ala. 1886, § 4500, providing, as to offenses punishable by imprisonment in addition to fine, that "the jury shall not be required to impose a fine if, in their judgment, the defendant should only be punished in some other mode, but may in such case only find him guilty, and leave the imposition of the punishment to the court," in a trial for gaming, which is an offense punishable by imprisonment in addition to fine, it is error to instruct that the jury upon conviction must assess a fine.

## 2. GAMING—KEEPER OF GAMING TABLE—WHO IS.

Under Code Ala. 1876, § 4208, providing a penalty against "any person who keeps, exhibits, or is interested or concerned in keeping or exhibiting, any table for gaming," defendant, who has custody of a table, authority over its use, and supervision of the gaming, is a keeper, or interested or concerned in keeping it, within the meaning of the Code.

## 3. SAME—GAMING TABLE—WHAT IS.

Code Ala. 1876, § 4208, forbidding the keeping of "any table for gaming of whatsoever name, kind, or description," includes any table which is used for gaming, without regard to its appliances for any particular game.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Appellant, Du Bose Bibb, was convicted of keeping a gaming table.

*Watts & Son*, for appellant. *Thos. N. McClellan*, Atty. Gen., for the State.

CLOPTON, J. The defendant was indicted under section 4208 of Code 1876, which provides: "Any person who keeps, exhibits, or is interested or con-

cerned in keeping or exhibiting any table for gaming, of whatsoever name, kind, or description, not regularly licensed under the laws of this state, must, on conviction, be fined not less than one hundred nor more than one thousand dollars; and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months." The statute is aimed at the use to which the table is appropriated. Any table used for gaming, without regard to its appliances or adaptation to any particular game, is included in the statute; and if the defendant had the possession or custody of the table, authority over its use, and supervised the gaming, he was the keeper, or interested or concerned in keeping it. *Toney v. State*, 61 Ala. 1; *Wren v. State*, 70 Ala. 1; *Bibb v. State*, 83 Ala. 84, 3 South. Rep. 711. The statute prescribes as the penalty for the offense a fine, and, in addition thereto, that it may be punished by imprisonment or hard labor for the county. Section 4500 of Code of 1886 declares: "When an offense may be punished, in addition to a fine, by imprisonment or hard labor for the county, the jury shall not be required to impose a fine, if, in their judgment, the defendant should only be punished in some other mode, but may in such case only find him guilty, and leave the imposition of the punishment to the court." The statute leaves it discretionary with the jury to impose a fine, or to return a general verdict of guilty, and leave the court to impose the punishment of imprisonment or hard labor. *McPherson v. State*, 54 Ala. 221. The court erred in instructing the jury that, if they found the defendant guilty, they must assess a fine against him. The effect of the charge was to require the jury to assess a fine on conviction, and to take from them the discretion conferred by the statute. If the jury should determine that the defendant should be punished by a fine, they alone are authorized to fix the amount within the limitations of the statute, and the court may impose the additional punishment; but if, in their judgment, the defendant should be punished in some mode other than by a fine, they need only return a verdict of guilty, leaving the court to impose the punishment other than a fine. They should not be required to assess a fine if, in their judgment, the defendant should be punished in some other mode.

As the judgment must be reversed for the error in so instructing the jury, it is improper for us to consider and determine the sufficiency of the evidence to authorize the affirmative charge. Reversed and remanded.

(84 Ala. 337)

SHELBY *et al.* v. TARDY.

TARDY v. SHELBY *et al.*

(Supreme Court of Alabama. May 24, 1888.)

1. EQUITY—CANCELLATION—SALE OF WIFE'S EQUITABLE INTEREST IN LAND BY HUSBAND—RIGHTS OF WIFE.  
A wife whose husband sells land for which she has paid in part, and whose claim therefor is a lien upon the land, is not entitled to have the purchaser's contract canceled where there is no showing that she cannot obtain full relief out of the proceeds of the sale to the purchaser without cancellation of the contract.
2. SAME—PLEADING—VARIANCE.  
Where the proof sustains only a part of a bill in equity, is within the averments, and there is no repugnancy between the case made by the proof and the allegations, complainant may have relief if there be a prayer to which it can be referred; and a general prayer is sufficient.
3. TRUSTS—ACTION TO ESTABLISH—EVIDENCE.  
An intention of a grantee of land to hold the title in trust for the benefit of another, his wife, who has paid a part of the purchase money, cannot be established by oral testimony.
4. DEED—ESCROW—WHAT IS—DELIVERY TO GRANTEE OR HIS AGENT.  
A deed reciting in the body to be from the grantor and his wife, but lacking the wife's signature and acknowledgment, since it is imperfect on its face, is not within the rule that an escrow cannot be delivered to a grantee or his agent, and delivery

to the grantee's agent, to be by him delivered to the grantee upon payment of the purchase money, is not such a delivery as will pass the husband's title to the property.<sup>1</sup>

Appeal from chancery court, Madison county; THOMAS COBBS, Judge.

Bill, by Annie S. Tardy against her husband, Clarence Tardy, and David D. Shelby, to have it declared that her husband holds in trust for her lands for which she claims to have paid, and to cancel as a cloud a contract of purchase of the land made by Shelby with the husband.

R. W. Walker and R. B. Spragins, for appellant. John D. Brandon, for appellee.

STONE, C. J. There is but one bill in this case, that of Annie S. Tardy against Shelby and against complainant's husband, Clarence Tardy. The object and prayer of the bill are to have it declared that Clarence, the husband, acquired and held title to the lands in controversy in trust for complainant, his wife, either as a resulting or constructive trust, and to have Shelby's claim of title vacated and removed as a cloud on the said Annie's title. She alone is actor in this suit, she alone prays relief, and, as the pleadings stand, only such relief can be granted as is necessary to secure to her the right she has shown herself entitled to. And even she can succeed only to the extent that her averments are supported by admissions in pleadings, or by proofs. *Cullum v. Erwin*, 4 Ala. 452; *Gilman v. Railroad Co.*, 72 Ala. 566; *Trimble v. Pariss*, 78 Ala. 260. But it is not necessary to a valid decree that the relief shall be co-extensive with the claim set up in the bill. If the proof sustain only a part of the claim asserted, and the proven part fall within the general purview of the averments, and there be no repugnancy between the case made by the proof and the allegations and prayer for relief, the complainant may have relief if there be a prayer to which it can be referred. A general prayer for relief is sufficient in ordinary cases. *Shipman v. Furniss*, 69 Ala. 555; *Munford v. Pearce*, 70 Ala. 452; *Machne Co. v. Zeigler*, 58 Ala. 221. We concur with the chancellor in holding that the thousand dollars, first payment made on the land purchased from Mr. White, was made with money furnished by Mrs. Annie S. Tardy. The testimony satisfactorily establishes this. To this extent the chancellor granted her relief; and he expressed no ruling which, on the question of the land purchase, went beyond this single payment made with her money.

The most severely controverted question arising out of the testimony in this record is the inquiry, whose money was used in paying the second installment to Mr. White? The conveyance being made to the husband, and not to the wife, the presumption is raised that he, and not she, was the purchaser; and the presumption is strengthened by very many circumstances, not the least weighty of which is the undisputed fact that he paid the second installment with money furnished him by his mother. Many other corroborating facts are shown, but we will not enumerate them. This presumption, and the effect of this corroborating proof, are claimed to have been overturned by oral testimony that complainant had loaned her husband \$1,800, and the payment by him of the second installment of the land purchase was only a partial repayment to her of the money thus borrowed. We have no wish to criticize this testimony in detail. Considering the close relationship between the parties and the witnesses, and the strong bias the circumstances tend to show they were laboring under, the testimony falls far below the required standard in such cases. *Hubbard v. Allen*, 59 Ala. 283; *Hamilton v. Blackwell*, 60 Ala. 545; *Thames v. Rembert*, 63 Ala. 563; *Pyron v. Lemon*, 67 Ala. 458; *Gordon v. Tweedy*, 71 Ala. 202; *Lipscomb v. McClellan*, 72 Ala. 151; *Gor-*

<sup>1</sup>As to what constitutes an escrow, see *Wier v. Batdorf*, (Neb.) 88 N. W. Rep. 22, and note; *Cherry v. Herring*, (Ala.) 3 South. Rep. 667, and note.

*don v. McIlwain*, 82 Ala. 247, 2 South. Rep. 671. The proof is not sufficient to show that the second installment was paid with Mrs. Tardy's money. It results that this suit must fail as an effort to establish a resulting trust, and equally as an effort to establish a constructive trust as to the \$1,500 paid in May, 1886. *Danforth v. Herbert*, 83 Ala. 497; *Tilford v. Torrey*, 53 Ala. 120; *Preston v. McMillan*, 58 Ala. 84.

There is some testimony tending to show an intention on the part of Tardy to hold the title in trust for the benefit of his wife, the complainant. Such trust cannot be established by oral proof. *Patton v. Beecher*, 62 Ala. 579; *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315.

A deed was executed by Tardy, acknowledged and certified, and left in the custody of Richardson, to be delivered to Shelby when the latter paid the agreed purchase money, \$5,000, in full. Richardson was Shelby's attorney to obtain the title from Tardy. Shelby made arrangements with Richardson, by which the latter undertook to pay Tardy the money when he called for it; and thereupon, at Shelby's request, Richardson delivered the deed to him, and it was recorded. It is contended for appellant that, inasmuch as Richardson was Shelby's attorney to obtain the title, a delivery to the former was in effect a delivery to the latter, and the deed became an executed conveyance by the delivery to Richardson. The general rule is that a delivery of a deed to a grantee, or to his attorney, cannot be a delivery in escrow. *Cherry v. Herring*, 8 South. Rep. 667; *Flagg v. Mann*, 2 Sum. 486; *Duncan v. Pope*, 47 Ga. 445; *Müller v. Fletcher*, 21 Amer. Rep. 356; Tied. Real Prop. § 815. This is the rule when the deed is perfect on its face. See *Nash v. Fugate*, 32 Grat. 595. If a deed be not perfect on its face, but shows that some other party or parties are to unite in it before it becomes completely executed, a delivery even to the grantee is not conclusive evidence of delivery so as to cut off inquiry. The language of the Virginia court of appeals is as follows: "This doctrine [the doctrine that a deed cannot be delivered to the grantee as an escrow] is applicable only to the case of deeds which are, on their face, complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; and it is not applicable to deeds which, on their face, import that something more is to be done, besides delivery, to make them complete and perfect contracts according to the intention of the parties." *Hicks v. Goode*, 12 Leigh, 479; *Ward v. Churn*, 18 Grat. 801; *Wendlinger v. Smith*, 75 Va. 309. This doctrine is stated without dissent in 1 Devl. Deeds, § 815. We think it reasonable, and will adopt it. The deed in the present case expresses in its body that it is a conveyance by Clarence Tardy and Annie, his wife. At the foot is the signature, "C. M. TARDY. [Seal.]"—and immediately under it a blank with another "[Seal.]" Following that is a certificate of acknowledgment of execution by C. M. Tardy signed by a justice of the peace officially. Immediately under that is a second form of certificate, such as is required for a married woman who unites with her husband in conveying a homestead, filled up with the name "Annie Tardy, known to me to be the wife of the within named C. M. Tardy." This certificate is neither dated nor signed. The delivery to Richardson was not a delivery as a deed completed; and, the purchase money not having been paid, it is not a consummated conveyance vesting the legal title in Shelby.

There can be no question that Mr. White has a paramount claim and lien on the land for the unpaid installment due him, whether the title remains in C. M. Tardy, or is decreed either to Mrs. Tardy or to Shelby. And neither his right nor his remedy is affected by this suit, for he is not a party to it. Next in order, as the facts appear in the record, is the claim of Mrs. Tardy for \$1,000, which is a lien on the land, and may be enforced out of the proceeds, if the sale to Shelby is permitted to stand. So that, to the extent Mrs. Tardy's claim is sustained by proof, it is not shown that she cannot obtain full relief without disturbing the contract of sale from Tardy to Shelby. So

far as her bill seeks to vacate the incomplete title made to Shelby as a cloud on her title, it is without merit, as she has neither title nor an equitable right to it. The deed from Tardy to his wife, being made after the agreement of sale to Shelby, and under the circumstances shown, cannot affect his rights. With the single exception that Mrs. Tardy has established her right to be paid \$1,000 out of the land or its proceeds, the relations of Shelby and Tardy remain as they, by their contract, had fixed them. The deed, executed as it was by Tardy, and left with Richardson, is in legal effect in the same condition as when left with him. It is not a legal title in Shelby, but a link in the chain of his claim against Tardy. There is nothing in Mrs. Tardy's rightful claim, or in the relief she shows herself entitled to, which renders it necessary to cancel that instrument, and its cancellation should not have been ordered.

What are the rights of Shelby? In the present state of the proceedings, he can claim only to be let alone, save as the land or its proceeds are subject to the said claims of Mr. White or Mrs. Tardy, as declared above. He avers that he is ready and willing to consummate the purchase, but claims there should be an abatement of the agreed purchase money co-extensive with Mrs. Tardy's inchoate right of dower. To raise these questions he must become actor, by cross-bill or otherwise, as he may be advised. There is nothing in the present pleadings under which they can be considered. In the event this course is adopted, we suggest some inquiries, without intending to decide them: *First*, was there a tender made, or a sufficient excuse shown for not making an actual tender? And was it kept good? *Rudolph v. Wagner*, 36 Ala. 698; 7 Wait, Act. & Def. 598; *Park v. Wiley*, 67 Ala. 810; *Frank v. Pickens*, 69 Ala. 369. *Second*, in estimating the value of Mrs. Tardy's inchoate right of dower, is it to be estimated as of the entire tract, or of that proportion which will have been paid for with her husband's means? *Third*, is Shelby willing to accept such title as he can obtain from Tardy, leaving Mrs. Tardy's inchoate right of dower unsettled and uncanceled? *Corson v. Mulvany*, 49 Pa. St. 88. *Fourth*, is there any question of homestead in the case? *Moses v. McClain*, 82 Ala. 370, 2 South. Rep. 741.

On the assignments of error made by Shelby, the decrees of the chancellor is reversed, and the cause remanded. There is nothing in Mrs. Tardy's assignments of error.

(84 Ala. 468)

*Ex parte BOSCOWITZ.*

(*Supreme Court of Alabama. May 24, 1888.*)

1. WITNESS—EXAMINATION—ANSWER TENDING TO HUMILIATE.

A witness cannot refuse to answer a question on the ground that the answer would tend to humiliate and degrade him.

2. SAME—CRIMINATING EVIDENCE—OFFENSE NOT BARRED BY LIMITATION.

On the trial of a female charged with being a common prostitute, a witness may rightfully refuse to answer a question as to whether or not he has had sexual intercourse with the accused, on the ground that his answer would tend to criminate him; the statute of limitations not having barred a prosecution for such intercourse at the time the witness was being examined.

*Certiorari* to city court of Montgomery; THOMAS M. ARRINGTON, Judge. *Arrington & Graham* and *Rice & Wiley*, for petitioner. *Thos. N. McClellan*, Atty. Gen., *contra*.

CLOPTON, J. The petitioner was adjudged guilty of a contempt, and ordered to be imprisoned for refusing to answer a question propounded to him as a witness. His refusal was based on the ground that his answer would tend to criminate, humiliate, and degrade him. We may discard from consideration the ground that the tendency of the answer would be to humiliate and degrade. The privilege of refusing to answer is restricted to questions, answering which may tend to criminate the witness, or expose him to punish-

ment. *Hall v. State*, 40 Ala. 698. It is an established and universally accepted maxim of the common law that a witness shall not be compelled to answer any question that tends to criminate him, or to expose him to a criminal prosecution or to a penalty, which finds expression in the constitutional guaranty that no person shall be compelled to give evidence against himself. The right of exemption extends, not only to answers which may criminate, but also to such as may tend to criminate.

On the trial of a female charged with being a common prostitute, and having no honest employment whereby to maintain herself, under section 4218 of the Code of 1876, the petitioner was called by the prosecution, and sworn as a witness. Having testified that he was a witness before the grand jury in July, 1887, when the indictment was found, the question was proposed to him whether or not he had had sexual intercourse with the accused within six months prior to the time he was before the grand jury. The court instructed the witness that it was his duty, and directed him, to answer the question. The witness refused to answer; whereupon the court adjudged him guilty of a contempt, and ordered his imprisonment. By the rule, as held in this state, it was the province of the court to determine, in the first instance, whether a direct answer to the question proposed would furnish incriminating evidence against the witness. The rule is founded on the duty of the court to take care that the exercise of the privilege shall not extend, by mistake or error of the witness, or on simulated pretense, to the suppression of evidence which is necessary to the due administration of the law, and in giving which there can be no real and appreciable danger of crimination, or exposure to prosecution or to any kind of punishment. *Calhoun v. Thompson*, 56 Ala. 166. It is also of the highest importance that the witness shall be protected in the proper and rightful exercise of his privilege, which has for its object the security of life and liberty. The court should not require the witness to fully explain the manner in which his answer may tend to criminate him, as the purpose of the privilege may be thereby defeated; nor should he be required to answer, when he claims his privilege, unless from the nature of the answer, and the circumstances of the case, it is evident to the court that his answer cannot have any tendency to expose him to a criminal charge or prosecution, or to a penalty. If the prosecution for the offense is barred by the statute of limitations, the reason of the privilege ceases, and the witness should be compelled to answer. The record only presents the question proposed to the witness, and the nature of the case which was being tried. No other circumstances are disclosed, and the statute of limitations had not barred a prosecution at the time the witness was being examined. The question, therefore, is whether his answer would tend, *prima facie*, to expose him to a criminal charge. Under the statutes, there are crimes in which sexual intercourse is an important and essential fact. Reference to one will suffice. Section 4012 of Code of 1886 makes it an offense, indictable and punishable, for any man and woman to live together in adultery or fornication. It is true that the statute was not designed to punish a single act or occasional acts of illicit intercourse. It was intended to prohibit and punish a state or condition of cohabitation intended by the parties to be continuous at their pleasure. This state of cohabitation may be assumed in a single day, if such is their purpose; and if the parties live together in adultery or fornication for a single day, intending a continuance of the connection, the offense is complete, though it may be unexpectedly broken off by some extraneous cause. *Hall v. State*, 53 Ala. 468. While a single act or occasional acts are not offenses against the criminal law, sexual intercourse is an essential element of the statutory crime. A witness should not be compelled to answer a question, the answer to which will disclose an important and essential fact of the crime, to a prosecution for which he may be exposed, or which constitutes a necessary and essential link in the chain of testimony sufficient to convict. If the witness is compelled to

answer a question which calls for only one act of criminal intercourse, which would not of itself tend to criminate, question may nevertheless succeed question until the answers to all would furnish sufficient evidence on which to base a criminal prosecution. A witness should not be compelled to answer as to any one act, the constant and frequent repetition of which may constitute the statutory offense, and furnish sufficient evidence to convict. On a prosecution for living together in adultery or fornication, all the constituents of the offense may be established, except the fact of sexual intercourse, and this be shown by the answer of the witness to the question proposed; thus compelling him to furnish an essential link in the chain of testimony. *French v. Vennemam*, 14 Ind. 282; *Ford v. State*, 29 Ind. 541.

The order of the city court adjudging the petitioner guilty of a contempt, and ordering his imprisonment, must be quashed, and the petitioner discharged.

(84 Ala. 332)

**ALEXANDER v. STEELE et al.**

(Supreme Court of Alabama. May 4, 1883.)

**1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNTS—MAY BE ENFORCED, WHEN.**

A decree directing an administrator to file his account and vouchers for settlement with the register is proper, although the administrator has committed no *devastavit* or default.

**2. SAME—SETTLEMENT—FUNDS BELONGING TO ANOTHER ESTATE.**

Though an administrator's settlement of an estate has been held void, yet if, in his settlement of another estate, he charges himself with funds coming to the latter estate from the former, and accounts for the same, he must have proper credit therefor.

**3. SAME—LIABILITY FOR LOSSES—PROOF OF LOSS—APPEAL.**

The liability of an administrator for losses sustained by the failure of others depending upon surrounding circumstances, an appellate court cannot decide the question of his liability without all the evidence bearing on such loss.

**4. PARTIES—FAILURE TO JOIN HUSBAND IN ACTIONS AGAINST WIFE—DEATH OF HUSBAND.**

Where a married woman is made a party to a bill, and her husband is not joined, an objection for such non-joinder, made after the death of the husband, is immaterial.

**5. SAME—MARRIAGE OF FEMALE PARTY PENDING ACTION—FAILURE TO MAKE HUSBAND A PARTY.**

Where a party marries, pending the litigation, and has her change of name noted in the record by an amendment of the pleadings, but does not have her husband made a party, and no objection to such failure is raised in the court below, it is no ground of reversal.

Appeal from chancery court, Dallas county; S. K. McSPADEN, Judge.

The appellees, as legatees and distributees of the estate of Dewitt C. Alexander, filed this bill against John D. Alexander, appellant, to compel a settlement of his accounts as executor and administrator of the estate of Joseph M. Alexander, their grandfather, and to remove the settlement of the estate into equity. A settlement or settlements by the said John D. Alexander of the estate of Joseph M. Alexander, his father, has been made in the probate court, but as said John D. was also the personal representative of his brother, Dewitt C., who was a legatee under the will, and a co-executor with the said John D. of the said Joseph M. Alexander, their father, the alleged final settlements were declared invalid, as will more fully appear from the report of the former appeal in this case, (*Alexander v. Alexander*, 70 Ala. 212,) and the bill in this cause declared to have equity. It appears from the opinion in this appeal, following the judgment of this court on former appeal, the chancellor declared the complainant entitled to relief, and directed the appellant, John D., to file his account and vouchers with the register. One of the questions raised by the record is the accountability *vel non* of John D. for the loss sustained by the failure of Patrick Irwin & Co. This firm had been the fac-

tors and merchants of both Joseph M. and Dewitt C. Alexander when they were living, and of the said John D. The said John D. Alexander, as the surviving executor of his father's estate, after the death of Dewitt C., continued to deal with said firm as factors of the estate, and left the proceeds of sales of cotton on deposit with them, and drew on them from time to time, as a bank, as money was required in the course of the administration. In March, 1868, Patrick Irwin & Co. failed, owing the estate of Joseph M. Alexander about \$8,000, a large amount to the estate of Dewitt C. Alexander, and to said John D. Alexander individually. The said John D. secured certain collaterals, some of which he realized in money, and accounted for in his settlements. Other collaterals were choses in action, which he reduced to judgment; others, mortgages on lands, plantations in Dallas and Wilcox counties, which he foreclosed. The said Joseph M., in his life-time, and appellant, John D., were co-sureties on the administration bond of one Horn; and since the settlement of the estate of Joseph, the appellant, John D., has been compelled to pay out large sums of money on account of said co-suretyship. The various assignments of error embrace, among others, the refusal of the chancellor to dismiss the bill for want of equity, and for want of necessary parties; the requirement of a settlement of the estate of Joseph M. Alexander; and error in the final decree.

*Brooks & Roy*, for appellant.

STONE, C. J. This case was before us at a former term. *Alexander v. Alexander*, 70 Ala. 212. The questions then considered were raised only by demurrer to the bill, which the chancellor had overruled. We affirmed the ruling of the chancellor, holding that John D. Alexander, first executor, and afterwards administrator *de bonis non* with the will annexed of Joseph M. Alexander, had made no valid final settlement of his said trust, and that the bill contained equity. There was implied in this ruling that other incontestable postulate, that all executors, administrators, and guardians may rightfully be brought to a settlement of the trust they have assumed, unless they have made a lawful final settlement, or, unless 20 years have elapsed, during which time no active function pertaining to the trust has been performed. *Austin v. Jordan*, 35 Ala. 642. And this right does not depend on the state of the accounts. It may be invoked by any one having a rightful, immediate interest in the succession. It is a right, not necessarily for the recovery of money or property, but to have a judicial ascertainment of the *status* of the trust,—to have it authoritatively determined whether the trusts have been fully performed. If there has been full administration, and no fault, the trustee must be discharged. If not, he must be held to account. If he has been wantonly and needlessly harrassed, he should be compensated so far as practicable in the adjustment of the costs. It is his legal duty, however, to make a settlement, and if nothing more than this is required of him, he is without cause for complaint. It is only when this boundary is transgressed, and he is put to unnecessary expense, that his claim for apportionment of costs should be entertained. Since the former hearing in this court, testimony has been taken, and a final decree rendered by the chancellor. Following the judgment of this court, he declared that the complainants were entitled to relief, and directed that John D. Alexander file his account current and vouchers with the register; and gave other general directions for making the settlement. He decided nothing, in the shape of instructions to the register or otherwise, in reference to the justness of charges sought to be fastened on the executor, nor in reference to counter-claims set up by him. The decree left these several matters open until the coming in of the report. Under the pleadings and testimony in this cause, and under the rules of law laid down above, there was no error in this, even if it be shown that the executor has committed no *devastavit* or default. It is simply an order that he do

what the law commands him to do,—make a settlement. *Hooper v. Smith*, 57 Ala. 557; *Cook v. Cook*, 69 Ala. 294; *Vincent v. Daniel*, 59 Ala. 602.

It is contended for appellant that the decree in this case must be reversed, because Mrs. Steele, when made a party complainant, was a married woman, and she did not have her husband associated with her in the prosecution of the suit. Whatever there may have been in this objection, if it had been raised in the life-time of Mr. Steele, it ceased to be material when Mrs. Steele became discoverd by the death of her husband. The same objection is urged in reference to the other complainant, Mrs. Chapman. When the bill was filed she was Miss Alexander, and unmarried. Pending the suit she intermarried with Chapman, and prosecuted the suit in her marital name, having the change noted in the record by an amendment of the pleadings, but did not bring in her husband as a party with her. This was an error, as the statute then stood. *Baines v. Barnes*, 64 Ala. 375; *Sawyers v. Baker*, 66 Ala. 292; *Sims v. Bank*, 73 Ala. 248; *Bolman v. Lohman*, 74 Ala. 507. This objection, however, does not appear to have been raised in the court below, and we will not make it a ground of reversal.

The most severely contested question raised by the record is, whether the defendant is to be held accountable for the loss sustained by the failure of Patrick Irwin & Co. Administrators are not insurers. They must be honest and faithful in intention, and must bring to the service that measure of diligence which an ordinarily prudent man bestows on his business transactions of a similar character. And surrounding circumstances must be taken into the estimate. *Gould v. Hayes*, 19 Ala. 438; *Henderson v. Simmons*, 33 Ala. 291; *Ferguson v. Lowery*, 54 Ala. 510; *Foscut v. Lyon*, 55 Ala. 440, 60 Ala. 468; *Nunn v. Nunn*, 66 Ala. 35; *Moore v. Randolph*, 70 Ala. 575. We know not what proof may be made on the reference, and do not undertake to decide the question of liability for this alleged default. We have held that John D. Alexander's probate court settlement of Joseph M. Alexander's estate was void. Still, if in the settlement of Dewitt O. Alexander's estate he charged himself with funds coming to the latter estate from the former, and accounted for the same, he must have proper credit therefor. He must not be required to pay the same liability twice. *Vincent v. Martin*, 79 Ala. 540. So, if he has rightful claims against the complainants for overpayments in his accounts as guardian for them, he should have the benefit of them. The alleged payment on account of the joint suretyship of Joseph M. and John D. Alexander for Horn may also become important in ascertaining any balance of Joseph M.'s in John D.'s hands for distribution. That question is, perhaps, not fully developed in this record. *Alexander v. Fisher*, 18 Ala. 374. We find no error in the record. Affirmed.

184 Ala. 6)

#### HAWK v. STATE.

(*Supreme Court of Alabama. May 23, 1883.*)

#### CRIMINAL LAW—APPEAL—REVIEW—EXCEPTIONS TO RULING OF COURT.

The appellate court will not consider an appeal in a criminal case from a ruling as to a change of venue, or from a ruling as to the selection of certain jurors, unless a bill of exceptions is submitted, setting out the evidence on which the trial court acted, and duly reserving exceptions to the ruling of the court.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

The appellant, Hawk, was convicted of murder. He excepts to the selection of certain jurors, and to the action of the court in denying his application for change of venue.

T. N. McClellan, Atty. Gen., for the State.

SOMERVILLE, J. An application for a change of venue in a criminal case may now be reviewed and revised on appeal to this court taken after final

judgment of conviction. Code 1886, § 4485. But in order to bring such a case up for review, however, there must be a bill of exceptions setting out the evidence upon which the trial court acted, and duly reserving an exception to the ruling of the court in refusing to grant the application. It is insufficient for the action of the court to be shown by the judgment entry alone, without a bill of exceptions. The same is true of the rulings of the court in reference to the selection of certain jurors, to which the judgment entry recites that exceptions were taken. These rulings can be reviewed only by bill of exceptions containing the evidence on which the court based its action. There is no bill of exceptions contained in the record, and the appeal must be dismissed.

(84 Ala. 36)

*Ex parte HENDERSON et al.*

(Supreme Court of Alabama. May 28, 1893.)

1. RECORDS—CORRECTION—MAY BE MADE, WITHIN WHAT TIME.

A court may correct its records after final decree has been rendered, and after an appeal has been taken, at any time before final decree in the appellate court.

2. APPEARANCE—WHEN SUFFICIENT TO DISPENSE WITH NOTICE—DEMURRER TO PETITION.

A demurrer to a petition praying the court to correct the note of testimony in a cause pending in the appellate court on appeal from such lower court, is a sufficient appearance to dispense with notice.

3. AMICUS CURIAE—POWERS OF.

A demurrer cannot be filed by *amicus curiae*.

*Application for mandamus.*

This was an application, by Lou W. Henderson and others, to the justices of the supreme court, for a writ of *mandamus* to Chancellor McSPADDEN, requiring him to entertain and pass upon a petition filed in the Talladega chancery court, praying a correction of the note of testimony in a cause now in the supreme court on appeal from said lower court. There was filed in the lower court a motion by *amicus curiae* to strike the petition from the files, and a demurrer, which motion and demurrer were filed by the attorneys of the appellees in the cause appealed to this court.

*Knox & Bowie*, for petitioners. *Parsons & Parsons*, against the petition.

STONE, C. J. This is an application for *mandamus* to Hon. S. K. McSPADDEN, chancellor of the North-East division, sitting in and for Talladega county, requiring and commanding him to entertain and pass upon the petition of relators, praying a correction of the note of testimony in the case of John Henderson, now revived in the name of his heirs at law, against Charles Pelham *et al.*, lately pending and decided in said court, and now in this court by appeal. A petition was filed in the court below praying for such correction. The chancellor sustained a demurrer to the petition, and dismissed it, on the ground that there had been a final decree in that court, and an appeal to this court, which was still pending and undetermined.

The case made by the petition is in the nature of an application for an amendment *nunc pro tunc*. All courts have the inherent power to correct their records, so as to make them speak the truth, even after final decree, and after appeal to this court; and that power exists until the judgment or decree of the lower court becomes merged in the judgment of this court by affirmation. *Stephens v. Norris*, 15 Ala. 79; *Norris v. Cottrell*, 20 Ala. 304; 1 Brick. Dig. 78, §§ 129-163; *Moore v. Lesueur*, 33 Ala. 237; 8 Brick. Dig. 577, 578. The chancellor erred in the reason he gave for his ruling. The petition was *prima facie* sufficient, and the demurrer filed was a sufficient appearance to dispense with notice. Demurrer cannot be filed by *amicus curiae*. The chancellor should so far consider the petition as to pronounce on the proofs offered. *Steel v. Commissioners*, 83 Ala. 304, 8 South. Rep. 761. A rule *nisi* is awarded to

the Hon. S. K. McSPADDEN, Ch., to show cause why a *mandamus* shall not issue as prayed for, unless in the mean time he entertains and considers relators' petition for amendment of the note of testimony. The rule to be returnable Tuesday, the 4th day of December, 1888.

(34 Ala. 7)

## CARNEY v. STATE.

(Supreme Court of Alabama. May 29, 1888.)

## 1. HUSBAND AND WIFE—ABANDONMENT—CRIMINAL PROSECUTION—CODE ALA. 1886, § 4047.

In a prosecution under Code Ala. 1886, § 4047, for abandoning one's wife and child, and leaving them in danger of becoming a burden to the public, it need not be shown that the danger of their becoming a burden to the public is immediate or imminent; but it is sufficient to show they will probably become such a burden within a reasonable time, and in the ordinary course of events.

## 2. SAME—ABANDONMENT—CRIMINAL PROSECUTION—EVIDENCE—PROSTITUTION OF WIFE.

In such case, evidence that defendant went to an assignation house, where he heard voices of women, and saw an unknown female clandestinely escaping from the premises, and that the keeper of the house subsequently told him that such female was his wife, was properly excluded as too remote to establish the identity of the female as defendant's wife.

## 3. SAME—ABANDONMENT—CRIMINAL PROSECUTION—EVIDENCE—HOW WIFE IS SUPPORTED.

In a prosecution for the abandonment of family, and leaving them in danger of becoming a burden to the public, evidence that the defendant's wife had not earned her own living since the birth of her child, and that her brother-in-law, who was supporting her, had a large family, is admissible, as tending to show the probability of the family becoming a burden to the public.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

This was a prosecution of the appellant for the abandonment of his wife and child. The witnesses for the state testified that William Carney, an able-bodied man and able to support his wife, was married to Kate Nicholas in February, 1886, and lived with her eight days, and then abandoned her; that said Kate Nicholas was the mother of a child before she married the defendant, and that after the marriage the defendant admitted that he was the father of the child; and that the child and mother had been supported and maintained, both before and after the marriage of the mother, by her brother-in-law. The defendant testified that, after he had been married eight days, he had to leave home to sit up with his brother's corpse; that he was absent from home all one night, and until about 12 o'clock the night following; that his clothes got wet, and he went home to get some dry clothes; that his wife came to the front door in her night clothes, and let him in; that when he got in he found his bedroom door ajar, and went in there; that, when he went in his said bedroom, he saw some man's shoes sitting by the fire-place, and asked whose they were, and his wife replied that they were her brother's shoes, and about that time he heard some one move in the bed, and, as he looked around, a man turned his face towards the wall, and pulled the cover of the bed over his head; that the cover on the outside of the bed was thrown back, and the bed looked as if two persons had been occupying it; that he took his clothes and left, and never went back any more. The defendant also denied that he was the father of his wife's child. A brother of defendant's wife testified, in rebuttal, that he slept in his sister's bed that night until 2 or 3 o'clock, and that he lived in the same house with his sister. The defendant also produced evidence, by cross-examination of the state's witnesses, that his wife was a woman of good health, and had been supported, both before and after her marriage, comfortably and well by her brother-in-law, and that she was still being so supported. The state asked the witness Judge, who so supported the defendant's wife, whether he also supported his mother. The defendant objected to this question, but the court overruled the objection; whereupon the defendant excepted. The witness answered that he did. The

defendant then offered to testify that he went, in consequence of a message that he had received, to an assignation-house in search of his wife, and was refused admittance; but, while watching from the outside, heard female voices within, and saw a woman, whom he believed to be his wife, step out the back way, and get over the fence, and that the keeper of the assignation-house subsequently told the defendant that such woman was his wife, and that she frequently visited such house of prostitution. This was before the defendant saw a man in the bed with his wife. But the court refused to allow the defendant to so testify, to which refusal he excepted. There was a variance between the testimony of the witness Judge and that of his wife, both of whom were state witnesses, as to the health of the defendant's wife; the witness Judge testified that it was not good, while his wife testified to the contrary. The defendant asked said Judge whether or not his wife had as good an opportunity of judging of the health of defendant's wife's health as he himself (Judge) had. The court sustained an objection to this question, and the defendant objected. The court refused to give two charges requested by the defendant, which, in substance, are set out in the opinion. These several rulings of the court on the evidence, and the refusal to give the charges requested by the defendant, are here assigned as error.

*G. L. & H. T. Smith*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

**SOMERVILLE, J.** The defendant was tried and convicted for abandoning his family, and leaving them in danger of becoming a burden to the public,—an offense which is made punishable by fine and imprisonment under the provisions of the statute. Code 1886, § 4047; Code 1876, § 4218.

The two charges requested by the defendant, and refused by the court, assert, in effect, that the statute must be construed to mean that the danger of becoming a burden to the public, in which the abandonment of the husband or parent places his family, must be immediate or imminent, and not dependent on any future contingency, however probable in the ordinary course of events. This construction, in our judgment, is not tenable. The members of the defendant's family, whom he is here charged with having abandoned, are his wife and a child of tender years. They were thrown upon the charity of a brother-in-law of the wife, who possessed but meager means, and was under no legal liability whatever to furnish them maintenance. The evidence tended, moreover, to show that the wife and child owned no property, and were unable to support themselves, either for want of ability or opportunity. It was for the jury to say whether the evidence satisfied them beyond a reasonable doubt that the defendant's family, under all the circumstances of the case, would probably become a burden to the public by reason of any contingency likely to happen, within a reasonable time, and in the ordinary course of events. Such contingency need not be immediate, nor ought it to be too remote or speculative. It should be one that may be reasonably apprehended between these two extremes of time. The instructions requested on this point were properly refused. The statute cannot be construed to make it criminal for one to abandon his wife under any and all circumstances. If she be guilty of adultery, as the evidence tends to show the defendant's wife was in this case, he would certainly be excused in leaving her as a preliminary step to making application to the chancery court for a divorce on this ground. To continue this marital relation with her, after information of her guilt, would be a condonation of it, and would operate to bar his right to claim a severance of the marriage tie. There can be no guilt where there is legal excuse or justification for the act charged. But, while this is true, abandonment is not excused by mere suspicion of the wife's infidelity, based on rumors or other hearsay evidence. It is not enough that he may have been informed of alleged facts by others which would justify him in believing her

to be guilty. The risk of abandonment is his own. The fact of her guilt must be shown, and the burden is on the husband to show it.

The circuit court properly excluded all the evidence relating to what occurred at a certain assignation-house kept by one Cora Levy, a prostitute, and her declaration made to the defendant regarding his wife. This was all hearsay, except the statement that defendant went to the house, and was refused admission; that he heard the voices of women in the house, whose identity the keeper attempted to conceal; and that defendant saw some unknown female clandestinely escaping from the premises by the back way. This evidence did not tend to identify this female as the defendant's wife, being too remote for this purpose. Any woman, not a common prostitute, found in such a place, would probably seek to escape observation by strangers who might persist in entering the premises uninvited.

It was competent to prove that the defendant's wife, Mrs. Carney, had not earned her living since the birth of her child, and also that her brother-in-law, Judge, who was supporting her, had as many as four children, and was also supporting his own mother. These facts all bore on the question as to the probability of Mrs. Carney becoming a burden to the public, because it tended, on the one hand, to rebut the inference that she was able to maintain herself, and, on the other, to show the difficulty attending the ability of her brother-in-law to maintain her by continuing the exercise of his charity towards her. It was for the jury to say what was the probability of the termination of this benefaction, which was of grace, and not of legal duty.

The rulings of the court are free from error, and the judgment must be affirmed.

(34 Ala. 319)

#### KNAUS v. DREHER.

(*Supreme Court of Alabama. May 20, 1888.*)

#### MORTGAGES—CONSTRUCTION OF ABSOLUTE DEED AS A MORTGAGE—EVIDENCE.

In an action to have an absolute conveyance declared a mortgage, the evidence of the intention of the parties was in direct conflict, but the uncontradicted testimony showed that plaintiff, having contracted for the purchase of certain land, afterwards took defendant in as joint purchaser; that cash payments were made from time to time by defendant alone, until only a portion of the purchase money remained unpaid; that defendant, in the presence of counsel, demanded of plaintiff a conveyance of the title to him; that subsequently plaintiff and wife, before the same counsel, executed a deed to defendant, which was read and explained to them; that during these interviews nothing was said of any interest, right, or claim retained by plaintiff. Held, that such deed should not be declared a mortgage.<sup>1</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.  
James J. Garrett, for appellant. Smith & Lowe, for appellee.

STONE, C. J. Dreher and wife, by absolute deed, executed, witnessed, and delivered, conveyed land to Knaus, with customary covenants of warranty. The deed was executed December 2, 1882. The present suit, instituted in March, 1885, is a bill seeking to have this deed declared a mortgage security

<sup>1</sup>A deed, though absolute in form, if intended merely as security for an indebtedness, will be treated as a mortgage. Knapp v. Bailey, (Me.) 9 Atl. Rep. 123; Nesbitt v. Cavender, (S. C.) 2 S. E. Rep. 702, and note; Bank v. Ashmead, (Fla.) 2 South. Rep. 657, and note; Frey v. Campbell, (Ky.) 3 S. W. Rep. 868, and note; Eisman v. Gallagher, (Neb.) 87 N. W. Rep. 941.

To convert a deed absolute on its face into a mortgage, the evidence should be clear and convincing. Cochrane v. Price, (Md.) 8 Atl. Rep. 361; Pancake v. Cauffman, (Pa.) 7 Atl. Rep. 67, and note; McCormick v. Herndon, (Wis.) 31 N. W. Rep. 308; Canal Co. v. Crawford, (Or.) 4 Pac. Rep. 113.

For facts held sufficient, see Id.; McMillan v. Bissell, (Mich.) 29 N. W. Rep. 787, and note; Huscheon v. Huscheon, (Cal.) 19 Pac. Rep. 410; Arnot v. Baird, Id. 386; Stephens v. Allen, (Or.) 3 Pac. Rep. 168; Miller v. Aussenig, (Wash. T.) Id. 111; Cosby v. Buchanan, (Ala.) 1 South. Rep. 898; Pearson v. Sharp, (Pa.) 9 Atl. Rep. 83.

for the payment of money, avers that the debt has been paid, and, if mistaken, tenders payment of any balance, and prays that title be divested out of Knaus and vested in Dreher. It seeks relief only as to one undivided half of the land described in the pleadings, admitting that the other half is both legally and equitably the property of Knaus. Cases of this class have been very often before this court, and it has been uniformly held that such claim may be established by parol proof, if sufficiently clear and strong to meet the requirements of the rule. But, to entitle a complainant to relief in such cases, the testimony must be clear, consistent, strong, and convincing. It has sometimes been said it must be stringent. *McKinstry v. Conly*, 12 Ala. 678; *Chapman v. Hughes*, 14 Ala. 218; *Bryan v. Cowart*, 21 Ala. 92; *Brantley v. West*, 27 Ala. 542; *Harris v. Miller*, 30 Ala. 221; *Phillips v. Croft*, 42 Ala. 477; *Parks v. Parks*, 66 Ala. 326; 2 Brick. Dig. 272, §§ 319, 320. There is an additional element which enters into such inquiry. To establish the proposition that the conveyance, absolute in form, was in intention and in fact only a mortgage security, there must be a continuing binding debt from the mortgagor to the mortgagee to uphold it,—a debt in its fullest sense. Not a mere privilege reserved in the grantor to pay or not at his election, but a debt which the grantee can enforce as a debt, and for its collection may foreclose the conveyance as a mortgage. Where there is no debt there can be no mortgage; for, if there is nothing to secure, there can be no security. *Etland v. Radford*, 7 Ala. 724; *West v. Hendrix*, 28 Ala. 226; *Swift v. Swift*, 36 Ala. 147; *Peoples v. Stolla*, 57 Ala. 53; *Haynie v. Robertson*, 58 Ala. 37; *Logwood v. Hussey*, 60 Ala. 417; *Douglass v. Moody*, 80 Ala. 61; *Perdue v. Bell*, 3 South. Rep. 698; 1 Jones, Mortg. § 267. The oral testimony in the case before us is in lamentable conflict. Conflict, not alone as to the main inquiry, whether it was agreed that the conveyance should operate only as a mortgage, but as to the attendant facts which, if believed, tend collaterally to fortify or weaken the testimony bearing directly on the main question. It is difficult to credit this discrepancy to honest mistake or imperfect memory. Only the parties to the conveyance testify to any actual knowledge, whether there was an agreement before the deed was executed that it should only operate as a mortgage, and their testimony is in direct conflict. Many, very many, witnesses testify that Knaus admitted he was to reconvey half the land to Dreher, when the latter should repay to him his half of the purchase money; but many, and the most important, of these witnesses, were closely related to Dreher, and were frequent inmates of his household. Some of the most damaging of these alleged admissions are testified to have been made by Knaus at and near Birmingham between the 22d and 27th of December, 1883, and the witnesses state circumstances calculated to fortify their recollection of dates. Against this, many witnesses, not related to either of the parties, testify that during all that time Knaus was at Broken Arrow, 35 or 40 miles distant from Birmingham, and they testify to circumstances calculated to impress the fact and the time upon their memories. Knaus denies all these imputed admissions, and testifies that he was not at or near Birmingham, but was at Broken Arrow, and did not see any of these witnesses during the time they testify he made the admissions. Looking alone at the oral testimony, it is doubtful if it be sufficiently "clear, consistent, and convincing" to overcome the presumptions which are raised by the absolute conveyance. There are important facts in the case, about which we have discovered no conflict in the testimony. Early in the year 1880 a contract was entered into between King, former owner, and Dreher, individually, by which the latter contracted to purchase from the former the lot of land—10 acres—which is the subject of this suit. A small cash payment was made, and notes of \$50 each, bearing interest, and payable at intervals of six months, were given by Dreher for the balance. The whole purchase money was about \$400. Before the close of the year 1880 Dreher took Knaus in as a joint purchaser with himself, each to pay half of

the purchase money, and the two to become equal owners of the land. King had given them only an obligation to make title. A cabin was constructed on the premises, which was occupied by Dreher and Knaus, the former having a family, the latter none. Payments were made during the year 1880, and on January 1, 1881, there remained unpaid of the purchase money precisely \$300, principal and interest included. In March, 1881, King and wife executed a deed, reciting as consideration \$400 received from John Knaus and Reinhard Dreher, conveying the lands involved in the suit, with covenants of warranty to them, by name, and to their heirs and assigns. The *habendum* clause is also to them by name, and to their heirs and assigns. In the granting clause there is an unfilled blank, their names being omitted. At that time Knaus and Dreher executed their joint notes of \$50 each, payable at intervals of six months, with interest, for the balance of the purchase money, \$300. About the 1st of December, 1882, half of the \$300 had been paid, leaving unpaid \$150, with interest. Knaus obtained counsel, and expressed dissatisfaction with his deed, for reasons which he soon afterwards explained to the same counsel in the presence of Dreher. His statement was that all the purchase money that had been paid had been paid by him, Knaus; that he was ready to pay, and wished to pay, the balance; and that he wanted the title conveyed to him as his own property. Dreher admitted this, admitted that he was unable to pay for the land, and expressed a willingness for Knaus to finish paying for it, and he and his wife would execute a deed to Knaus therefor. Counsel advised that King execute a second and perfect deed to Knaus and Dreher, and that Dreher and wife then convey to Knaus. This was done, counsel drawing the deeds, and being a witness to the one executed by Dreher and wife to Knaus. Counsel read and explained the deed to Dreher and wife, and they executed the same voluntarily. During none of these interviews was a word said by any of the parties tending to show any interest, right, or claim retained in Dreher. Knaus thereupon took up and canceled the remaining purchase-money notes held by King, although they were none of them due. During the year 1883, Knaus, with his own means, built a second and better house on the premises at a cost of from \$250 to \$375, and in the fall, soon after its completion, the parties to this suit moved into it and occupied it as a dwelling, as they had previously occupied the cabin. This continued until the spring of 1884, when Dreher and his family moved to another residence, and have not since occupied the premises sued for. When the land was purchased from King, the agreed price was at or above the market value. In December, 1882, there had been a slight increase, but not very marked. When this suit was brought the estimated value, irrespective of the improvements, was more than double the agreed purchase price. The intendment growing out of Dreher's absolute deed to Knaus makes a strong *prima facie* case, and the corroboration furnished by the uncontroverted facts recited above reduces the probative force of the complainant's testimony far below the requisite standard. The bill ought to have been dismissed. Code 1886, § 675.

The decree of the chancellor is reversed, and a decree here rendered dismissing complainant's bill. Reversed and rendered.

(24 Ala. 133)

#### GEORGIA PAC. RY. CO. v. BROOKS.

(Supreme Court of Alabama. May 29, 1886.)

#### MASTER AND SERVANT—LIABILITY OF MASTER FOR DEFECTIVE MACHINERY—WHAT IS MACHINERY.

A hammer used for driving spikes into cross-ties on a railroad is not machinery, within the meaning of Code Ala. 1886, § 2590, subd. 1, providing that an employer is liable for injuries to an employee as if he were a stranger, when the injury is caused by any defect in the machinery used in the business of the master or employer.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

v. 450. no. 9—19

This was an action brought by Brooks against the Georgia Pacific Railway Company for damages on account of a personal injury received while in the employ of appellee. Judgment was rendered for plaintiff, and defendant appeals.

*James Weatherly*, for appellant. *Hewitt, Walker & Porter*, for appellee.

CLOPTON, J. The action is brought by appellee to recover damages for an injury suffered while a workman in the service of the appellant. Plaintiff's counsel admit that the suit is instituted, and the complaint framed, under the first subdivision of section 1 of the act of February 12, 1885, entitled "An act to define the liabilities of employers of workmen for injuries received by the workman while in the service of the employer," which, with some verbal changes, constitute section 2590 of Code 1886. In order to maintain the action, the plaintiff must bring himself within the purview of the act. By the first subdivision of the section, the master or employer is made liable to answer in damages to a servant or employe as if he were a stranger, and not engaged in such service or employment, "when the injury is caused by any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer." It is further provided, in a subsequent part of the section, that the master or employer is not liable under this subdivision, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the employment of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition. There is no pretense that the defect complained of was in either the ways, works, or plant. The point of contention is, what is meant by "machinery," as employed in the act? In construing words used in a statute, reference should be made to the subject of legislation; and if they have acquired a defined, popular signification when referable to such subject, the presumption is that they were used in such sense by the legislature. A machine is a piece of mechanism which, whether simple or compound, acts by a combination of mechanical parts, which serve to create or apply power to produce motion, or to increase or regulate the effect. As used in the patent act, it has been defined to be "a concrete thing, consisting of parts, or of certain devices, or combination of devices." *Burr v. Burr*, 1 Wall. 531. Primarily, machinery means the works of a machine; the combination of the several parts to put it in motion. But we do not understand that the term was used in the statute in its primary sense; but, having a more enlarged signification, should be construed as so used, nothing appearing to show that it was intended to be used in its primary or restricted sense. Thus understood, the term "machinery" embraces all the parts and instruments intended to be and actually operated, from time to time, exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency. *Seavey v. Insurance Co.*, 111 Mass. 540. The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive power is created or applied, constitute the machinery of a cotton-mill. When cars, though used at times, and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business.

The circumstances and cause of the injury are alleged in the complaint substantially as follows: The plaintiff, who was working under the control and directions of W. C. Burton, to whom the defendant had intrusted the superintendence of the work, had raised a cross-tie, by means of a pinch-bar, to the iron rail on the track of the railroad, and was holding it in place; while another employe of the railroad, who was also working under the control and

directions of Burton, endeavored to drive an iron spike with a hammer furnished by defendant for that purpose; and owing to a defect in the hammer, or in the handle thereof, the co-employee missed the spike, and struck the iron rail with such force as to cause a scale to fly therefrom, which struck and put out plaintiff's eye. The complaint further avers that the defect in the hammer arose from the negligence of an employee of defendant who was intrusted with the duty of seeing that it was kept in proper condition, and that the defect could and would have been discovered by the exercise of ordinary care and diligence. A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when intended to be and is operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification or in the meaning of the statute. The plaintiff is not entitled to recover on the complaint as framed, and the demurrer thereto should have been sustained. It is unnecessary to consider the other questions raised, as they cannot again arise. Reversed and remanded.

(34 Ala. 11)

MYERS *et al.* v. STATE.

(Supreme Court of Alabama. May 20, 1888.)

## 1. RAPE—INDICTMENT—DESCRIPTION OF OFFENSE.

An indictment for rape which states that defendants "forcibly ravished Mary H. Jones, a female," is sufficient; the word "female," in such case, meaning the same as woman.

## 2. SAME—EVIDENCE—CONDITION OF PROSECUTRIX TEN DAYS AFTERWARDS.

On an indictment for rape, evidence of a physician as to the condition of the prosecutrix, at an examination made by him 10 days after the commission of the alleged offense, is not *per se* irrelevant; and, when the question asked relates to the condition of her clothing at such time, it will be presumed that it did no harm, unless it appears that the question was answered.

Appeal from circuit court, Calhoun county; LEROY F. BOX, Judge.

The indictment found at the February term, 1888, of the circuit court of Calhoun county, stated that Joe Myers and Mary Myers forcibly ravished Mary H. Jones, a female, against the peace and dignity of the state of Alabama. There were several grounds of demurrer interposed to the indictment. Among them, the failure to allege that the said Mary H. Jones was a woman, and that she did not consent to the ravishment. The objection to the testimony appears in the opinion. The defendants were convicted, and sentenced to the penitentiary for life. They were respectively the step-father and mother of the girl, who was between 10 and 11 years old.

G. C. Ellis and Kelly & Smith, for appellants. T. W. McClellan, Atty. Gen., for the State.

STONE, C. J. The words "female" and "woman," used as the former was in the indictment before us, mean the same thing, and the indictment is sufficient. 1 Brick. Dig. p. 499, § 736; *Sparrenberger v. State*, 53 Ala. 481; *Smith v. State*, 63 Ala. 55; *Block v. State*, 66 Ala. 493; *Parker v. State*, 39 Ala. 365; *Watson v. State*, 55 Ala. 150.

The expert witness who had made a professional examination of the girl, the alleged subject of the rape, was asked to state the condition in which he found her and her clothing. This was 10 days after the offense was charged to have been committed. The witness gave testimony "as to the condition of the girl on the 27th day of January, 1888." He is not shown to have said anything about the clothing. Both the question and the answer were objected to, and exceptions reserved. As there is not shown to have been any testimony given in regard to her clothing, we need only say that such testimony would probably have been improper, given so long after the alleged offense.

it cannot be presumed that the physician had knowledge of the clothes she had worn 10 days before. But the question did no harm unless it was answered; and, in the absence of all statement that it was answered, we must presume that it was not. 3 Brick. Dig. p. 444, § 577.

Testimony of what the physician discovered on an examination of the girl 10 days after the injury was not *per se* irrelevant. It is not shown what the testimony was. It may have tended to prove or confirm other testimony tending to prove penetration,—a material ingredient in the crime of rape. 2 Bish. Crim. Law, (7th Ed.) § 1127. Other possible, pertinent facts or circumstances might exist and be discovered by a physician, about which he would be clearly competent to testify. There is no error in the record. Affirmed.

(84 Ala. 323)

**GIRARD *et al.* v. FUTTERER *et al.***

(Supreme Court of Alabama. May 30, 1888.)

**EXECUTORS AND ADMINISTRATORS—ELECTION TO PAY LEGACY—ACTION FOR—WHEN BARRED.**

Where an executrix elects and promises to pay certain legacies, and acknowledges that she has funds in her hands therefor, such money becomes a trust fund, and a right of action to recover same is not barred by presumption of payment within 20 years after a part of the legacy has been paid.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Chancellor.

This was before this court on former appeal. 83 Ala. 234, 3 South. Rep. 516. On its return to the court below, the bill was amended, as appears in the opinion. The demurrers to the amended bill were overruled by the chancellor. From the decree of the chancellor overruling the demurrers, the defendants appealed, and now assign such decree as error.

*D. C. Anderson & Sons*, for appellants. *F. G. Bromberg*, for appellees.

STONE, C. J. Considering this case on the former appeal, (83 Ala. 234, 3 South. Rep. 516,) and speaking of the conduct of Mrs. Julia Spuller, the executrix, we said: "In the absence of any absolute promise on her part electing to pay the legacies, especially when accompanied by her disposition of the remainder of the property by her last will to others than the complainants, it seems plain to us that the executrix considered, whether rightly or not it is immaterial, that the retention of the property was required for the comfort of herself and family." That decision was pronounced on an alleged letter written to complainants by Mrs. Spuller, bearing date March 12, 1867, in which she said: "Wishing to comply as nearly as possible with the desires of late and much-lamented husband, I have two thousand dollars in the currency of the United States subject to your orders, and wish to know what disposition I am to make of the sum. I am unable to send more at present; but will if I can do so at some future time, and I hope that I may be able to send the remainder of the sum later." This, we held, was not an election or determination to pay a greater sum than the \$2,000 which she sent to them. In the amended bill it is averred that Mrs. Spuller, on July 4, 1866, wrote complainants as follows: "I am therefore now glad to be able to say that I have the full sum of four thousand dollars ready, whenever any one duly authorized appears to demand it." This is the exact amount of the four pecuniary legacies to complainants, for the recovery of the unpaid half of which the present suit was brought. The original bill in this case was filed February 26, 1887. By Stephen Spuller's will the pecuniary legacies were given to complainants, with a proviso "that they shall not be payable in case that, by reason of the existing war, or other circumstances, my said wife, Julia Spuller, shall not deem it discreet to pay the same, in view of the wants and requirements of herself and family; hereby intending to make the payment of said legacies, or any part thereof, as

well as the time of payment of the same, entirely subject to the sound discretion of my said wife." The will appointed Mrs. Julia Spuller executrix, and the testator died in 1864. The will was probated, and Mrs. Spuller took upon herself the execution of the trust. The object of the present bill is to force the collection of the residue of the legacies out of lands that were of the estate of Stephen Spuller at his death. The defendants claim and hold under the will of Mrs. Spuller.

Treating, as we must on demurrer, the averments of the bill as true, the complainants make the following case: On July 4, 1866, Mrs. Spuller, executrix, admitting she had the requisite funds in hand, in the exercise of her discretion, elected to pay the pecuniary legacies in full, and so notified the legatees. That money became thenceforth a fund in her hands as trustee, held by her as an express trust. On March 8, 1867, she recognized the continued existence of the trust, and made partial payment on it. The present suit was instituted in less than 20 years after that time, and no presumption of payment had arisen when this suit was brought. *Austin v. Jordan*, 35 Ala. 642; *Philippi v. Philippi*, 61 Ala. 41; *Harrison v. Heftin*, 54 Ala. 552; *Greenlees v. Greenlees*, 62 Ala. 330; 3 Brick. Dig. p. 619, § 26; *Kennedy v. Winn*, 80 Ala. 165; *Cameron v. Cameron*, 82 Ala. 392, 3 South. Rep. 148; *Whetstone v. Whetstone*, 75 Ala. 495; *Philippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. Rep. 1181; *Solomon v. Solomon*, 83 Ala. 394, 3 South. Rep. 679. The claim, as shown by the averments of the bill, is not barred. Affirmed.

(55 Miss. 369)

## BROWN v. NORMAN.

(Supreme Court of Mississippi. April 16, 1888.)

## 1. EQUITY—RESCISSON—PLACING DEFENDANT IN STATU QUO.

Where plaintiff exchanged a farm for defendant's interest in a firm, relying upon the latter's fraudulent representations that the firm was solvent and prosperous, and the firm proved insolvent, and its affairs were soon turned over to a receiver, the fact that the *status in quo* cannot be restored as to defendant will not prevent equity from rescinding the contract.<sup>1</sup>

## 2. SAME—RESCISSON—CONTRACT INDUCED BY FRAUD—RELIANCE ON DEFENDANT'S REPRESENTATIONS.

Where defendant induced plaintiff to exchange a farm for a worthless interest in an insolvent firm, by representations that it was solvent and prosperous, and plaintiff engaged in the business of the firm for several months before discovering the fraud, such delay will not operate as a ratification of the contract so as to prevent equity from setting it aside; as plaintiff had a right to rely on defendant's representations without investigating the affairs of the firm.<sup>2</sup>

Appeal from chancery court, Lawrence county; T. B. GRAHAM, Chancellor.

Action in chancery by E. L. Norman to set aside, as fraudulent, a conveyance by him to B. W. Brown. Defendant demurred to the bill, and, the demurrer having been overruled, he appeals.

R. H. Thompson, for appellant. A. H. Longino and A. C. McNair, for appellee.

COOPER, C. J. The appellee exhibited his bill in the chancery court of Lawrence county to cancel a conveyance of certain lands and personalty made by him in October, 1885, to the appellant, on the ground that it was procured by fraud and deceit. The defendant demurred to the bill, and, his demurrer having been overruled, he appeals. It appears by the bill that prior to October, 1885, the appellant was a member of the firm of Mangum, Brown & Butler,

<sup>1</sup> As to the necessity of restoring the consideration of a contract by a party seeking its rescission, see *Kelly v. Kershaw*, (Utah,) 14 Pac. Rep. 804, and note; *Insurance Co. v. Howard*, (Ind.) 18 N. E. Rep. 108; *Bell v. Keepers*, (Kan.) 17 Pac. Rep. 785.

<sup>2</sup> The right to disaffirm a contract for fraud must be exercised promptly after its discovery. *Bell v. Keepers*, (Kan.) 17 Pac. Rep. 785.

doing business in the town of Wesson, in Copiah county. At that time the said firm was insolvent, owing debts to the amount of \$12,000, and having assets only to the value of \$5,000. A day or two before the bargain between appellee and appellant, Brown and Mangum went from the town of Wesson to the residence of appellee, which was some 10 miles in the country, and proposed to him to purchase Brown's interest in said firm, representing to him that the firm was in a solvent and prosperous condition, and that its total liabilities did not exceed \$4,000, while its assets were not less than \$16,000, and exhibited to him a false and fraudulent statement which they had prepared for the purpose of deceiving him as to the condition of the firm. The appellee was a farmer, having no knowledge of mercantile affairs, and, believing Brown and Mangum to be honest and truthful men, (he having known them for many years,) relied upon the representations, and bargained for Brown's interest in the firm, giving him in exchange therefor his farm and the personal property thereon, (at a valuation of \$3,100,) and paying in cash the sum of \$500, and made a deed conveying the property to Brown. In addition to the price paid by appellee, he assumed liability for the existing debts of the firm. After this contract had been made the name of the firm was changed to Mangum, Butler & Co., the appellee being the Co. The new business was carried on until March, 1886, at which time Mangum, at the instance of the creditors of Mangum, Brown & Butler, exhibited his bill in the chancery court of Copiah county for the dissolution of the firm and administration of its assets on the ground of the insolvency of said firm of Mangum, Brown & Butler. On this petition a receiver was appointed, who took possession of the entire assets, and applied them, under the direction of the court, to the payment of the debts of the said firm, there being an insufficient amount to pay the debts in full. The bill charges that the appellee did not discover the insolvency of the firm of Mangum, Brown & Butler until "shortly before" Mangum instituted his proceeding for dissolution and administration. The bill in this cause was exhibited in August, 1886, more than five months after the appointment of the receiver in the proceedings instituted by Mangum. The complainant stated in his bill that, by reason of the proceeding by Mangum, and the administration of the firm assets by the chancery court, he could not offer to restore the defendant to the position he had occupied before the contract was made, but that in fact the property had been applied as the law and the rights of the other parties partners required, and as was contemplated by the contract between the complainant and defendant. The grounds of demurrer are: (1) That, since the *status quo* cannot be restored, a rescission cannot be decreed, but that complainant must resort to an action at law for the deceit practiced upon him. (2) That complainant, having failed to rescind presently upon the discovery of the fraud, ratified and affirmed the contract. (3) That, complainant having failed to promptly notify the defendant of the proceedings by Mangum, and by permitting the property to be administered in a suit to which he was a party, affirmed the contract. (4) That complainant, having access to the books of the firm, and the opportunity of discovering the fraud, was guilty of negligence and laches in not having pursued his inquiries within a short time after the sale, and must be treated as having known of the fraud at the time when by diligence he might have discovered it, and that, by remaining in possession after that time, he affirmed the contract. It will be noted that the objections to the relief asked resolve themselves into two classes: (1) That there can be no rescission because the *status quo* cannot be restored; and (2) that the conduct of the complainant, after he knew or should have known of the fraud, is in law a ratification of the contract.

In decisions in actions at law arising from attempted rescissions of contracts for the sale or exchange of personal property the language of the courts is almost uniform in declaring that the defrauded party, in order to maintain his suit, must have restored or tendered to restore whatever was received by

him under the contract, because of the principle that the contract must be rescinded *in toto* if at all, the plaintiff not being permitted to retain a benefit under an indivisible contract which he repudiates. But, even in actions at law, there are exceptions to the rule. If the thing received by the defrauded party be of no value, (*Fitz v. Bynum*, 55 Cal. 459,) or if, by reason of the act of the fraudulent party, a return be rendered impossible, (*Masson v. Bovet*, 1 Denio, 69, 43 Amer. Dec. 651, and notes; *Hammond v. Pennock*, 61 N. Y. 145,) a return or tender is unnecessary. So, also, where, by natural causes or reasonable use, the value of the property is diminished, and perhaps where it is necessarily destroyed in discovering the fraud, the fraudulent party must receive it in its depreciated condition. *Baker v. Lever*, 67 N. Y. 304; *Gatling v. Newell*, 9 Ind. 574. And if the *bona fide* buyer has expended work, money, or material in the improvement of the property before discovering the fraud, he may restore the property, and recover for the work and labor, money, or material put upon it. *Farris v. Ware*, 60 Me. 482. In the two latter classes of cases there is a restitution of the thing itself to the fraudulent seller, but the *status quo* is not restored; for in the one case he receives the property back less valuable than it was, and in the latter he takes it improved in value, but possibly improved in a manner or to an extent he would not have desired, but he is nevertheless chargeable with the value of improvement. In many of the cases for rescission in equity language is used from which it might be inferred that precisely the same principles govern in suits in equity that are applied to determine the right of the party to sue at law. In actions, whether at law or in equity, usually both of the questions presented by this record are involved, viz., whether there has been a restoration of the *status quo*, and whether there has been ratification by the plaintiff after knowledge of the fraud. It is evident, that ratification goes to the very root of the controversy, and if that be shown, whether in a court of law or of equity, the plaintiff must fail. It is therefore true that in investigating and determining that question the rule would be the same in equity as at law. But there is this marked distinction between suits at law for the recovery of the consideration paid, after rescission by the plaintiff, and bills in equity for rescission; the plaintiff at law must have the legal title to the thing sued for, if it be a chattel, or a legal right to the sum demanded, at the time of the institution of his suit. If he has parted with his property by reason of the fraud of the buyer, or if, being buyer, he has parted with his money by reason of the fraud of the seller, the legal title or right has passed out of him and into the other party. The contract is not void, but voidable only, and it must be avoided to reinvest him with his legal title or right to sue. Since the law permits him to reacquire this legal right by his own act, it puts upon him the necessity of restitution of the thing received by him as a condition of the exercise of the right to avoid the contract. From necessity the law knows nothing of compensation, but requires restoration of the thing received, for to permit the plaintiff to determine what would be just compensation would be to make him judge in his own case. In equity the complainant does not necessarily rescind and sue; he may sue for rescission. He is required to restore the consideration, not, however, as a condition of acquiring the right to sue, but because of the equitable maxim that he who seeks equity must do equity. Mr. Pomeroy thus states the rule: "In administering these remedies, pecuniary as well as equitable, the fundamental theory upon which equity acts is that of restoration,—of restoring the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions they occupied before the fraud was committed. Assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases the court applies the maxim, he who seeks equity must do equity, and will thus secure to the wrong-doer, in awarding its relief, whatever is justly and equitably his due."

2 Pom. Eq. Jur. § 910. In *Neblett v. McFarland*, 92 U. S. 101, 105, it is said: "The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction." Other writers upon equity jurisprudence deduce the right of the defendant to have restoration of his property from the maxim of equity that imposes doing equity upon the complainant as a condition upon which he secures relief. Adams, Eq. (7th Amer. Ed.) 191; 2 Story, Eq. Jur. (18th Ed.) § 693. Where the complainant has a plain and adequate remedy at law, and the condition of the parties has been so radically changed that it is difficult to put the defendant into as good position as before the sale, and the complainant has had substantially the benefits contracted for, the misrepresentation being as to a part only of the subject-matter, for which recovery of damages would be full relief, many cases may be found in which the court of equity has declined to interfere. But an examination of many cases discloses the fact that the most vigorous announcement of the rule requiring the restoration of the *status quo* is to be found in *dicta*, or in cases in which there has been ratification after discovery of the fraud. In *Pintard v. Martin*, 1 Smedes & M. 126, and *Johnson v. Jones*, 13 Smedes & M. 580, relief was denied upon the ground that the complainants had ratified after knowledge of the fraud. What was said upon the other branch of the case seems to have been uncalled for, and to have been only incidentally remarked. The annotator of Adams' Equity cites, in addition to these cases, the following other decisions. It is curious to note how far they fall below supporting the proposition they are cited to sustain. *Garland v. Bowling*, Hemp. 710; *Coppedge v. Threadgill*, 3 Sneed, 577; *Skinner v. White*, 17 Johns. 357; *Clay v. Turner*, 3 Bibb, 52. In *Garland v. Bowling* the court held, first, that the evidence failed to support the allegation of fraud, and therefore the complainant could not recover. But it also appeared that the complainant did not seek to rescind the contract; what he attempted to do was to enjoin a judgment at law recovered for the price of the property sold, (slaves,) and to retain the slaves. *Coppedge v. Threadgill* was a case in which a sale of land was set aside, but the court had neglected to require the complainant, a married woman, to restore the cash she had received. The supreme court held that her coverture did not relieve her of the obligation to refund, and reversed the cause, that a decree might be entered to that effect. *Skinner v. White*, 17 Johns. 357, was a case in which there had been a rescission by the act of both parties, and the only question was as to the extent of the liability of one of the parties to the contract. *Clay v. Turner*, 3 Bibb, 52, the court refused either to specifically enforce a contract at the suit of one of the parties or to rescind it at the suit of the other. On the subject of rescission the court said that the matter complained of was not material under the terms of the contract, and, besides, that the complainant had speculated on the chances of getting a paying bargain through a series of years, and sought relief, not because of the want of capacity in the other party to convey, but because he found after a long time it would be better to rescind. A review of these cases illustrates how unreliable the work of the average annotator is often found to be. Let us now refer to cases in which the specific question has been raised and passed on by courts of equity. In *Barker v. Walters*, 8 Beav. 92, and *Jervis v. Berridge*, L. R. 8 Ch. 351, demurrers had been interposed to bills seeking rescission on the ground that no offer was made to restore the *status quo*. It was held that it was unnecessary to do so, since the court on final hearing would require the complainant to do equity. In the latter case Lord SELBORNE said: "Upon principle there appears to be no good reason why a plaintiff in equity, suing upon equitable grounds, should be required on the face of his bill to submit to those terms which court at the hearing may think it right to impose as the price of any relief to which he may be entitled." In *Savery v. King*, 5 H.

L. Cas. 626, the party seeking rescission had disposed of part of the property received by him, (a policy of insurance,) and on this branch of the case Lord CRANWORTH said: "The only remaining question is as to the terms on which relief ought to be given. With respect to the mortgage, it is plain that Richard must, as far as possible, put Savery in the condition in which he must have been if no such mortgage had been made, and if his security had rested solely on the life of his father, and the several policies of insurance. One of the 11 policies of insurance was sold by Richard in January, 1846. It is impossible, therefore, as to that policy, to restore Mr. Savery exactly to the position in which he stood in 1835; but he cannot be heard to complain of this, for, by the arrangement he had made or concurred in, he had led Richard to suppose that all the policies had become his own, and that he might deal with them as he thought fit; indeed he himself suggested a sale of one or more of them as a step which it might be advisable for Richard to take. All therefore which can be done as to the policy which was sold is to charge Richard in accounting with Mr. Savery with the sum which it produced, together with interest from the time when it was sold." In *Warner v. Daniels*, 1 Woodb. & M. 90, the court directed in decreeing a rescission that the complainant should redeliver to the defendant the property received, (certain shares in an incorporated company,) but, if it should appear that he had disposed of any of the shares, then that he should restore the value thereof with interest. In *Myricks v. Jacks*, 33 Ark. 425, the court said: "It is no objection that complainant cannot put Jacks entirely *in statu quo* on rescission. The change in condition of the property was brought about by persuasion, to accomplish a transaction in which Jacks was a party, and before the fraud was discovered, and by the action of complainant in a matter she did not understand. When courts cannot place parties wholly *in statu quo*, they are not thereby precluded from granting relief against fraud. They may proceed to do so as nearly as possible, and make compensation. See, also, *Gatling v. Newell*, 9 Ind. 574; *Crosland v. Hall*, 33 N. J. Eq. 111. In *Ogden v. Thornton*, 30 N. J. Eq. 573, the court, finding itself unable to rescind the contract because the fraud occurred after the conveyance, remanded the cause in order that the bill might be amended, so as to enforce a lien upon the property for the price at which it had been valued, the defendant by his fraud having prevented the complainant from receiving what he contracted she should have. Upon principle and authority we think it immaterial that the *status quo* cannot be literally restored. The defendant, by the grossest fraud, seduced complainant to exchange his farm for mere moonshine. What he professed to give was in fact of no value to himself or to any one else. He simply placed him in a position to be rendered insolvent, for by his purchase he secured nothing except what should remain of the partnership assets after payment of debts, and, the firm being hopelessly insolvent, this right was of no value. It ought also to be noted that from the very moment of the execution of the contract it was impossible for the defendant to be placed *in statu quo* either by the act of complainant or by both his act and the consent of the defendant. The defendant had been a member of a partnership, and his act in selling his interest therein was a dissolution of the firm. He could not again become a member without the assent of Mangum and Butler, over whom neither the defendant nor complainant had control. By his own act, therefore, a restoration of the *status quo* was made impossible.

Nor do we think the record discloses ratification by inaction. The complainant owed the defendant no duty to investigate the condition of the firm. He had the right to rely upon the truth of the representations made by the defendant, and all that was required was that he should act when he discovered the fraud of which he was the victim. In *Rawlins v. Wickham*, 3 De Gex & J. 304, the complainant had been inveigled into an insolvent copartnership by false representations of its condition, and acted as a partner for

five years; and then, having discovered the fraud, exhibited his bill for rescission and for an account, and his right to rescind was upheld. See, also, *Smith v. Smith*, 30 Vl. 189, which was an action at law successfully defended by the party defrauded on facts strikingly similar to those involved here. It is held, both at law and in equity, that delay alone before the discovery of the fraud will not bar the right to rescind. Notes to *Bryant v. Isburgh*, 74 Amer. Dec. 655. The dissolution of the new firm of Mangum, Butler & Co. by the appointment of a receiver, in a suit to which the defendant was not a party, does not, we think, preclude complainant of his right to rescind. It was not at his instance that the proceeding was instituted, and at last it is but the subjecting of defendant's property for the payment of his own debts. The demurrer was properly overruled, and the decree is affirmed.

(65 Miss. 391)

WARREN MILLS v. NEW ORLEANS SEED CO.

(Supreme Court of Mississippi. April 23, 1888.)

INJUNCTION—WHEN LIES—TO RESTRAIN REPEATED TRESPASSES.

Injunction will lie to restrain defendant from using sacks prepared by a rival in the same business for its own use in carrying on the business of buying and selling cotton-seed, the owner of the sacks having made frequent objection to such use.

Appeal from chancery court, Warren county; WARREN COWAN, Chancellor. The appellee, the New Orleans Seed Company, conduct their business in New Orleans. It buys many thousand sacks of cotton-seed; owns many thousands of sacks, which it distributes throughout the country for the purpose of buying and having them filled with cotton-seed, to be shipped to the company in New Orleans. These sacks are plainly marked with its name. The Warren Mills owns a much less number of sacks, which it distributes; and the agents of the Warren Mills use the sacks of the appellee, which are plainly branded with its name, for the purpose of shipping cotton-seed to the Warren Mills; and do this by having a large number of appellee's sacks, together with a few of its own sacks on top and at bottom, to make it appear that all the sacks are its own. Thus the Warren Mills, an opposition company, used sacks owned by the New Orleans Seed Company, against the frequent objections of said seed company. The New Orleans Seed Company filed a bill in the chancery court setting up the above facts, and praying for an injunction against the use of its sacks by the Warren Mills. The Warren Mills demurred to this bill. The demurrer was overruled, and injunction continued, from which the Warren Mills appealed.

*Lea & McKee*, for appellant. *Müller, Smith & Hirsh*, for appellee.

ARNOLD, J. The demurrer was properly overruled. The allegations in the bill, of repeated, willful, and continuous wrongs committed and threatened by appellants, warranted the issuance of the injunction. The jurisdiction of equity in such case cannot be doubted. It is said that the prevention of vexatious litigation, and of a multiplicity of suits, constitutes a favorite ground for the exercise of the jurisdiction of equity; and it may be laid down as a general rule that wherever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, equity may properly interpose, and afford relief by injunction. 1 High, Inj. § 12; 1 Pom. Eq. Jur. § 245. Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive, or inflict irreparable injury, and the legal remedy may therefore be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. 1 Pom. Eq. Jur. § 245; 3 Pom. Eq. Jur.

§ 1357. The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against the same wrong-doer in regard to the same subject-matter. The ends of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding. And such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies.

Affirmed and remanded, with leave to appellants to answer within 30 days after the mandate of this court herein is filed in the court below.

(55 Miss. 297)

SAUNDERS v. McLEAN.

(*Supreme Court of Mississippi*, April 30, 1883.)

1. ATTACHMENT—SALE OF LAND PENDENTE LITE—RIGHTS OF PURCHASER.

Plaintiff attached the interest of S. in certain real estate to enforce the payment of a debt. Pending the attachment, with notice thereof, defendant, a tenant in common with S. in the real estate attached, took a conveyance of the interest of S. in the land in satisfaction of a debt due to her. Afterwards the land was sold under the attachment, and plaintiff became the purchaser. *Held*, that a decree for partition was properly made; defendant, by the conveyance, having only acquired the right to pay off the lien of the attachment, lost such right by the attachment sale.

2. APPEAL—REVIEW—ERRORS NOT APPEALED FROM.

Where no appeal is taken from a decree by the party against whom the same is entered, such decree will not be reversed on the appeal of the adverse party.

Appeal from chancery court, Carroll county; B. W. WILLIAMSON, Chancellor.

Bill in equity, by Anna McLean against Narcissa P. Saunders, for partition of lands formerly owned by defendant and her brother John E. Saunders in common. Partition was decreed, and defendant appeals.

*W. B. Helm* and *Frank Johnston*, for appellant. *Nugent & McWille*, for appellee.

COOPER, C. J. In December, 1883, the appellant and her brother J. E. Saunders were owners, as tenants in common, of the lands described in the pleadings. At that time, John E. Saunders was a non-resident, and indebted to the appellee in a considerable sum, to secure the payment of which she instituted a suit against him by attachment in chancery, and levied upon his undivided interest in the land. In this proceeding a final decree was rendered in favor of complainant, under which the land attached was sold, and she became the purchaser. The sale was in due time confirmed, and a conveyance made to her by the commissioner under the direction of the court. Pending the attachment proceeding, the appellant, with notice of the same, took a conveyance from the defendant in attachment for his undivided interest in the land; the consideration being a debt due to her from him for moneys advanced by her from time to time, since the year 1868, to pay the taxes on the common lands, and for which she had a lien upon the lands at the time the attachment was levied. The present bill is one exhibited by appellee to partition the lands, against which the defendant (appellant) defended upon the ground that, by the conveyance from her brother, she acquired his interest in the property; but, apprehending that this claim might not be sustained, she made her answer a cross-bill, and prayed that, if the conveyance did not invest her with the title, then that she might have an account of the sums advanced by her to the payment of the taxes while the land was owned by herself and her brother, and that a lien should be fixed upon complainant's half for one-half of such sums, and interest thereon. On the original bill, partition was decreed and has been made. On the cross-bill the chancellor held that the conveyance from J. E. Saunders to appellant was void, and inoperative to convey title, but that appellant was entitled to charge the land with the money ad-

vanced to pay taxes on the property, not, however, to exceed the consideration price expressed in the deed, which was \$1,000. Under this interlocutory decree, an account was stated, from which it appears that there was due complainant some \$700, for which a decree was made charging its payment on the interest of complainant in the land. From this decree the cross-complainant appeals, and assigns for error the ruling of the court by which she was restricted to the sum named in the deed, and also in overruling exceptions taken to the action of the commissioner in excluding certain items propounded by her for allowance.

The view we take of the rights of the respective parties makes it unnecessary to consider either of the errors assigned, for in no event can the complainant complain of the result reached. Conceding that she held a lien upon the interest of her co-tenant for taxes paid by her to preserve the common estate, and that she might have charged the land with its payment after it had come to the hands of the complainant, yet, by accepting a conveyance from her brother in payment of the sum due, the debt, and with it the lien which existed for its security, were extinguished. After the execution of the deed, the appellant was the owner of the land by conveyance *pendente lite*, and her right was to pay off the attachment levied on the land, and thus secure the unincumbered title. The conveyance discharged the debt, and vested in her the legal title, but it was subject to the lien of the attaching creditor; and, since appellant was a purchaser *pendente lite*, it was necessary for the protection of the title she had acquired that she should protect the property from sale under the decree in favor of the attaching creditor. By permitting it to be sold she lost the title, but did not reacquire the debt that was discharged in consideration of the conveyance she had accepted. The court below erred in fixing any charge upon the land in her favor; but, since the appellee has not prosecuted a cross-appeal, the decree cannot be reversed on that ground; and appellant has no ground of complaint, since she is not only not entitled to collect the rejected portion of her account, but ought not to have recovered any portion of that for which she has secured a decree. The decree is affirmed.

(40 La. Ann. 325)

**BROWN *et al.* v. SMYTH *et al.***

(*Supreme Court of Louisiana.* March 5, 1888.)

**1. HUSBAND AND WIFE—JUDGMENT OF SEPARATION—RIGHTS OF CREDITORS.**

Creditors whose claims arose subsequent to a judgment of separation of property between husband and wife cannot contest the correctness or validity of such judgment, except, at least, for absolute nullities.

**2. SAME—JUDGMENT OF SEPARATION—FAILURE TO PUBLISH.**

Want of publication of the judgment, unless shown to have been fraudulent or injurious, is not a ground of nullity which subsequent creditors can urge.

**3. SAME—JUDGMENT OF SEPARATION—WHEN SET ASIDE—FAILURE TO ISSUE EXECUTION.**

Where the judgment allowed no moneyed claim against the husband, and only recognized the wife's title to a carriage and horses shown to have been her paraphernal property, no execution was necessary, and want of it is not a ground of nullity.

**4. SAME—SEPARATION OF PROPERTY—WHEN ALLOWED.**

The wife's right to a separation of property is not limited to cases where she has actual claims against her husband, which are endangered, but extends also to the case in which his circumstances require it in order that she may enjoy the fruits of her separate industry for the support of herself and family, without liability to her husband's creditors.

(*Syllabus by the Court.*)

Appeal from district court, parish of Tensas; J. D. S. NEWELL, Judge *ad hoc*.

Controversy between Brown & Learned and John Smith and others, in which plaintiffs seek the nullity of a certain judgment. From a judgment rejecting their demand, plaintiffs appeal.

*J. N. Luce and S. L. Elam, for appellants. Steele, Garrytt & Dagg, for appellees.*

FENNER, J. The object of this action is to declare the nullity of a judgment of separation of property between defendant John Smyth and his deceased wife, with the view of subjecting certain property subsequently acquired by the wife to the payment of the husband's debts. The grounds of nullity alleged are two,—want of publication, and non-execution of the judgment.

1. *As to Want of Publication.* Plaintiffs only became creditors of the husband long after the judgment of separation and acquisition of the property by the wife. It is well settled that such creditors have no right to contest the correctness or validity of the judgment, except, at least, for absolute nullities. *Gates v. Legendre*, 10 Rob. (La.) 74; *Brassac v. Ducros*, 4 Rob. (La.) 336; *Morris v. Williams*, 6 La. Ann. 391; *Levistones v. Brady*, 11 La. Ann. 696; *Noland v. Bemtes*, 14 La. Ann. 49; *Farrell v. O'Neill*, 22 La. Ann. 619; *Hanney v. Maxwell*, 24 La. Ann. 49; *Lewis v. Peterkin*, 2 South. Rep. 577.

It is equally well settled that want of publication, unless shown to have been fraudulent and injurious to third persons, is not a cause of absolute nullity. *Turnbull v. Davis*, 1 Mart. (N. S.) 568; *Ratford v. Thorn*, 15 La. Ann. 81. In this case, moreover, want of publication is not proved. Files of the newspaper in which it should have been published could not be found. The presumption is that the law was complied with.

2. *As to Non-Execution.* The petition for separation alleged and the judgment allowed no moneyed judgment against the husband, and no claim for any property, except a carriage and pair of horses. The evidence establishes that these were paraphernal property owned by her before marriage, and the judgment simply recognized her title to them. There was no necessity for the execution of such a judgment. *Jones v. Morgan*, 6 La. Ann. 632; *Holmes v. Barbin*, 13 La. Ann. 474; *Vickers v. Block*, 31 La. Ann. 672; *Baldwin v. Insurance Co.*, 2 Rob. (La.) 136. She would have had the right to hold or resume the possession and administration of such paraphernal property, without the necessity of a judgment of separation or execution thereof. The petition plainly sets forth that her object was, in view of the embarrassment and heavy indebtedness of her husband, "to secure to herself the moneys of her own industry, and to enable her to reap the fruits of her own industry." This has been frequently held to afford a sufficient ground for the separation, independent of any actual claims against her husband which may be endangered. *Davock v. Darcy*, 6 Rob. (La.) 843; *Jones v. Morgan*, 6 La. Ann. 632; *Wolf v. Lowry*, 10 La. Ann. 272; *Mock v. Kennedy*, 11 La. Ann. 525; *Webb v. Bell*, 24 La. Ann. 75; *Meyer v. Smith*, Id. 153; *Vickers v. Block*, 31 La. Ann. 672. The charge that the property acquired by the wife was bought with the husband's means is not only unsustained, but rebutted by proof to the contrary. Judgment affirmed.

(40 La. Ann. 514)

*In re LOUISIANA SAVINGS BANK & SAFE DEPOSIT CO.*

(*Supreme Court of Louisiana. April 16, 1888.*)

1. PAYMENT—UNDER ORDER OF COURT—PRESUMPTION.

Payments made by syndics, liquidators, and other fiduciaries under *ex parte* orders of a court are still open to inquiry as to their correctness. The practice of granting such orders without notice to those interested and without proof contradictorily made, is, as a general rule, irregular and unwarranted.

2. SAME.

But, though unauthorized, such orders may be regarded as confirmatory of the good faith and honesty of those making the payment; and when the charges paid are not extravagant on their face, and were for services of experts, attorneys, and others, rendered under the eye of the court, and some of whom were appointed by the court without opposition, and the conduct and administration of the fiduciaries

is free from suspicion of fraud, the payment will be viewed as *prima facie* correct; and, in the absence of sufficient evidence to negative or rebut such presumption, the payments will not be rejected.

1. TRUSTS—TRUSTEES OF INSOLVENT BANKS—POWERS—COMPENSATION.

Where an insolvent estate or banking institution is administered by three liquidators, whose commissions are fixed by law, they will not, in addition to such commission, be authorized to charge salary for their services. Nor will they be entitled to the assistance of clerks unless they first show that, from the intricacy of the accounts or other cause, the services of the clerk were a necessity, and obtain the authority of the court for their employment, when they have already the help of the two experts in the work of liquidation.

2. BANKS AND BANKING—INSOLVENT BANKS—RIGHTS OF DEPOSITORS.

The depositor becomes the ordinary creditor of the bank, unless he makes a deposit in kind, as defined by the Code. Civil Code, arts. 2940, 2943-2945, 2963, 3523; *Longbottom's Ex'rs v. Babcock*, 9 La. 50; *Grant v. Noel*, 17 La. 163; *Wall v. Spurlock*, 10 La. 343.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. BRIGHTON, Judge. *Hornor & Lee*, for heirs of Porter. *Jas. B. Guthrie* and *Jas. D. Seguin*, for M. C. Randall. *F. N. Butler* and *Henry C. Miller*, for John Crossley & Sons, appellants. *W. S. Benedict* and *Chas. S. Rice*, for commissioners, appellees.

TODD, J. The Louisiana Savings Bank & Safe Deposit Company was placed in liquidation in June, 1879. On the 16th of June, 1887, the liquidators or commissioners filed their second provisional account. This account exhibits assets as follows:

Delivered to commissioners to the bank when they took charge,	\$48,171 70
Proceeds sale bank building,	52,700 00
Recd. for amount,	6,870 00
Making total assets,	\$102,821 70

The total charges on the account amount to \$81,197. Oppositions were filed to the account by the heirs of Royal A. Porter, deceased, Milton O. Randall, and John Crossley & Sons. From an adverse judgment these opponents have appealed.

1. *Opposition of the Porter heirs.* Upon the settlement of the succession of Royal A. Porter, the father of these opponents, their distributive shares were found to be in the aggregate \$9,866.15, which sum was deposited in the Louisiana National Bank to the credit of the succession of the deceased. On the 12th of June, 1878, under an order of the Second district court of New Orleans, this fund was withdrawn from the bank mentioned, and deposited in the Louisiana Savings Bank, where it drew interest, which was paid to the executrix. On the 31st of May, 1879, an order of the same court was rendered, directing the withdrawal of said funds from the savings bank, and the investment thereof by the tutrix in United States bonds. On the 4th of June thereafter, this order was presented to the president of the bank, who, after a short delay to ascertain the correctness of the order, informed the tutrix that no United States bonds could then be purchased in New Orleans, but that he would take the money, and send it to Washington city, and there purchase the bonds for the heirs. To this the tutrix agreed, and surrendered her bank-book, and received two certificates of deposit, one for the shares of the two younger heirs, and the other for the oldest, who had then been emancipated, accompanied by the assurance of the president of the bank that these certificates would be exchanged for the bonds as soon as they arrived, which it was stated would be about the 7th of July. The bonds never came, the investment was never made in fact, and the bank failed; closing its doors on the 30th of June. It possessed, at the time, in cash, \$32,639.42, which went

into the hands of the commissioners. On the account of the commissioners these heirs are placed thereon as ordinary creditors. They claim, however, by reason of the facts recited above, that their deposit was a special deposit, entitling them to be paid by preference over all creditors; and this is the sole question relating to this opposition to be determined. The contention of the opponents rests entirely on the hypothesis that there was an actual deposit made on the 4th of June, 1879. The actual deposit was really made in June, 1878, and in point of fact from that time continuously the fund was in the possession of the bank, after the proposed investment of the fund of the bonds as before. From the time of the actual deposit of the money in June, 1878, the heirs or their tutrix were never in possession of their money. There was an order of court, it is true, requiring the fund to be invested in United States bonds, but the fund was not withdrawn for the purpose of this investment; and, although there was a promise on the part of the president of the bank to make this investment or purchase the bonds for the parties, it was never done by him, and the money remained in the bank as before. The issuing of the certificates, even coupled with the promise of the president to invest in the bonds, and the purpose of the depositors to effect the investment, did not change the *status* or condition of the fund, and convert the original irregular deposit of 1878 into a real or special deposit. We cannot, under any reasonable view of the circumstances, construe this deposit as the real or special deposit, as contended for by the opponents. A deposit, as defined by the Code, "is an act by which a person receives the property of another binding himself to preserve it, and return it in kind." Civil Code, art. 2926. "The depositary cannot make use of the thing without the express or implied consent of the depositor." Id. art. 2940. "The depositary ought to restore the precise object which he has received." Id. art. 2944. "The only real deposit is that where the depositary receives a thing to be preserved in kind, without the power of using it, and on the condition that he is to restore the identical object." Id. art. 2968. "He who deposits a thing in the hands of another still remains the owner of it;" "consequently his claim to it is preferred to that of the other creditors of the depositary, and he can demand the restitution of it, \* \* \* if the thing reclaimed be identically the same which he deposited." Id. art. 3222. The deposit thus specifically described in the foregoing article is claimed by opponents to be the kind of deposit that was made by them in the savings bank; and upon this claim exclusively their case rests. It will be seen that the essential conditions of the deposit, a real or special deposit, is that the thing deposited can be identified. In this case, \$9,866, in no particular or designated kind of money, was placed in the bank in June, 1878. In June, 1879, the bank failed, having in its vault, in money, \$82,689. That the fund deposited more than a year before could be identified and taken from these moneys found in the bank would certainly seem impossible; and even that any of this original fund remained, and made part of this balance found, was highly improbable. Yet this identification is essential. In the case of *Longbottom's Ex'rs. v. Babcock*, 9 La. 50, opposing creditors to the executor's account claimed the privilege on account of the special deposit, as follows: "The evidence in the record shows that the deceased was the attorney in fact of Cotton Henry during his (Henry's) absence from the state, and that before his departure he had given his agent (the deceased) a check on one of the banks for \$1,300, to be disbursed in his account, and that \$1,100 was found in the store of the deceased at the time of his death. But there is no evidence to show that this sum is the same money received by the testator. Article 3189 [now 3222] requires, in order that the depositor may exercise his right of privilege, proof of the identity of the thing deposited must be made. It is of the essence of the deposit that the depositary should be bound to keep the thing deposited, and restore it in kind to the depositors. In this case the money appears to have gone into the hands of Longbottom as agent of Henry.

He was bound to account for it, and not to restore it in kind. He did disburse a part of it for the use of his principals. The court properly rejected the claim as a privilege." The case of *Matthews v. McKenzie*, 10 La. Ann. 842, is confirmatory, and even more strongly illustrative of the same principle. We quote from their decision: "The money was counted and debited to the depositary simply as so much cash. Special or real deposits are usually sealed up, and not counted by the banker, and are to be returned in kind. The box or package containing the real deposit is indorsed with the depositor's name, and is put away by itself in the vault, there to remain till demanded by the owners, and checks cannot be drawn against it." In view of the above, it is plain that the issuing of the certificates of deposit in this case cannot be regarded as changing in anywise the character of the deposit, as contended for by opponent's counsel. A certificate is given as evidence of the amount standing to the credit of the depositor. The main object of such certificate is to afford satisfactory evidence of such credit, and to enable the depositor to utilize the credit by drawing checks against or upon the amount so deposited; whereas, it is seen from the authority last cited that, if it be a special or real deposit, checks cannot be drawn upon it. The counsel for opponents claim that the identification of the fund was sufficient, because the bank, when it failed, had in its possession cash exceeding in amount the deposit. We have before adverted to the extreme improbability that any part of this money was part or parcel of the funds originally deposited; but the authority of the case in 9 La., above cited, is, as we have seen, directly opposed to such contention. It is true that authorities from other states were cited by the counsel of the opponents that undoubtedly supported their argument, and especially on this particular point, but they belong to a different system, and were the enunciations of equity courts, relating to trusts, express or implied, and to trust funds. While they are authority entitled to respect, we cannot yield to them in the face of the positive declarations of our written law, and the settled jurisprudence under it. The claim was properly construed to be an ordinary debt of the bank, and the privilege rejected.

2. The claim of Milton C. Randall is for services rendered the commissioners as an expert. He was paid \$3,000, but demanded \$7,000 more; and appeals from a rejection of his demand. It is strongly urged by the opponents of this claim that there was no necessity for this appointment; that the issues were such that the services of an expert were not required. Were this a matter open to discussion, the necessity for the appointment of an expert might be reasonably questioned. He was, however, regularly appointed, on the application of the commissioners, without opposition from any of the parties litigant. He rendered continuous services for a long time; but whether the character of those services, and the report made thereof were strictly within the line or scope of his duties or appointment, it is at least too late to be made a subject of inquiry. The appointment must be considered as regularly and legally made. We have attentively considered the character of the services rendered, their value to the parties, etc., and at present will content ourselves in saying that we are not convinced that \$3,000, which the expert received, was an inadequate consideration for the services; and see no reason to disturb the conclusion of the judge *a quo* who rejected the demand for further remuneration. The consideration of this claim will occur again in the course of this opinion.

3. The opponents John Crossley & Sons were mentioned in the account as creditors, but the amount owing them was stated therein as unknown. (1) By the judgment of the lower court the amount of the indebtedness of the estate to them was fixed at \$41,714.11, with legal interest from the 10th of March, 1886, and the further sum of \$74,768.25, with legal interest from the 18th of May, 1886. These sums were in exact conformity to the decree of this court, rendered on appeal in the case of *Crossley v. Bank*, 38 La. Ann. 75. A

larger amount was adjudged by that decree than was given by the judgment now under review, but by that decree a privilege for part of the debt was recognized on certain drainage warrants, and they were ordered to be sold, and their proceeds applied as a credit on the debt. They were so sold, and the debt was reduced thereby to the sum or sums allowed by the judgment of the lower court in the instant case. This adjustment of the debt was undoubtedly correct. (2) They opposed the charges imposed, or sought to be imposed, on the insolvent estate, for salaries of the commissioners, hire of clerks, compensation to experts, and fees of attorneys. Their oppositions to these charges were all dismissed. As before stated, the entire sum for distribution amounted to \$102,321.70. The total charges on this fund for the administration of the insolvency, paid under orders of the court, amounted to \$69,000. (a) The commissions of syndics on sums that came into their hands, as fixed by law, are 5 per cent. on amounts up to \$50,000, 3 per cent. on amounts not exceeding \$100,000, and 2 per cent. on all sums above \$100,000, so that their entire commissions on \$102,321 would be \$4,046, and no more. There is charged as commissions on \$43,172; the amount first received by the commissioners from the officers of the bank, \$2,158; and to this is added, "as received on salaries of commissioners," \$900 more; making in all \$3,058. The charge for commissions is a proper one, but there is no warrant in law for the additional amount charged on account of salaries. This must be rejected. (b) The charges for clerk hire amount to \$2,000. It is to be noted that the entire fund for distribution, \$102,321, consisted of \$43,172 on hand when the bank failed; \$52,700, proceeds of sale of real estate; and \$6,449, derived from collections. The creditors among whom this fund was to be distributed, and the respective sums owing them, was a matter of easy ascertainment; and the entire claims of all the creditors could probably have been listed from the bank's books. It seems to us that the three commissioners might have performed this work themselves, and the services of clerks been dispensed with. The rule as to such allowances for clerks, in cases like the present one, is thus properly declared in the case of *Pandelly v. His Creditors*, 1 La. Ann. 21 (quoting:) "The syndics receive a compensation for their services in the shape of a commission. Among the services the law expects them to render is the keeping of proper official accounts. Cases may arise in which extraordinary skill as an accountant might be required to unravel complicated accounts left in confusion by the insolvent, and in such cases upon a distinct allegation by the syndics of the difficulties and necessities of the case, we are not prepared to say that the testimony in support of such allegations would be inadmissible. Such were not the allegations of the tableau." The entire charge for clerks, under this authority, which we approve, should have been rejected; so far as, in this instance, it appears in the statement submitted by the commissioners that there was a necessity for the services of clerks, there was no motion made in court or petition for their employment, and no judicial authority obtained therefor. (c) There was paid to Milton Randall, as before stated, \$3,000; and it likewise appears that the further sum of \$1,500 was paid Edward Harris, another expert engaged during the administration of this insolvent estate. The labors of the first named continued three or more years, and of the latter for at least six months. The parties were appointed by the court without opposition from the creditors or parties in interest; and it is too late to draw in question, as is sought to be done, the necessity or propriety of their appointments. Opposition is, however, urged to the payments made them for their services. An examination of the evidence in the record cannot fail to produce the conviction that the services rendered were exceedingly arduous, and of great value, even if some of the labors of one of them, Mr. Randall, were misdirected, as charged. The liquidation of this insolvent institution has been attended by the most important and protracted litigation, in which the gravest issues were presented, and the most intricate and complicated accounts, amount-

ing to many hundred thousand dollars, were to be adjusted, and some of the most difficult questions and problems relating to banking and book-keeping were to be solved. These labors were performed under the eye of the judge before whom the proceedings were pending in which their services were rendered, and who approved the charges, and granted express orders for their payment upon the application of the commissioner. These orders of the judge approving the charges, and directing the payment, are, however, not to be considered as conclusive in favor of their correctness. On the contrary, as a rule, such orders should be reserved for or rather confined to approval of accounts contradictorily rendered, and after due notice and delays, such as are required for the due and regular homologation of accounts and tableaux. These judicial orders, though irregular, are, however, confirmatory of the good faith of the commissioners in allowing the charges, and whose conduct during their entire administration is free from suspicion of fraud or dishonesty. The payment of these charges fully come under the rule so often announced in the decisions of this court, that when payments are thus made by executors or other fiduciaries in the administration of estates, acting under oath, apparently in good faith, and not extravagant on their face, they are to be deemed and treated as *prima facie* correct. *Broussard v. Sudrique*, 2 La. (N. S.) 596; *Muse v. Yarborough*, 6 La. (N. S.) 834; *Succession of Frantum*, 8 Rob. (La.) 283; *Gilliss v. Gibson*, 6 La. Ann. 125.

We find in the record no evidence whatever to rebut the *prima facie* presumption in favor of the correctness of these items. Under these circumstances, we cannot disturb the conclusion reached by the judge *a quo* in dismissing this opposition, whatever might be our opinion of the correctness of these charges, were the entire matter open to inquiry, and the simple proposition presented for the first time whether the commissioners should pay them in their entirety. (d) The fees allowed the several attorneys who were employed during the course of the administration of the insolvency were all opposed as excessive. This opposition includes the fee of Charles S. Rice for \$2,000, \$1,000 paid already; the fee of T. J. Semmes, \$2,500, paid; and that of W. B. Benedict for \$10,000, not paid. In regard to Mr. Rice's fee, the attorneys for the opponents use the following language in their brief respecting the same, (quoting:) "In view of Mr. Rice's services in placing the bank in liquidation, and other services as detailed by him, the opponents would be content with \$2,000 charged for it, if that is to be in full." In view of this admission, and under the condition expressed, that it is a finality, the charge is approved. The services were rendered by Mr. Semmes under a contract with the commissioners, in which the amount of his fee was fixed. This was approved by the court, and its payment made in compliance with its order. As before stated with reference to the litigation that has transpired during the progress of this liquidation, the amounts involved were very large, the questions of law and fact very grave and complicated, demanding the highest possible skill for their determination, and imposing great responsibility; and we doubt not that the commissioners, in making the engagement with Mr. Semmes, were actuated by entire good faith. For the reasons given with reference to the charges of the experts, we shall decline to disturb the ruling made by the court below with respect to this item. The services of Mr. Benedict were engaged by the commissioners at the commencement of their administration, and the chief labor and responsibility has fallen upon him as the regular and principal attorney of the estate. They have been arduous in their character; and the record shows, faithfully performed, and of great value. Had he been the only attorney who rendered services in the administration of this insolvency, and his fee the only one to be paid, we do not think that the amount charged, \$10,000, for the valuable services rendered, would have been too much. But considering the assistance he has received from his able associates, and the immense charges that this estate is burdened with, we think

that \$6,000 would be a reasonable and sufficient fee for Mr. Benedict. This completes the review of all matters embraced in this litigation.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court, in so far as it dismisses the oppositions of John Crossley & Sons to the charges of the commissioners for salaries amounting to \$900, and to clerk's hire \$2,000, be reversed, and the oppositions in this respect be sustained, and charges rejected; that the judgment, in so far as it dismisses the opposition to the charge for fee of W. S. Benedict, be amended by reducing the charge or fee from \$10,000 to \$6,000; and that, as thus amended, and in all other respects, the judgment be affirmed; the costs incurred by the oppositions of Randall and the Porter heirs to be paid by them, respectively, in both courts, and those incurred by the opposition of John Crossley & Sons to be paid by the liquidation in both courts, reserving to the liquidation the right to recover from the parties whose claims were rejected or reduced, the costs incurred by the opposition of the Crossleys to such items.

#### ON REHEARING.

(May 22, 1882.)

FENNER, J. We granted this rehearing solely on two points, viz.: (1) The disallowance by our former decree of \$2,000 placed upon the account as expenses of clerk's hire; (2) the disallowance of \$900 compensation for special services of commissioners.

1. A reference to our opinion in relation to this case, reported in 35 La. Ann. 196, will show that it presents very peculiar features, which need not now be further detailed. Suffice it to say that these commissioners, first selected by the stockholders, and, on their request, appointed by the court, were placed in charge of the affairs of this large bank. These affairs were extensive and complicated. The case was not like an ordinary insolvency, in which the insolvent is required to present a full statement of his affairs in the shape of elaborate schedules, setting forth the assets and liabilities, with proper particularity of information as to all the items thereof. In such a case the syndics, thereafter appointed, find in these schedules a proper basis for intelligent action, and have the right to exact from the insolvent all further necessary information; but these commissioners had no such aids. They were bound to do for themselves what the ordinary insolvent would have been required to do at the outset,—to ascertain the nature and extent of the assets and liabilities, and the relations of the bank generally to third persons, so as to elucidate and understand its affairs, and thus be enabled to liquidate them properly. It is obvious that, under such circumstances, the aid of at least some of the clerical officers of the bank was absolutely essential, and that without such aid the commissioners must have been like a ship without a rudder. It is therefore apparent, from the nature of things, that the retention and payment of such officers were proper and necessary; and finding that the charges now assailed were submitted to and approved by the court, and were actually paid under judicial order more than eight years ago, we conclude that we applied too strictly the rule laid down for ordinary syndics, and that the ruling of the district judge on this subject should have been left undisturbed.

2. As to the allowance of \$900 to the commissioners for special services, we see no reason to change our former opinion; but as the payment has been actually made, as the present account is only provisional, and as it appears that a larger amount will probably come to them as legitimate commissions on their final account, we will permit the present allowance to stand, with provision that it shall be credited to any further allowance for commissioners.

It is therefore ordered that our former decree herein be amended so as to affirm the judgment appealed from in so far as it rejected the oppositions to the charge for clerk's hire, and also to affirm it in so far as it rejected the op-

position to the charge for salaries, provided, however, that said charge is to be deducted from any further allowance for commissions; and that, as thus amended, it remain undisturbed.

### PATTERSON v. WORRELL.

(*Supreme Court of Louisiana. March 26, 1888.*)

#### SET-OFF AND COUNTER-CLAIM—WHEN ALLOWED—FAILURE TO ESTABLISH.

This suit, brought by a discharged overseer for his salary for the whole year, in which the planter or employer filed a reconventional demand in a large amount for alleged injury to his crop by mismanagement and neglect of duty of the overseer, involves questions of facts only. The reconventional demand is rejected because it was not proved with legal certainty.

(*Syllabus by the Court.*)

Appeal from district court, parish of Tensas; S. CHARLES YOUNG, Judge.

Suit by J. B. Patterson against Robert Worrell for alleged breach of contract. Worrell filed a reconventional demand for \$3,650, which being rejected, he prosecutes this appeal.

*Snyder & Tullis*, for appellant. *Steele, Garrett & Dagg*, for appellee.

POCHE, J. This controversy arises out of a contract by which the defendant employed the plaintiff as overseer to manage and cultivate a cotton plantation for a term beginning on the 3d of March, 1887, to the end of that year, at a salary of \$55 per month. Plaintiff, having been discharged on the 11th of July, 1887, brought suit for the whole amount which he would have earned for the entire term of his employment, on the ground that he had been discharged without just or sufficient cause. After alleging the cause for which he had discharged plaintiff, defendant urged a plea in reconviction in the sum of \$3,650, for damages alleged to have been caused to his crop by the overseer, through his want of skill, incompetency, mismanagement, and gross neglect of duty, although he had claimed, at the time that he engaged his services to the defendant, to be a competent, skillful, and experienced planter. The district judge found that the employer had good and sufficient cause to discharge the overseer, and allowed to the latter a judgment for the wages earned up to the date of his discharge, but rejected defendant's demand in reconviction. As plaintiff's claim was in amount far below the lower limit of our jurisdiction, we have no concern with the judgment rendered on that branch of the case, and the appeal which is brought here is from the judgment rejecting the reconventional demand. It appears from the record that the first agreement between the parties was to the effect that, during the unexpired portion of the month of March, the overseer was employed and was to work on trial or probation, his permanent employment to depend upon that test; and that, being satisfied with him at the end of that month, defendant had retained him for the balance of the year. That circumstance goes far to show that the representations which plaintiff had made of his ability had been confirmed after a test, in defendant's own judgment, and that plaintiff had no desire to practice any deception on his employer. It is in evidence that the crop on that plantation for that year turned out very short; but it is also in proof that the season was very unfavorable, and that, owing to very heavy and almost continuous rains, which prevailed at the very time when the crops should have been steadily worked, the bad weather had disastrously impeded the planting operations to such an extent that the failure of the crop must in justice be attributed to causes over which the overseer could have no control. Defendant, in his own testimony, admits that in the month of June, when he found his crop very small, exceedingly grassy, and almost lost, he was in doubt whether to attribute the disaster to the effect of excessive rains or to the mismanagement of his overseer. That doubt, entertained in his own

mind, when he had had the frequent opportunity of examining the crop, and of investigating the conduct of his manager, is, in our opinion, a very significant feature of the testimony in the case, and it must turn the scales against defendant's recovery on the reconventional demand. Such a demand must be established with legal certainty, and the evidence in this record falls short of the requirements of the law. In keeping with the views of our predecessors, we recognize the legal obligation of employers and contractors, such as overseers, to respond in damages to their employers for injury which they may cause to them through their misconduct, want of skill, and culpable neglect of their duty, but the evidence in this case is not sufficient to sustain the reconventional demand based on these charges.

We find no error in the conclusion reached by the district judge. Judgment affirmed.

(40 La. Ann. 322)

PARISH OF EAST FELICIANA v. LEVY.

(*Supreme Court of Louisiana. March 5, 1883.*)

1. TAXATION—PARISH TAXATION—WHAT EXEMPT FROM.

Section 1 of act 172 of 1852 exempts from the payment of parish taxes all objects of parish taxation, whether property or occupation, and whether denominated taxes or licenses.

2. SAME—WHAT CONSTITUTES A TAX—LICENSES.

A license fee or exaction, whatever name or designation is given it, when plainly imposed for the sole or main purpose of revenue, is, in effect, a tax.

3. SAME.

The "town of Jackson" includes the inhabitants as well as the property of that corporation.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; J. G. KILBOURNE, Judge.

Suit by the parish of East Feliciana against Louis Levy for parish licenses. From a judgment dismissing the suit plaintiff appeals.

*Stone & Brame*, for appellant. *T. J. Kernan*, for appellee.

WATKINS, J. This suit is brought against the defendant for the sum of \$60, with interest, as the amount he is due for parish license on the business of retail merchant, in the town of Jackson, in the parish of East Feliciana, for the years 1884, 1885, and 1886, *i. e.*, \$20 per year for each one of those years. His answer is, among other things, that he is not liable for any license tax on his business as retail merchant, because it is exempt from all parish taxation by the terms of section 1 of act 172 of 1852. The legality of this \$20 annual license is put squarely at issue. The evidence shows that the defendant is a retail dealer or merchant doing business in the town of Jackson, East Feliciana parish, and paid a state license of \$20 during each of the three years mentioned. Section 1 of act 172 of 1852 is couched in the following language, *viz.*: "That the town of Jackson, in the parish of East Feliciana, be, and the same is hereby, exempt from the payment of parish taxes." The construction which plaintiff's counsel placed on the provision of that act is that the property which is situated within the corporate limits of the town of Jackson is alone exempt, and that the occupation of the citizen is not; while the construction contended for by the counsel for defendant is that all objects of parish taxation, whether property or occupation, come within the operation of the exemption. Simplified and refined, the question is whether or not a license is a tax. We are of the opinion that it is. "License" and "tax" are frequently and properly employed as convertible terms, though not precisely synonymous. In *Delacombre v. Clere*, 34 La. Ann. 1050, we said: "While this section conferred authority incident to police powers to regulate private markets, \* \* \* it conferred no power to levy a tax or license," etc. Again:

"Licenses or taxes may be imposed on certain branches," etc. In *Mestayer v. Corrigs*, 88 La. Ann. 711, we said: "The taxing power of the city of New Iberia is its only power for obtaining revenue, by exactions levied upon its citizens, and that power is limited to the *ad valorem* or property tax or the license tax." Those decisions are in strict accord with the principle of interpretation announced by Mr. Justice DILLON. He employs this language: "The power to license and regulate particular branches of business or matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes." Dill. Mun. Corp. §§ 98, 609; *Ward v. Maryland*, 12 Wall. 418; *Mayer v. Roth*, 29 La. Ann. 261; *Board v. Migue*, 32 La. Ann. 923. It was evidently the intention of the legislature to exempt all objects of parish taxation from the payment of parish taxes; and the word "taxes" was obviously employed in its broadest sense, and includes license taxes as well as property taxes. It declared "that the town of Jackson \* \* \* is hereby exempt," etc. The "town" of Jackson certainly includes its inhabitants, as well as the property that is situated within its limits. The defendant's occupation comes within the purview of the legislative exemption, and the judge *quo* was correct in deciding that he was not liable for the parish license claimed of him. Judgment affirmed.

(40 La. Ann. 353)

## MCNAIR v. GOURRIER.

(Supreme Court of Louisiana. March 26, 1888.)

## 1. PARTNERSHIP—FINAL SETTLEMENT—CLAIM FOR A SHARE OF STOCK AND PROFITS—ELECTION.

In a suit in which the plaintiff makes a claim for a definite sum invested as her share of the capital stock of a partnership, and also for another and indefinite sum as her share of the net profits thereof, on final liquidation and settlement, a motion to compel her to elect will not prevail.

## 2. EVIDENCE—EXPERT TESTIMONY—WHEN ADMISSIBLE.

During the progress of a trial, it is improper to appoint *ex parte* a single expert, when there is no professional opinion to be given on any question, on the decision of which the case depends.

## 3. SAME—REPORT OF AUDITORS—HOMOLOGATION OF REPORT.

It is improper for the report of auditors to be admitted in evidence before it has been duly homologated. The proceedings for homologation of the report of auditors constitute a trial of its accuracy and sufficiency to be admitted in evidence.

## 4. SAME—FINAL SETTLEMENT—APPOINTMENT OF LIQUIDATORS—DISCRETION OF TRIAL COURT.

The appointment of a liquidator is one of those matters that must be left, in a great measure, to the sound discretion of the court.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; J. W. BURGESS, Judge.

Suit between Mrs. R. A. McNair and Mrs. E. C. Gourrier, as testamentary executrix and tutrix, involving the liquidation of an alleged partnership, and the adjustment of differences between the partners. Defendant appeals from an adverse judgment.

*R. N. Sims, Read & Goodale*, and *Percy Roberts*, for appellant. *C. O. Bird* and *Kernan & Laycock*, for appellee.

WATKINS, J. 1. This is a suit for the liquidation and settlement of an alleged partnership, and the adjustment of differences between the partners. The plaintiff claims to be the surviving member of the firm styled Gourrier & McNair, and her suit is directed against the legal representative of her deceased associate, Clay Gourrier. Her predeceased husband, Henry McNair, was a member of a firm, also styled Gourrier & McNair, which had been engaged for many years in the business of insurance agents in the city of Baton

Rouge. He died on the 22d of September, 1884. She represents that thereafter she became a partner of the surviving member, Clay Gourrier, in a new business of like character as the old one, which was to continue for one year from the 1st of October, 1884, and under the old firm name, Gourrier & McNair. She claims to have put into this enterprise \$3,125 as her proportion of its capital stock, which was to be first restored to her at its termination, and thereafter she was to receive one-half of the net profits of the business. This partnership, she contends, operated a successful and prosperous business, and realized large profits, aggregating \$3,000 or more for her share. In order that her interest be ascertained, and the affairs of the partnership liquidated and settled, she prayed for the appointment of a liquidator, and, on suitable allegations, obtained the judicial sequestration of the books and other partnership property. She asks judgment decreeing the restitution of her capital, and for her share of one-half of the ascertained net profits of the business. The defendant executrix denies the existence of the alleged partnership between the deceased and the plaintiff, but admits the existence of one between the deceased and Henry McNair, the plaintiff's husband, prior to his death. She represents that McNair kept the books of the firm, and had exclusive charge of the cash and its disbursement; that after his death it was discovered that he had overdrawn his account, and had kept back funds belonging to the insurance companies, whereby an indebtedness of \$12,000 had been created,—a sum far in excess of the assets of the firm, and which endangered the personal estate of her deceased husband, Clay Gourrier, that of McNair having been insolvent; that her said husband caused an estimate to be made of the lowest possible sum that was required to meet the immediate exigency and discharge the most pressing liabilities, and to thus protect the good name of McNair from dishonor; that it was ascertained to be \$3,024.01; that her husband's defalcation was made known to the plaintiff, and the amount required to meet and discharge it; and that she contributed that sum for that purpose. Her contention further is that, after the death of McNair, the business of the firm of Gourrier & McNair was continued, under the name and style of that partnership, by the surviving partner, Clay Gourrier, simply for the purpose of liquidating and settling up its affairs, and that its earnings were inadequate to reimburse and make good the additional deficiencies of McNair that were ascertained in the *interim*. She prays the dissolution of plaintiff's sequestration, with \$500 damages. On these issues and pleadings the parties went to trial, and from an adverse judgment the defendant has appealed. In this court the plaintiff has answered the appeal, and assigned as an error of the judge *a quo* the charge against her of \$243, being one-half of a debt of the old firm of Gourrier & McNair, with which she is improperly debited, and from which she asks relief. On the trial there was quite a number of witnesses interrogated in the presence of the court, and some under commission; and, as in many other cases, unfortunately, they made numerous unsatisfactory, conflicting, and contradictory statements, that are exceedingly difficult to reconcile with each other, or harmonize with the theory of either party. We shall not attempt to follow them, or reconcile their differences,—indeed, it would prove futile if we should,—but will rest content with a simple recital of those facts that appear from the record to be well founded, and exercise a material bearing on the case. They are as follows: The firm of Gourrier & McNair was composed of Clay Gourrier, deceased, husband of the defendant, and Henry McNair, deceased, husband of the plaintiff; and they were engaged in business as insurance agents, with their domicile in Baton Rouge. It was dissolved by the death of McNair on the 22d of September, 1884. Soon after, Gourrier ascertained that there were some debts which the firm owed, and, among the number, some that were due to different insurance companies for premiums that had been collected, and not remitted. He caused an examination of the books to be made, and the amount was

ascertained to be \$3,024.01,—i. e., the amount of the debts the payment of which was pressing and immediately necessary, and not the gross sum, which was in excess of that,—a sum which could not be presently realized out of the partnership assets, but which might be eventually collected therefrom. Gourrier visited the plaintiff, and represented to her this state of facts, and besought her assistance in making good this alleged shortage of her husband. She at first refused, assigning as a reason that her husband had requested her not to spend any part of her insurance money, \$10,500, in payment of his debts; but Gourrier was persistent in his entreaties, and exhibited to her the statement which he had caused to be made from the partnership books; and she, after consulting her friends, yielded her consent, and gave him a check for the \$3,024.01 that her husband was alleged to owe the insurance companies. From the testimony of the witnesses we cannot determine the object which plaintiff had in view in furnishing the sum; but we think that a fair preponderance of the entire evidence favors the theory that she advanced it to Gourrier for the purpose of enabling him to discharge the alleged confidential indebtedness of her deceased husband. It is certain that she was in no manner personally bound for its payment, and that more than ordinary reasons influenced her to part with this, to her, large sum of money, in disobedience of her husband's request. Doubtless, she believed that it was necessary to shield his good name from dishonor. But there is nothing in the record to justify the conclusion that it was intended by her as a gratuity; and a gratuity is never presumed. Our opinion is that she intended it as an advance of money to the surviving partner of her husband's firm, with which he was to satisfy those urgent demands, and with the expectation of having it reimbursed to her, out of its assets, when a sufficiency thereof had been collected, and that she acted on her faith in his representations. We are further of the opinion that, as an additional inducement to her to make this advance, he proposed to continue the business of insurance agents, under the firm name of Gourrier & McNair, for a period of one year from the 1st of October, 1884, and that they should participate in its profits equally. We are further of the opinion that the plaintiff accepted this proposition, and that in this manner a new partnership was created between them. *Serviss v. McDonnell*, 14 N. E. Rep. 314, and authorities. The evidence discloses a good reason why such an arrangement should have been desirable to each of the parties; and that was that by this means the credit and good-will of the old partnership could be utilized, so that a profitable business would be guaranteed for the future, and the collection of the assets of that firm would be better assured. It does not appear from the evidence that the statement, on the faith of which the plaintiff made the advance, was correct. There is nothing to show in what way this money was applied; and it seems that Gourrier rendered her no account of it after he received it. If, as we have concluded, this sum was advanced by the plaintiff on the hypothesis that it was imperatively necessary to make immediate payment of certain confidential debts of her husband, she was entitled to have the evidence of their discharge when same had been satisfied. Under the evidence the plaintiff is entitled to one-half of the net profits of the new partnership business when liquidated and ascertained; the date of its formation being fixed as the 1st of October, 1884, and the date of its dissolution as the 29th of September, 1885, the date of Gourrier's demise. Plaintiff is also entitled to reimbursement for the money advanced, from the sum realized from the assets of the old partnership,—not to payment or return of it, as capital, from the net profits of the new firm,—and to an accounting by the decedent of the assets of the old, that were left in his hands at the date of dissolution, and of the entire business and affairs of the new, of which he had sole and exclusive management.

2. The defendant filed a motion to compel the plaintiff to elect whether she would pursue her demand for the restitution of the \$3,024.01 capital invested,

or that for the liquidation and settlement of the partnership. It has been repeatedly decided that partners have no cause of action against each other for a specified sum resulting from a partnership transaction until there has been a settlement of the partnership. *Sewell v. Cooper*, 21 La. Ann. 582; *Succession of Dolhonde*, Id. 8; *Stanton v. Buckner*, 24 La. Ann. 391. As previously stated, plaintiff makes claim for \$3,125, as the amount of her share of the capital put in the new partnership, to be first withdrawn therefrom; and also for the settlement and liquidation of the business and affairs of the partnership, and the recovery of one-half of the net profits thereof. Her demands are predicated on the dissolution of the partnership, and payable out of its assets. In any event, they can certainly be considered as resulting from the partnership transactions. But viewing her case as we have construed it, and no practical difference results, notwithstanding the two partnerships are in some sense involved. Their transactions were dual, between the same parties, evidenced by the same agreement, and depend upon the same evidence. They are so completely blended as to form essentially one cause of action, which may be considered and decided in one suit. Their determination, in this suit, will inflict injury upon neither party, nor occasion inconvenience to either. The motion was properly refused.

3. During the progress of the trial an expert accountant was appointed to examine the books of the firm, in which plaintiff claimed an interest, and he made a report which was admitted in evidence, over defendant's objection and exception. At a subsequent stage of the proceedings, auditors were appointed by the court, at the suggestion of defendant's counsel, to examine the books and accounts of the firm of Gourrier & McNair,—*i. e.*, the old firm, which, according to their theory, had been continued for the purposes of liquidation,—and their appointment was opposed on the part of the plaintiff's attorney. The auditors made an examination of the books, and filed a report; but the latter was not homologated, and on that account its introduction in evidence was opposed by the defendant, though unsuccessfully, and a bill of exceptions was retained. We think it was error on the part of the judge to appoint a single expert *ex parte*, inasmuch as there was no professional opinion to be given on any question, on the decision of which the case depended. Code Pr. art. 441. It was likewise error on the part of said judge to admit in evidence the auditors' unhomologated report. Code Pr. arts. 453, 456, 457. The proceedings for the homologation of the report of auditors constitute a trial of its accuracy and sufficiency to be admitted in evidence. On such trial the court may rectify its errors, or order a new report. Code Pr. art. 453. This should be done invariably in case the account stated by the auditors between the parties is not sufficiently clear, full, and succinct to enable the judge to intelligently and impartially determine their respective rights and interests. Each of the parties has a perfect right to be heard *pro* and *con.* on this question, before it is admitted in the record as evidence. "A report of auditors not homologated should not go to the jury." *Reynolds v. Rowley*, 2 La. Ann. 892. The judge cannot arbitrarily sustain or dismiss an opposition to the report. "He must try it summarily on its merits, and hear evidence on such questions of fact as it distinctly puts at issue." *Thompson v. Parrent*, 12 La. Ann. 183; Code Pr. art. 456. Inasmuch as we have arrived at a different solution of the questions at issue from that by the judge *a quo*, in greater part, the report of the auditors as made would not meet the present exigences of the case. In any event, it was improperly admitted in evidence.

4. The judge of the court below, considering the report as evidence, arrived at the conclusion that the statement of the partnership accounts was sufficiently accurate to enable him to render a final judgment liquidating the affairs of the new partnership, to which it was confined; and he did not find it necessary to appoint a liquidator, as prayed for by the plaintiff. There appears to be a large amount of assets that have been either uncollected or unaccounted

for. There is no prayer, in either petition or answer, for the sale or division in kind of the partnership rights and credits, and they cannot be treated as cash, and, as such, used in settlement. Some disposition must be made of them before a liquidation and settlement of the partnership can be effected. The appointment of a liquidator may be deemed necessary, in order to effect their collection, if considered available, or, if not, to make a judicial sale of them. But these questions are for the consideration of the lower court. The appointment of a liquidator is one of those matters that must be left, in a great measure, to the sound discretion of the judge. *Pratt v. McHatton*, 11 La. Ann. 260.

On the whole, it is necessary that the case be remanded to the court *a quo* for a new trial, to be therein restricted to the issues not determined in this opinion and decree. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed that the plaintiff do have and recover one-half of the net profits of the business of the new firm of Gourrier & McNair, from the 1st of October, 1884, to the 29th of September, 1885, on final liquidation and settlement thereof. It is further ordered, adjudged, and decreed that the plaintiff do have and recover the sum of \$3,024.01 out of the moneys collected from the assets of the old firm of Gourrier & McNair, on liquidation and final settlement contradictorily had in this suit. It is finally ordered, adjudged, and decreed that the demand of plaintiff for the restitution of \$3,125, capital invested, be rejected; that all other issues in the suit remain undetermined until a new trial is had in the court *a quo*; and that for this purpose the cause is remanded, further proceedings to be taken in pursuance of the views herein expressed. The costs of appeal are to be paid by plaintiff and appellee, and those of the lower court to await the final determination of the cause therein.

ON APPLICATION FOR REHEARING.

(May 28, 1888.)

WATKINS, J. A careful examination of this case has led us to the conclusion that there is only one amendment necessary to be made in our opinion, and that is in reference to the date at which the business of the new partnership of Gourrier & McNair terminated. In the opinion it is fixed at the date of Gourrier's death, on the 29th of September, 1885. There is evidence in the record going to show that the business was continued until some time in November following. We think that the ends of justice would be best subserved by leaving this question open for the determination of the lower court. It is therefore ordered, adjudged, and decreed that our former decree be so amended as to leave the date at which the business of the new partnership of Gourrier & McNair terminated open for the ascertainment of the judge *a quo* on the new trial of the cause, and that, as thus amended, the same remain undisturbed. Rehearing refused.

(40 La. Ann. 323)

HOWE v. AUSTIN *et al.*

(Supreme Court of Louisiana. March 26, 1888.)

**MORTGAGES—WHAT CONSTITUTES—CONDITIONAL SALE.**

In a contract relating to real estate situated in this state, between parties residing in a state where the common law prevails, it is stipulated substantially that one of the parties sells to the other the immovable for a designated price, and, further, that the said sum mentioned as the price was a debt owing the alleged purchaser by the vendor, and that, should said debt be paid by a time stated, the act or conveyance should be void. The act was termed by the parties "a deed of mortgage," and was recorded in the mortgage record-book of the parish where the property was situated. Held, that the instrument was a common-law mortgage, and did not have the effect of passing title to the property.<sup>1</sup>

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; J. W. BURGESS, Judge.

Suit by Charles L. Howe, in the capacity of testamentary executor of Thomas A. Gaff, to recover a certain tract of land near the city of Baton Rouge known as the "Race Track," claiming title thereto by virtue of a common-law mortgage.

L. D. Beale and Henry C. Miller, for appellant. Kernan & Laycock, for appellees.

TODD, J. This is a petitory action, instituted by the plaintiff, testamentary executor of Thomas A. Gaff, deceased, late of Aurora, Ind., to recover from the succession of the deceased a tract of land situated in East Baton Rouge, and described in the petition. The claim is based upon an instrument set forth in the petition, and termed a sale by the plaintiff. It bears date the 28th of April, 1877, and was executed by George W. Corcoran and Martha Corcoran, his wife, residents of Kenton county, Ky., in favor of Thomas Gaff, a resident of Indiana. The instrument was indorsed, "Mortgage from George W. Corcoran and wife to Thomas Gaff," and was recorded in the book of mortgages in the parish of East Baton Rouge shortly after its execution, and several years thereafter in the book of conveyances. Corcoran acknowledged the execution of the instrument, and his signature thereto, before a notary public of the city of New Orleans, and in this acknowledgment this instrument is termed or described as a deed of mortgage. The act in question contained a clause substantially to the effect "that if the vendors paid their promissory note of eleven hundred dollars, and interest," held by Gaff, the vendee, that then "these presents" shall be void. On the 10th of May, 1878, Corcoran conveyed by an act of sale, in its term complete, the same land to Miss Emma Corcoran and Mrs. Agnes C. Moore, the real defendants in the suit; and on this act of sale they resist the demand of the plaintiff, and claim title to the property in themselves.

The act from Corcoran and wife to Gaff of the 28th of April, 1877, on which plaintiff rests his claim to the land in controversy, was not a sale, but a mortgage only in the common-law form; the common law being the system prevailing in the states where the parties resided at the time. It did not vest Gaff with the ownership of the land or the title, and was not intended to do so; but its sole purpose was to secure the payment of the debt owing by Corcoran to Gaff, acknowledged in the instrument. *Bernard v. Scott*, 12 La. Ann. 489; *Watson v. James*, 15 La. Ann. 386; *Crozier v. Ragan*, 38 La. Ann. 154; *Miller v. Shotwell*, *Id.* 890. The case last cited is that of *Miller v. Shotwell*, where title was claimed to certain land in this state under an instrument almost identical with the one relied on by plaintiff in the instant one. In that case the whole subject was thoroughly considered, and the ad-

<sup>1</sup> See *McComb v. Donald's Adm'r*, (Va.) 5 S. E. Rep. 558, and notes thereon.

judications on the point cited and reviewed, and it was expressly determined that the instrument purporting to be a sale, like the one under present consideration, did not convey a title to the property, and could only be viewed as a mortgage given to secure the payment of the debt set forth in the act. Whether the debt mentioned in this act had been paid or not, or whether the mortgage is or not still operative against the land, is at present a matter of no concern; the sole question being one of sale or title *vel non*. This act being the sole foundation of plaintiff's claim, and it failing, his claim goes with it. He has no case. Judgment affirmed.

(40 La. Ann. 219)

LEHMAN *et al.* v. GODBERRY *et al.*

(*Supreme Court of Louisiana. February 18, 1888.*)

1. MORTGAGES—PLANTATION ADVANCES—WAIVER BY JUNIOR MORTGAGEE.

In case a junior mortgagee, for a consideration that is satisfactory to himself, intervenes in a subsequent act of mortgage in favor of a senior mortgagee to secure plantation advances to the mortgagor, and postpones thereto the rank and priority of his own, has no ground of complaint if the proceeds of the crops, to which the advances were made, are applied to its discharge, even though the advances were not necessary plantation supplies; there being no clause in the act making such a limitation.

2. SAME.

Such a clause being incorporated in the *proces-verbal* of the deliberations of a family meeting recommending the postponement, the intervenor being an interdict, will not be considered as a restriction on the contract of mortgage, in the absence of other provisions on the subject therein contained.

3. SAME—ADVANCEMENTS FOR PLANTATION SUPPLIES—DUTY OF MORTGAGOR.

The phrase, "that said sum of \$20,000 shall be exclusively used for the cultivation of the crop," indicates that a duty was imposed on the mortgagor, who borrowed the money, and not on the lender, who could not control its use or destination.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; W. T. Houston, Judge.

This appeal is prosecuted by Emile Legendre, from a judgment dismissing a third opposition instituted by him against Lehman, Abraham & Co.

*E. W. Huntington, James Legendre, and Berault & Chenet*, for appellants. *White & Saunders*, for appellees.

WATKINS, J. This is a third opposition, in which Emile Legendre, a junior mortgage creditor of the defendant James Godberry, seeks to regulate the distribution of the proceeds of the sale of the Terre Haute plantation, in satisfaction of the first mortgage of plaintiffs for the sum of \$23,458, and of his own for \$60,000. His claim is that the amount of plaintiffs' demand against Godberry is excessive, and should be reduced to \$15,400.58; and that, when a sufficient amount of the proceeds of sale of the mortgaged property has been applied to extinguish it, there will remain a surplus of \$12,000 to be applied to Godberry's indebtedness to him. This controversy arises on the following state of facts, namely: On the 22d of December, 1883, the defendant consented a mortgage on his Terre Haute plantation, in the parish of St. John the Baptist, in favor of E. F. Stockmeyer & Co., to secure his six notes of \$10,000 each, with interest, etc. On the 23d of January, 1884, he consented a mortgage in favor of plaintiffs, as his cotton factors and commission merchants, to secure his four notes, aggregating \$42,000, in which E. F. Stockmeyer & Co. intervened, and granted them (Lehman, Abraham & Co.) priority in rank. This indebtedness to plaintiffs was subsequently reduced to the amount now claimed by them, by the application thereto of the proceeds of the crop of 1884. On the 15th of November, 1884, E. F. Stockmeyer was interdicted, and Carl Stockmeyer appointed his curator. On these mon-  
eys, it seems, the defendant has operated his plantation prior to the beginning

of 1885, though unsuccessfully, and by which accumulated indebtedness he was embarrassed. In this position of affairs plaintiffs were unwilling to make him any further advances, and at first declined to make them, and suggested that he look for another merchant who would take up the debt due them, and advance him the amount he required to carry on his plantation for the year 1885. He made the effort, and failed, and returned to the plaintiff, and renewed his entreaties for assistance. After some deliberation, they consented to give it on the condition that he should obtain the postponement of the Stockmeyer mortgage to one he should grant in their favor, securing said advances for 1885. To accomplish this object it was necessary that a family meeting should be convened, on behalf of the interdict, to recommend said postponement. Thereupon the curator presented to the court a petition for the convocation of a family meeting, in which the following representations are made, viz.: "That said Lehman, Abraham & Co. are on the point and have threatened to foreclose their first mortgage against said plantation; that, at the present juncture and critical condition of the money market, your petitioner is of opinion and avers that a forced sale of said property at the present moment, under said first mortgage, would seriously and materially impair the interest and injure the second mortgage claim of said interdict; that the said Lehman, Abraham & Co. are willing to forbear from foreclosing their first mortgage in consideration of their obtaining a priority of mortgage on said Terre Haute plantation, to secure the future advances which they proposed to make to James W. Godberry during the year 1885, to carry on and cultivate said plantation, which advances up to October, 1885, will probably amount to \$20,000, and on the condition that a lien and privilege will be granted said Lehman, Abraham & Co. on the whole crop and proceeds thereof, to secure the advance which shall be made before and during the grinding, to be to such an amount and such an extent as may be necessary to take off and gather the crops as may be consented to by Lehman, Abraham & Co.; to which mortgage of \$20,000, for advances made before grinding, the mortgage in favor of Edward Stockmeyer shall be subordinated in rank; and on condition that no means will be taken to foreclose, during the present year, the mortgage on behalf of said interdict; and on the further condition that the crops as received shall be first imputed to any advance made *during its shipment*, and the mortgage to secure any *ultimate balance, up to \$20,000, which may exist after imputation of the crops to the advances*; and the curator of the interdict to be forced to intervene in and sign the act with the above and foregoing stipulations. [The italics are ours.] That the object in view of all parties is to promote the interests of all concerned, by enabling said Godberry to make a future crop on said plantation, which will, in all probability, enable him to reimburse, not only said advances, but to extinguish the first mortgage of \$23,000, above recited, to Lehman, Abraham & Co.; and thus enabling the second mortgage of the interdict to become first in rank and priority." This recital was adopted by the family meeting, and incorporated into the *proces-verbal* of their deliberations, and thereafter they made the following declarations and recommendations, viz.: "And the said members, after mature deliberation and consultation on the subject-matter of said petition, which is hereinafter expressed, unanimously declared that, considering the facts and allegation contained in said petition, and the reasons therein given, which they adopt as their own, it is the interest of the interdict that a mortgage for \$20,000 be granted by James W. Godberry on said Terre Haute plantation, to secure Lehman, Abraham & Co. for the future advances which they propose to make to James W. Godberry, during 1885, to carry on and cultivate said plantation, and which advances, up to October 1, 1885, will probably amount to \$20,000; that a lien and privilege be granted said Lehman, Abraham & Co. on the whole crop and the proceeds thereof, to se-

cure the advances that shall be made before and during the grinding season, (which shall be considered as beginning from October 1, 1885,) the latter, *i. e.*, those made during the grinding season, to be to such an amount and such an extent as may be necessary to take off and gather the crops, and as may be consented to by Lehman, Abraham & Co.,—to which said mortgage of \$20,000, for advances made before grinding, the mortgage granted in favor of Edward F. Stockmeyer, on the 23d December, 1883, before Zenon Miller, recorder of the parish of St. John the Baptist, shall be subordinated in rank; that the said sum of \$20,000 shall be exclusively used for the cultivation of the crop of 1885 on said Terre Haute plantation; that Lehman, Abraham & Co. shall not foreclose their mortgage against James W. Godberry, passed before N. B. Trist, notary, in January, 1884, during this present year; that no means shall be taken to foreclose, during the present year, the said mortgage on behalf of said interdict; that the crop, as received, shall be first imputed to any advance made during its shipment; that the mortgage shall secure any ultimate balance, up to \$20,000, which may exist after imputation of the crop to the advances; that the curator of the interdict is authorized to intervene in, and sign act with, the above and foregoing stipulations." The proceedings of the family meeting were duly approved and homologated, and the act of mortgage executed conformably thereto. The curator of the interdict intervened, and consented to the stipulated postponement. Under this contract plaintiffs made advances to the defendant, on open account, prior to the 1st of October, 1885, to the amount of \$16,424.44; and the same were subsequently increased, during the season, to \$54,800. In June, 1885, plaintiffs sued to judgment their account of 1884, which was secured by their mortgage of that year, and the mortgaged property was sent to sale under it, and that of Stockmeyer; but an insufficient sum was realized to satisfy both demands. During the pendency of these proceedings the intervenor acquired the Stockmeyer mortgage notes, with full subrogation to the rights of the interdict. From the proceeds of the 1885 crop there was enough realized to pay the whole of plaintiff's advances, and leave a surplus of \$790, which was withdrawn by the defendant in January, 1886.

Intervenor's theory and contention is that plaintiffs advanced money to the defendant for purposes and objects foreign to, and in no manner connected with, the cultivation of the crop of 1885, and illegally and unjustly charged same to the proceeds thereof, to his injury and detriment; and that the sum thus advanced and charged exceeds \$8,000, which should have been applied to their 1884 account and mortgage; and that, in this manner, his mortgage would have been promoted, *pro tanto*, in pursuance of the tenor and spirit of the recommendations of the family meeting and the expectation of the parties. He insists that the advances to be made under the act of mortgage were to have been exclusively used for the purpose of cultivating the defendant's Terre Haute plantation; that the plaintiffs were specially charged with the duty of seeing that the money they advanced was thus applied; and that, to their knowledge, said sum of \$8,000 was not so applied, and, for that reason, their distributive share of the proceeds of sale should be reduced accordingly. The evidence shows it to have been the purpose and expectation of the parties that the \$20,000 was to be the limit for the advances plaintiffs were to make, during the cultivation of defendant's crop, and antecedent to the commencement of the rolling season, the date of which was indicated as the 1st of October, 1885, and that from that date until the crop was marketed the amount was not limited. In addition to the security of mortgage, the defendant consented a lien and right of pledge in favor of plaintiffs on all his 1885 crop, to secure the payment of the whole debt for advances; and there is a special clause in the mortgage which provides that same "shall secure any ultimate balance, up to \$20,000.00, which may exist after the imputation

of the crop to advances." This stipulation was intended to secure, by the mortgage, any deficit there might be in the crop pledged. Undeniably it was the purpose and expectation of the family meeting that defendant should negotiate a loan from plaintiffs of \$20,000, to be exclusively used in the cultivation of his crop prior to the 1st of October, 1885; and that, subsequent to that date, defendant was to obtain additional advances, unlimited in amount, on the faith of his pledge of the crop. The question is, at whose request, and for whose benefit, was the arrangement consummated? Most certainly, that of Godberry and Stockmeyer. And why? What was the position of the parties when the negotiations were initiated in the spring of 1885? The plaintiffs held a first mortgage on Terre Haute plantation of \$23,000, and were disinclined to permit defendant to increase his indebtedness to them. He owed the Stockmeyer mortgage of \$60,000, and could not raise the means to cultivate his plantation. Stockmeyer, curator, was quite apprehensive that the place would not be cultivated, and that plaintiffs would enforce their mortgage, then past due, and his security be thereby impaired, if not sacrificed. He yielded a reluctant consent to the further postponement of his mortgage to a new one in favor of plaintiffs, securing future advances to the defendant, in the hope that a surplus large enough would be yielded by the venture, when applied to their first mortgage, to satisfy it, and his own would be advanced to the first in rank. The negotiations were begun and perfected by and between Stockmeyer, curator, and Godberry; plaintiffs merely stipulating the terms and conditions. When the notes and mortgage were executed, and the rank of the Stockmeyer mortgage postponed thereto, the plaintiffs discounted the defendant's notes, and placed the proceeds to his credit. Beyond this they did, nothing other than disburse them on his orders. The proceedings of the family meeting formed no part of the act of mortgage. Their only effect was to authorize the curator of the interdict to postpone the rank of his mortgage. Plaintiff's contract and obligations are to be found in the act of mortgage exclusively. When they paid money out of the fund to his credit, they had and could exercise no further control over same. They were powerless to control its use or destination. The covenant contained in the *proces-verbal* of the family meeting's proceedings, that the money should be "exclusively used in the cultivation of the crop," was, necessarily, one between defendant and intervenor, inasmuch as the former was the sole recipient and beneficiary; and he was left free to draw at will. He was the only one entitled to use this fund standing to his credit with the plaintiffs. He had the exclusive charge of his Terre Haute plantation, and the cultivation thereof. Plaintiffs were in no sense the defendant's or intervenor's agents in the matter. The relations between the plaintiffs and defendant were those of lender and borrower, *quoad* the discount of the \$20,000; but, in regard to the advances plaintiffs were to make subsequent to the 1st of October, 1885, their relations were those of factor and customer. The situation would be quite different if this were a controversy between plaintiffs and intervenor as to which is entitled to preference on the proceeds of the crop of 1885, by reason of their conflicting privileges thereon. But the intervenor has no lien or privilege on them, and claims none. He simply contends that plaintiffs had none, and illegally charged to them the moneys they improperly advanced defendant, and to which he would have been entitled. He insists that plaintiffs should have desisted from making the advances complained of, and retained their value in money for his account. But, under the contract, was it in plaintiffs' power to have retained any part of the fund resulting from the discount of the defendant's notes, or the proceeds of his crop? If either or both were free from the mortgage and pledge of plaintiffs, were they not subject to the absolute control and destination of the defendant, quite as much as the balance of \$790 he drew in January, 1886? They were in no way subject to

the Stockmeyer mortgage. There was no imputation of payment made in the act of mortgage or proceedings of the family meeting. There was nothing to have hindered defendant from imputing to plaintiffs' account a part or the whole of any such sum as they might have thus retained. It would have been out of the intervenor's power to have subjected such surplus to their demands, except by garnishment or seizure. The defendant having drawn the money from plaintiffs, and closed his account with them by receipting for the balance of \$790 that was to his credit on the transactions of the year, imputed same to his 1885 indebtedness to them, and placed it beyond the control of the intervenor. If Godberry violated any moral or legal obligation in so doing, the intervenor must look to him for the reparation of the loss he has sustained, and not to the plaintiffs. There is nothing in the act of mortgage which imposed on plaintiffs the duty to see that the money advanced was "exclusively used for the cultivation" of Terre Haute plantation, and nothing which prevented the defendant from paying them out of the proceeds of his crop. Plaintiffs are demanding nothing under the contract of 1885. It subverted the purpose of postponing sale of the plantation, and enabled the defendant to make the experiment of another crop. The intervenor's expectations were not fulfilled, the defendant's crop being insufficient to discharge, in any part, plaintiffs' mortgage of 1884. This is the only loss he has sustained thereby. At this time the situation of the parties is precisely the same as it was when the \$20,000 mortgage was executed. The fatal injury was inflicted by the first postponement of the Stockmeyer & Co. mortgage. It was, in its maimed condition, transmitted to the interdict, and the intervenor acquired same with full knowledge. For the loss he may have suffered, if any, he has no recourse against the plaintiffs. Judgment affirmed.

(40 La. Ann. 540)

ANTOINE v. SMITH *et al.*

(Supreme Court of Louisiana. May 28, 1888.)

1. **CONTRACTS—VALIDITY—PUBLIC POLICY—RIGHT TO MAINTAIN ACTION.**  
Where the cause of the contract sought to be enforced is unlawful, and opposed to good morals and public policy, there is no right of action in the courts, for either party suing through it, to enforce it.
2. **SAME—EXECUTED CONTRACT—UNLAWFUL CONSIDERATION—RIGHTS OF PARTIES.**  
But, after the reprobated transaction has become an accomplished fact, neither party can legally interpose such illegality or turpitude as a defense.
3. **COMPROMISE—EVIDENCE—FORM OF WRITTEN INSTRUMENT.**  
An instrument cannot be rejected and disregarded, as not evidencing a compromise, because it does not contain the formal words "for preventing or putting an end to a lawsuit." Under our system of practice, nothing is sacramental as a matter of form, unless made so by statute.
4. **EQUITY—RESCISSIION OF CONTRACTS—GROUNDS FOR.**  
The disproportion of the amount received as compared with that of the amount demanded, is no cause for the rescission of a transaction otherwise valid, and the same cannot be explained or disclosed by parol evidence.
5. **SAME—RESCISSIION OF CONTRACTS—EVIDENCE.**  
Error, fraud, or the like must be formally averred against it, and proved, to admit it.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Controversy between C. C. Antoine and D. D. Smith and another, involving 200 shares of the capital stock of the Louisiana State Lottery Company, which plaintiff seeks to recover from defendants. From a judgment favorable to defendants, Antoine appeals.

*Rouse & Grant* and *T. J. Semmes*, for appellant. *Leonard, Marks & Bruenn*, for appellees.

**WATKINS, J.** This suit is for the recovery of 200 shares of the capital stock of the Louisiana State Lottery Company from the defendants. The claim of the plaintiff is that on the 26th of October, 1874, he transferred, on the books of the company, said shares of stock to D. D. Smith, without consideration; and that said transfer was made upon the friendly advice of one George L. Smith, who suggested to him that, being engaged in politics, and necessarily absent from the city a large portion of the time, he would be unable to manage the stock to an advantage, and that it would be better that it should be placed under his control. He further advised him that, for his own convenience, it should be placed in the name of D. D. Smith, a trustworthy and responsible person; and that it was so done. He represents that George L. Smith executed and delivered to him a receipt for the stock at the time, in which he obliged himself to return it on call, all of which was to the knowledge of D. D. Smith, who undertook to administer same accordingly; that George L. Smith died on the 9th of July, 1884, without having caused said stock to be returned; that he demanded the stock, and its dividends, of D. D. Smith, whereupon he paid \$2,500 on account of the dividends, but refused to surrender the stock. The answer is that G. L. Smith assigned to D. D. Smith 425 shares of the stock of said company, which he then owned, and informed him of the fact; that thereupon D. D. Smith went to the office of the company, and procured the certificates therefor; and that he was not informed and did not know how, when, or from whom George L. Smith procured the same. He avers that he was not advised and did not know that Antoine had any interest in the stock, and that he did not undertake to administer it for him; that, soon after the death of George L. Smith, Antoine called to see him, and claimed of him (D. D. Smith) some of the shares of stock, alleging himself the owner thereof, and threatened suit for the same, and, though he did not believe he had any interest in the stock, in order to avoid a lawsuit

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and to buy his peace, he gave him \$2,600, in consideration whereof Antoine relinquished all claim to any interest in the stock standing in his (D. D. Smith's) name, and also relinquished all claims of any kind against the estate of George L. Smith. The defendants are D. D. Smith and the heirs of G. L. Smith, who have accepted his succession unconditionally, and have been placed in possession thereof. On the trial the defendants pleaded the agreement referred to in their respective answers "as a transaction and compromise, which had and has, as against said Antoine, and the claims and demands by him asserted herein, the force and effect of *res judicata*," and they pleaded it as a peremptory exception, and as a bar to plaintiff's action. This plea having been overruled, they pleaded same agreement as a release executed by the plaintiff, which he could not revoke at will, and urged it as a bar to the demands of Antoine. On these issues the parties went to trial, and from a judgment in favor of the defendants the plaintiff appealed.

1. It is well that the testimony of the plaintiff, and that of some of his witnesses, should be examined and analyzed, in order that a fair understanding may be had of the incipency of this transaction, and that we may be the better enabled to judge of the rightfulness of plaintiff's claim. This is deemed necessary for the especial reason that one of the principal actors died several years before suit was brought and the filing of it occurred, nearly 15 years after the alleged transfer of the stock. Indeed, defendant's first exception was that plaintiff's demand was stale, and prescribed by five and ten years. The following is a synopsis of the statement of Antoine, as a witness in his own behalf, in so far as it bears on that part of his case, viz.: That he and George L. Smith were close, confidential friends from the time they entered politics, in 1868, to the time of the latter's death, in 1884. That there were many and large money transactions between them. For instance, Smith being tax collector, speculated in plaintiff's salary warrants, and realized sometimes as much as \$3,000 or \$4,000 in profits for his (plaintiff's) account. That he purchased the 200 shares of lottery stock in controversy on the 21st of March, 1873, from Charles T. Howard, at 60 cents on the dollar; i. e., \$12,000. That about 18 months afterwards, Smith came to him, and said that they (Antoine and himself) had better transfer their stock. Using his own words, he says: "He said that both of us was engaged in politics,—he was then running for congressman or member of the legislature. We were in politics, both of us. I don't recollect exactly, but his remarks were: 'We are both engaged in politics, and that it would not do to have the stock in our name.' He said that more especially myself, as I was lieutenant governor and president of the senate; that questions in regard to the charter of the lottery company might come up; and that, in case of a tie vote, I would naturally have to vote on it, and probably my vote might be challenged; and he suggested that we should transfer our stock in the name of his cousin, Dexter. \* \* \* He said Dexter, meaning David Dexter Smith, is as honest as the days are long. He says: 'I will manage the stock for you, and invest [the dividends] in stocks, bonds, and other securities; and, when we are out of politics, we will start a savings bank. You shall be president, and I a member of the board of directors.'" He says that the transfer was made at the lottery office, when no one was present other than George L. Smith; that the purchase of this stock was suggested to him by Mr. Kelso. Smith transferred, at the same time, his 225 shares to D. D. Smith, but the latter was not present. He says Smith gave him a receipt for his stock, but he kept no account with Smith. To use his own words, he says: "Well, there was usually no accounts kept between us of our business. Mr. Smith, he always put all our business on the high ground of mutual confidence. That is the way he, more or less, dealt with me." He says that, from time to time, he obtained from him what money he wanted. Quoting: "Question. Do you know how much you got? Answer. Well, I don't know exactly. I can approximate. I suppose I must have got

altogether from him, after the stock was transferred,—I must have got about \$5,800 or \$5,400," etc. This gentleman, Mr. Antoine, was a delegate from Caddo parish to the constitutional convention of 1868, and afterwards he represented that parish in the state senate until 1872, when he was elected lieutenant governor. He held that office until 1876,—a period of time embracing all of these transactions. As further illustrative of the history of that epoch, and particularly of the part the plaintiff took therein, and which has a significant bearing on this controversy, it is well to invite attention to the various financial adventures on which he entered in the *interim*. When he first "went into politics," he was the proprietor of a barber shop in the city of Shreveport. A few years afterwards, he engaged in the cotton factorage business in this city, in partnership with P. B. S. Pinchback; acquired an interest in a newspaper establishment; had a grocery store; and purchased and operated a small plantation in Caddo parish. He also purchased some city lots in Shreveport, and a \$18,000 residence in this city. This, in addition to the \$12,000 he paid for the lottery stock. We cannot refrain from expressing some surprise at the auspicious good fortune that seemed to attend his efforts, whereby his hitherto slender income and limited means had yielded such a comfortable little fortune within so few years. Money matters appeared to have been so easy with him that he could loan a friend a thousand dollars, payable on call. He says: "I loaned him [Dr. Pemberton] \$1,000 just on his word, and he returned it." Mr. George Y. Kelso, one of plaintiff's witnesses, gives his version of the transaction in reference to this stock. He says: "In January, 1878, I had 200 shares of lottery stock put aside for me, and, when the time expired for me to take it up, I wasn't able to take it up, and I advised Mr. Antoine to take it. \* \* \* I went with Mr. Antoine to the party, and told the party Mr. Antoine would take the shares in my place. *Question*. Who was the party? *Answer*. Mr. Charley Howard. *Q*. Did you see the money paid. *A*. I saw Mr. Antoine give him a roll of bills. He counted it, said it was correct, and gave him the certificate." On cross-examination the following was elicited, viz.: "*Question*. You say that you had 200 shares of Louisiana Lottery stock put aside for you? *Answer*. Yes, sir. *Q*. Who put it aside for you? *A*. Mr. Howard. *Q*. The president of Louisiana Lottery Company? *A*. Yes, sir. I had bought some stock previous to that. A party came to me in 1869, and told me that he could get me 800 shares at fifteen cents. He went out, and only returned with 50 shares; but I paid him twenty cents. I left my stock with a broker,—a friend of mine; and Mr. Howard, as a friend of mine, told me he would put aside 200 shares for me, at a certain figure. *Q*. That is the stock you referred to? *A*. Yes, sir. \* \* \* *Q*. Mr. Howard then suggested that he would put 200 shares aside for you? *A*. He asked me if I was tired of the stock; that it was good stock. Mr. Charley wasn't friendly to the party who had my stock, and I went and seen the party. I saw Mr. Howard afterwards, and I told him I was friendly to his institution, and I told him I would take 200 shares at a certain figure, provided he would wait on me. He said he would keep it for me for sixty days. At that time I failed to take it up, and I seen Mr. Antoine, and gave him the benefit of it." This is the history of this stock, as detailed in the evidence of the plaintiff, Antoine, and his principal witness, Kelso; the former, lieutenant governor at the time, and the latter, state senator. On the faith of these declarations as to the source and origin of the plaintiff's title, and the character and avowed object of his dealings with George L. Smith, and through which he traces his title, defendant's counsel insist that it is manifestly a contract that is tainted and reprobated in law, as in good morals; and for the enforcement of which he has no right, or cause of action, against defendants. He further insists that it is the duty of the courts of justice to vindicate and maintain the sanctity of their proceedings, before they proceed to the consideration of the merits of a case; and that,

in the instant case, the cause of the contract, and the motive of its transfer, were in themselves intrinsically illegal, false, and unlawful, and opposed to good morals and public policy. That such contracts cannot be enforced, has been held in very many opinions of this court and its predecessors, as evidenced by the following cases: *Denton v. Erwin*, 5 La. Ann. 18; *Mulhollan v. Voorhies*, 8 Mart. (N.S.) 46; *Gravier v. Carraby*, 17 La. 132; *Davis v. Caldwell*, 2 Rob. (La.) 271; *Davis v. Holbrook*, 1 La. Ann. 176; *State v. Lazarre*, 12 La. Ann. 166; *Slidell v. Pritchard*, 5 Rob. (La.) 106; *Insurance Co. v. Addison*, 9 Rob. (La.) 486; *Denton v. Willcox*, 2 La. Ann. 60; *Denton v. Erwin*, 6 La. Ann. 317; *Glover v. Taylor*, 38 La. Ann. 634. But however much we may reprobate such scandalous transactions; however much we may feel constrained, for decency's sake, to summarily eject the plaintiff from the portals of the temple of justice,—it is our deliberate opinion that it cannot be done in the present attitude of this affair. Fortunately, the *regime* in which such abuses were possible has long since terminated, and passed into history; and the people who were instrumental in bringing it about have passed from the stage of action. George L. Smith is dead, and the plaintiff has ceased to be lieutenant governor. D. D. Smith is no longer the representative of George L. Smith, but he is representing his heirs. There stands on the books of the lottery company 200 shares of its capital stock, to which one of the parties is entitled, irrespective of the fraud and speculation that may have characterized the transactions through which its issuance and transfer were procured. We understand this to be the jurisprudence established, on that subject, by the supreme court. In *Brooks v. Martin*, 2 Wall. 80, that great court employs this striking language, viz.: "There was, then, in the hands of the defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds to refuse to do equity to his other partners because of the wrong originally done or intended to the soldier? \* \* \* The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions, which were illegal, have become accomplished facts, and cannot be affected by any action of the court in this case." This opinion was most carefully and deliberately expressed, after a thorough review of the best American and English cases on the subject; and the doctrine meets our unqualified approval. Our decree must rest on different grounds.

2. The plea of *res judicata*, urged by the defendant's counsel, rests on the following instrument: "NEW ORLEANS, September 4, 1884. In consideration for a note from David Dexter Smith, dated September 4, 1884, for twenty-four hundred dollars, (\$2,400.00,) the surrender of a note which the said Smith holds against me for one hundred dollars, dated September 13, 1876, and one hundred dollars in cash, I hereby surrender all claims I have to any Louisiana State Lottery stock on the books of said company in the name of David Dexter Smith. I further agree to relinquish all claims and considerations in every form against the estate of the late George L. Smith, deceased; also to pay any balance, if called for, that the estate of said Smith might be liable for by said George L. Smith's signature to my bond as treasurer of the school board for the city of Shreveport, parish of Caddo, state of Louisiana; this being a receipt in full for all demands, in any form, against the estate of the late George L. Smith, deceased; also any and all claims, in any form, against David Dexter Smith. C. C. ANTOINE." The signature is admitted to be that of the plaintiff. It is not disavowed in the plaintiff's pleadings, notwithstanding his counsel filed one supplemental petition subsequent to the filing of defendants' answer, to which said agreement was annexed, and of which it was made a part. The provisions of the Code are that

"a transaction or compromise is an agreement between two or more persons who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." Rev. Civil Code, art. 3071. Our learned brother of the district court declined to give effect, as a compromise, to the agreement in question, because it did not contain the phrase, "for preventing or putting an end to a lawsuit." In *Calhoun v. Lane*, 39 La. Ann. 596, 2 South. Rep. 219, we gave effect to an instrument, as a compromise, which did not contain those formal words. We can see no good reason why their use should be deemed essential. Under our liberal system of practice, nothing is sacramental as a matter of form, unless expressly so declared by statute. The instrument does not contain the phrase, "and which every one prefers to the hope of gaining, balanced by the danger of losing," which would seem to be equally important. In our view, the only essential, as a matter of form, which the article quoted requires, is that "the contract must be reduced to writing." Without recapitulating the terms, provisions, and conditions of the instrument, we hold it to be a transaction or compromise in the sense of the Code, and was evidently intended for the purpose of preventing a lawsuit. A transaction has "a force equal to the authority of things adjudged." Rev. Civil Code, art. 3078. "A thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed for appealing is elapsed, or because it has been affirmed on appeal." Rev. Civil Code, art. 3556, No. 31. Under this view of the case, we are dispensed from the consideration of a mass of testimony that is, in the main, conflicting and quite unsatisfactory, and the recital of which would only serve to fortify and strengthen the conclusion at which we have arrived.

3. While the only plea plaintiff, as a witness in his own behalf, could set up was that he did not read the instrument when it was presented for his signature, and that he signed it thinking it a receipt, his learned counsel argue against the effect of it as a compromise, because (1) of the disproportion of the amount Antoine received and the value of the stock; (2) because advantage was taken of his necessitous circumstances. The law provides that a compromise cannot be attacked on account of error in law or any lesion. Rev. Civil Code, art. 3078. In *Davis v. Lee*, 20 La. Ann. 248, the court said that "in transactions, as they are defined in the Code, and in the Roman law, there is, from the nature of such contracts, something aleatory." Pothier, in treating on this subject, says: "There are certain agreements in which persons of full age are not entitled to restitution, be the injury ever so considerable. Such are compromises according to the edict of Francis II. These are agreements respecting pretensions upon which there are impending or expected litigations. \* \* \* By the very nature of such agreements, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them." 1 Poth. Obl. 121, (36.) In *Long v. Robinson*, 5 La. Ann. 627, the court said: "The plaintiff seems to rely, to establish both [of his demands,] by the large amount of his claims, compared with the small sum of \$3,000, for which they were compromised. But the Code expressly provides that a compromise cannot be annulled on account of any lesion, (article 3045,) because it is an agreement to put an end to a lawsuit, and which the parties prefer to the hope of gaining, balanced by the danger of losing. Code, art. 3038. The plaintiff is therefore, not only unfounded in the opinion that the sacrifice he made in the compromise is cause for its rescission, but the district court properly refused to admit testimony of the value of the property and claims compromised by him." There is no proof in the record that any advantage was sought or obtained of Antoine's embarrassed financial situation. He it was who sought an interview with D. D. Smith at once he ascertained that George L. Smith was dead, and, without

ceremony, threatened him with a lawsuit because he declined to yield to his demands. Immediately afterwards he sent a lawyer to him. During the 10 days' delay allowed for a conference with the heirs, who resided in a distant state, he voluntarily accepted \$2,600 in settlement of his claims, whatever they were. His financial situation was not discussed. It did not constitute a factor in the settlement. No proof shows that D. D. Smith or the heirs knew anything of his embarrassment financially. The fact that Antoine did forbear, during all these years, to prefer any claim, judicially, against his alleged confidential friend while living; his immediate action after his death; the fact that, when the \$2,600 were procured, he remained in contented silence for nearly three years before this suit was filed, and then fled it without any admonition whatever to D. D. Smith or the heirs; and the fact that he does mainly rely upon his own testimony to evade the effect of his written relinquishment,—place him in a doubtful and unenviable light before the court.

4. The further argument is made that, as a compromise, the instrument, so called, cannot be given effect, because the transaction alleged to have been compromised possessed no element of doubt. To this a sufficient reply is made by the judgment pronounced by our learned and conscientious brother of the lower court, who saw the witnesses, and heard them testify; and notwithstanding the lips of George L. Smith were sealed in death, and the plaintiff produced a number of witnesses by whose evidence to bolster up his cause, he manifestly disbelieved their story, and rejected his demands. While we do not rest our decree upon the same grounds as did the judge *quo*, it is quite likely that, if we should, it would be the same. Judgment affirmed.

(40 La. Ann. 413)

**BEER *et al.* v. HAAS.**

(*Supreme Court of Louisiana.* April 16, 1888.)

**1. TAXATION—SALE TO MORTGAGE CREDITOR SUBSEQUENTLY RETROCEDED—RIGHTS OF CREDITOR.**

Property adjudicated at a sheriff's sale for taxes, to a mortgage creditor, and subsequently retroceded, with the formal agreement that matters will stand in the condition in which they were previous to the adjudication, can be proceeded against, *via executiva*, by the creditor to foreclose the mortgage as though the tax sale and the retrocession had never taken place.

**2. SAME.**

Such creditor has the right to surrender possession of the property given him to extinguish the debt, by application of the fruits, and to have the property seized and sold to pay his claim, when he has not expressly abandoned that right, or bound himself to retain possession.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Plaintiffs, Henry Beer, Bertrand Beer, and B. Neugass, instituted this action against David Haas, to compel him to comply with the terms of his bid on certain real estate. Intervention by the Citizens' Bank of Louisiana. From a judgment rejecting plaintiffs' demands, this appeal is taken. The bank also appeals from a judgment dismissing her intervention as to title.

*Henry C. Miller* and *G. A. Breauw*, for appellants. *C. E. Schmidt* and *White & Saunders*, for appellees.

**BERMUDEZ, C. J.** This is a suit to compel an adjudicatee to comply with his bid on certain real estate. The defense is that the title tendered is not such as the defendant is bound to accept. The appeal is taken by the plaintiffs from a judgment against them. The material facts from which the litigation arises, are the following: The Citizens' Bank was a creditor of J. W. Zacharie for a large amount, secured by mortgage on valuable property in this city.

After the death of Zacharie, the property involved in this controversy, and other property, was offered for sale by the sheriff, under an execution for the payment of back taxes. At that sale, which occurred in 1874, the bank became the adjudicatee. In June, 1875, the widow and heirs of Zacharie, and the bank, executed an act whereby the claim of the bank was liquidated, and the property retroceded; possession being retained by the bank, with a view to the extinguishment of the debt, by application thereto of the rents and revenues. It was stipulated, *ex industria*, that the object of the agreement was to place matters in the condition in which they stood before the sheriff's sale for taxes; but that the widow and heirs of Zacharie would, under no circumstances, be liable for the debt due the bank. In the course of time, finding that her condition had not improved, and that it was to her interest to foreclose the mortgage, the bank, in 1876, instituted proceedings to that end, against widow J. W. Zacharie, executrix and possessor. Under the writ issued, the property was seized and advertised, and in August, 1876, adjudicated for \$54,000 to the bank, who retained the amount of the adjudication, which was inferior to her claim, and she paid the costs and charges. In 1881 the bank sold to the plaintiffs part of the property thus adjudicated, and in May, 1884, the plaintiff caused it to be offered at public auction, when it was adjudicated to the defendant at \$20,000. The validity of the title tendered having been questioned by the defendant, who declined to comply, the bank intervened, joining the plaintiff, to affirm the title made them by her. On the other hand, the widow and heirs of Zacharie, brought in by the plaintiffs and by the bank, made common cause with the defendant.

The only question to be determined is simply whether or not the title resided in the succession of J. W. Zacharie at the foreclosure of the mortgage. The argument cannot be successfully urged that the bank cannot hold the affirmative, as she has undertaken to reconvey to the widow and heirs of Zacharie the property adjudicated to her at the sheriff's sale for taxes, and as, by the retrocession, the title passed from her to them, and was, at the date of the proceedings, in them, and not in the succession of Zacharie. The object of the act, to which allusion has already been made, was to adjust with the widow and heirs the claim of the bank, to avoid the tax sale formally, and, as said, to place matters and persons in the condition in which they stood before the sheriff's tax sale. The retrocession was designed for no other purpose than to show an express relinquishment of any title by the bank to the property, in favor of the succession, represented then by the widow and heirs, who, at Zacharie's death, had become the joint owners of the property left by him, and who had undertaken to champion its rights. What title they acquired by the act of 1875 was merely that which they held at Zacharie's death, in 1870. At that time the bank could well have issued executory proceedings against the succession of Zacharie, (*Bank v. Buisson*, 7 Rob. La. 506;) and, as the title was in it at the date of the seizure and sale to foreclose, it is apparent that the bank had a right to proceed against the succession, represented by the executrix. Indeed, she had no other alternative. Rev. Civil Code, art. 8481. In such a case it was unnecessary to make any other parties. The objection that, by the agreement of 1875, a contract of *antichresis* was entered into, and that the bank had no right to surrender the property which formed the object of it, has no foundation. The bank had a right to relinquish or abandon possession at any time, as she had not bound herself to retain it. Id. art. 3178. Viewing the agreement otherwise than as an *antichresis*, we do not find in its tenor any obligation assumed by the bank to retain possession until the debt be finally paid. Had such been the intention of the parties, they surely would have unequivocally expressed it. The bank, besides, had hypothecary rights on the property, the exercise of which had not been in any manner suspended or affected by the agreement in question. We therefore conclude that the title is such as the purchaser was bound to accept.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that there be now judgment in favor of the plaintiffs and the Citizens' Bank, intervenor, rejecting the claim of the widow and heirs of J. W. Zacharie, declaring that the property described in the petition belongs to the defendant, David Haas, and condemning him to pay to the plaintiffs the price of adjudication, (\$20,000,) and interest, with vendor's lien and privilege and special mortgage on the property, and according to the terms and conditions of the adjudication as specified in said petition, and that the widow and heirs of Zacharie, and the defendant, Haas, pay costs in both courts.

Rehearing refused, May 28, 1888.

(40 La. Ann. 571)

### Succession of DUMESTRE.

(*Supreme Court of Louisiana. May 7, 1888.*)

#### 1. JUDICIAL SALES—RIGHTS OF PURCHASER—INQUIRY INTO REGULARITY OF PROCEEDINGS.

Although a purchaser may be protected by the order of a court directing a sale in a matter over which it has jurisdiction, yet he has the right to inquire into the validity of the proceeding conducive to the order of sale, to ascertain whether, under the showing made, the court had the power to make the order.

#### 2. SAME—REFUSAL OF PURCHASER TO COMPLY WITH ADJUDICATION—IRREGULAR PROCEEDINGS.

His refusal to comply with the adjudication may be justified, whenever the order of sale, and the proceedings instituted to procure it, are, on the face of the papers, unwarranted by law.

#### 3. SAME.

An order of court for the sale of succession property, which is not justified by the face of the papers, is illegal, and can be successfully resisted by an adjudicatee refusing compliance with his bid on property offered for sale.

#### 4. SAME.

An adjudicatee cannot be compelled to accept a title tendered under such circumstances, and has a right to demand reimbursement of the cash paid by him to the auctioneer at the moment of adjudication. FENNER, J., dissenting.

#### 5. EXECUTORS AND ADMINISTRATORS—SALE OF PROPERTY OF SUCCESSION—SETTLEMENT OF ESTATE.

An order of sale of the entire property of a succession inherited by minor and major heirs, to pay the debts, and to settle the claims and interests of the latter, can be assimilated neither to a sale asked by an administrator, nor to one to effect a partition, nor to one of minor's property.

#### 6. SAME—RIGHTS OF TUTOR.

No more can a tutor administering a succession, than an administrator, ask and obtain the sale of more property than is necessary to pay the debts.

#### 7. SAME.

A tutor can undertake the settlement of a succession only when it accrues exclusively to his wards.

#### 8. SAME—PROBATE PRACTICE—POWER OF COURT—SALE OF LAND TO PAY DEBTS.

A court having probate jurisdiction has no power to order the sale of all the property of a succession inherited by minor and major heirs, at the instance of the tutor, with the consent of the latter, to pay debts which hardly amount to two-fifths of the estimated value of the property, and to settle the interest of the major heirs.

#### 9. SAME.

Enough property must first be sold to pay the debts, and the residue accruing to such heirs may then form the object of a partition in kind, or by sale on proper proceedings.

#### 10. SAME—PARTITION—HOW MADE.

In such a case, a court cannot decree the partition by sale, unless on proof that the property cannot be conveniently divided in kind.

#### 11. PARTITION—BY SALE—INABILITY TO DIVIDE PROPERTY IN KIND.

A judgment, to operate a partition by sale, can be validly rendered only on proof that the property cannot be conveniently divided in kind.

#### 12. SAME—SALE OF MINORS' LAND—WHEN ALLOWED.

Property belonging exclusively to minors can be ordered to be sold only on compliance with the requirements of the law on the subject.

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

In this case, Mrs. Delia Joyce is appellant from a judgment on a rule condemning her to comply with the adjudication made to her of certain succession property at public sale. She declined compliance because she believed that a faulty title was tendered her, that the sale was in reality one to effect a partition, and that the forms of a partition were not at all regarded.

*Jas. Timony*, for appellant. *Ben C. Elliott*, for appellee.

BERMUDEZ, C. J. The question presented is whether the adjudicatee of certain property belonging to this succession shall be compelled to comply with her bid. The ground of resistance is that the proceeding by which the order of sale was obtained, and the order itself, are unwarranted, and as such null, and that, therefore, no title has passed to the adjudicatee. Mrs. Dumestre died, leaving minor and major heirs, and owning property inventoried at \$24,000. She was indebted to third parties in about \$6,000, and, it is alleged, to her major heirs, \$4,000. A dative tutor was appointed to the minor children, and he was relieved from furnishing security. He undertook the settlement of the succession, and, to that end doing that which an administrator could have done, and even more, he presented a petition, alleging the debts, and that for the purpose of paying them, and of settling with the major heirs, the whole or part of the property ought to be sold. A family meeting was called, and fixed the terms of sale, and the heirs of age assented. By the same order the deliberations were homologated, and the entire property was ordered to be sold. It was offered, and realized \$21,746; part being withdrawn.

It is apparent, from this condition of things, that the sale was asked either exclusively to pay debts, or also to effect a partition. If it was to pay debts, aggregating at most \$10,000, there was no necessity, no propriety, no authority, to order the sale of \$24,000 worth of property, and the order must be deemed *ultra vires* of the court. If the property was ordered to effect a partition besides, the forms of law have not been observed, and the order is likewise a nullity. So that, in either case, the order of sale was unwarranted, and the execution of it has not stripped the minors of their undivided share therein. Forcing the adjudicatee to comply with her bid is to compel her to give her money for property to which a voidable or doubtful title is tendered. The safest test for the validity of the sale is to ascertain the precise nature or character of the proceedings which provoked it. They were designed either to obtain the sale of the succession property to pay debts, or to effect a partition, or for the sale of minors' property as an act of tutorship. If intended to pay debts, they must be controlled by the law and the jurisprudence on that subject, and could ignore the heirs. If intended to operate a partition, they should be conducted under the provisions of the Code in that respect. If intended to accomplish a sale of minors' property, and only in that case, they should comply with provisions of Rev. Civil Code, art. 339 *et seq.* (a) Tested by the fundamental allegation of the petition, which is that the sale was necessary to pay the debts of the succession, the conclusion is warranted that the object in view was to pay debts by the tutor administering the succession. In such case the sale could not be sustained, as there were two heirs of age, and the tutor could not control the succession as an entity; for it is well established that a tutor can *ex officio* administer a succession only where it accrues exclusively to his wards. (b) If the proceedings were to be treated as contemplating a partition, it is apparent that the minors, for whom the laws accept a succession under benefit of inventory, had then no standing, for the plain reason that the succession was not liquidated, was burdened with debts, and the property could be the object of a partition only after such liquidation had been effected. (c) If the tutor proposed to make a sale under Rev. Civil Code, art. 339 *et seq.*, he is denied that right, as the minors were not then the sole or exclusive owners of the property, to which they had only an undivided share,

the value of which could not be ascertained before a complete administration and liquidation of the succession. *Richard v. Deuel*, 11 Rob. (La.) 508. It will not do to say that a purchaser has no right to look beyond the decree ordering the sale, when it is rendered by a competent court; for it is settled that he must look, not only to the jurisdiction of the court, but also inquire into the power of the court to make the order of sale. When he discovers, on the face of the proceedings, at least those conducive to the sale, and which serve as a foundation for the order of sale, illegalities calculated to throw a cloud on this title tendered, he may successfully refuse compliance with the adjudication. If he were to be held protected by the mere order, then he could be forced to take title to the property of minors ordered to be sold without the consent of family meeting, or without any previous appraisalment, or without any reason being assigned to justify the sale. Rev. Civil Code, art. 340. Surely, such is not the law. There is no precedent to show that a purchaser ever was compelled to take a title under such circumstances. In the case of *Succession of Gassen v. Palfrey*, 9 La. Ann. 560, in which a purchaser had refused to comply, and was relieved, the court substantially said: "There is yet for him a *locus penitentiae*, and the presumption *omne rite acta*, etc., created for his protection, cannot estop him, though it be available to throw on him the burden of proof. He can always successfully resist, when the title tendered is, if not void, at least voidable. In the case of *McCulloch v. Hommes*, not reported, No. 4,672, decided in 1857, Op. Bk. 27, fol. 240, and alluded to in *McCulloch v. Weaver*, 14 La. Ann. 33, in which the court had ordered the sale of property belonging to minor and major heirs, on an *ex parte* proceeding, and without the formal judgment of partition, a purchaser was relieved from compliance with his bid on property at the sale. It is true that there were exceptions in the case, which had not been disposed of before the order of sale had been rendered. In the case in 14 La. Ann. 33, just mentioned, an adjudicatee, at the same sale, under the same order, was quieted in a suit brought by the administrator to annul the sale; but this, because he had gone into possession, and his title could be subsequently ratified. In the present case the adjudicatee is not attacking the order of sale collaterally. He charges its nullity on its face, because the petition and the deliberations of the family meeting, which form part of it expressly, do not justify the order. His objections are founded on the proceedings on their face. The court, no doubt, had jurisdiction over the succession and over the minors. It had authority to order the sale of part of the property to pay the debts, but it had none to order the sale of the entire property, as it did. Property sufficient to pay the debts, even what is said to be due the major heirs, ought to have been first ordered to be sold; and this, once done, the rest of the property would have next remained unincumbered, the common property of the heirs, who, if unwilling to hold in indivision, might then have asked a partition, either in kind or by licitation. Before ordering a sale of property held in common by minors with majors, the court must be satisfied, either by the reports of experts or by satisfactory evidence, that the property cannot be divided in kind; for it is the policy of the law, in its jealousy for the protection of minors, that they should rather own real estate than that they should have money or securities, which would be, by their nature, more imperiled than if invested in such property. There is nothing to show, in those proceedings,—not even an allegation either in the petition or in the *proces-verbal* of the deliberations of the family meeting,—that the property cannot be conveniently divided in kind, among the heirs. It is well observed by the judicious counsel for the resisting purchaser: "If the method pursued in this case be legal, all the safeguards thrown around the interests of minors by the forms prescribed \* \* \* are utterly useless." The proceedings leading to the order of sale have none of the features of a partition, although it was one in disguise, intended to operate as such; but, even it was regular in its form, the absence of

proof of the impossibility of convenient division in kind would not have justified the judgment of sale. Under the circumstances, the purchaser cannot be compelled to take the title offered. The adjudicatee has prayed that the amount deposited by her with the auctioneer be returned to her. She is clearly entitled to have it back.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed; and it is now ordered and decreed that the rule herein taken to compel compliance with the adjudication be discharged, and that the defendant therein recover the amount deposited by her with the auctioneer, namely, \$622.50, and costs in both courts.

Rehearing refused.

FENNER J., (*dissenting*.) The decedent, Mrs. Dumestre, left as her sole heirs ten children, two of whom were majors, and the other eight minors. Arthur Gastinel, having been recommended by a family meeting as dative tutor of the minors, presented a petition praying for an inventory of all the property of said minors, which was ordered accordingly. Their property consisted exclusively of their interest in the estate of their deceased mother, and the inventory embraced all the property of said deceased. After filing and homologation of the inventory, Gastinel was duly appointed and qualified as dative tutor. He thereupon presented a petition to the court, solely in his capacity as tutor, representing "that the inventory shows the property of the minors consists, in the main, of real estate, in which their co-heirs (the two major children) have an undivided interest; that, besides the minors' mortgage of \$15,202.32, there are other debts due by deceased, amounting to upwards of \$6,000; that it is necessary to sell the whole or a part of said estate in order to pay the debts of deceased, and settle the claims and interest of the major heirs; that, as to the terms of sale and other matters, he desires the advice of a family meeting," etc. A family meeting was accordingly ordered and held, which, with the approval of the under-tutor, recommended the sale of all the property at public auction on the terms therein fixed. The proceedings of the family meeting were presented to and duly homologated by the judge, and the tutor prayed for an order of sale in conformity therewith, which prayer was, in writing, concurred in by the two major heirs. Thereupon the judge made his order as follows: "In accordance with the advice of the family meeting, and the concurrence of the major heirs herein, let the entire property of the succession of Mrs. Dumestre be sold," etc. The sale was accordingly made, and Mrs. Delia Joyce became the adjudicatee of part of the property. She declined to accept the title, and to comply with the terms of the adjudication, and her present appeal is taken from a judgment ordering her to comply. Her objection is based on the allegation contained in the petition for sale, that it is necessary "in order to pay the debts of the deceased, and to settle the claims and interests of the major heirs." They contend that the latter clause converts the proceeding into a partition sale, and that, as such, it is null and void for want of compliance with the requirements of the law in the conduct of partition proceedings.

Her apprehension as to the defectiveness of the title tendered, are, in my opinion, groundless. This is not an administrator's sale, as to which it is settled that an administrator has no right to provoke a sale for the mere purpose of effecting a partition between heirs, when there is no necessity therefor for the payment of debts. *Hebert v. Hebert*, 22 La. Ann. 309; *Hutchiss v. Dodd*, 13 La. 86; *Pipkin v. Thompson*, 14 La. 272; *Bank v. Delery*, 2 La. Ann. 648; *Succession of Morgan*, 12 La. Ann. 153; *Monition of Dickson*, 6 La. Ann. 754. Even if it were an administrator's sale, however, it might find protection under the doctrine of a recent case, in which we held that, where

the petition alleged a necessity for the sale in order to pay debts, it would not be invalidated because accompanied by a further suggestion as to its necessity also for settlement between the heirs. *Nesom v. Weis*, 34 La. Ann. 1004. See, also, *Succession of Weber*, 16 La. Ann. 420. But, as said before, this is not an administrator's sale. The tutor has not acted as administrator, either actual or constructive. As his wards were not the sole heirs, he could not have authority to assume administration of the whole succession. He has scrupulously confined his official action within the limits of his authority as tutor, extending it only to the interest of the minors, while the sale of the remaining interest is expressly based, both by himself and the judge, upon the concurrence of the major heirs. Who, then, can assail the title tendered to appellant? Not the creditors, for whose payment the sale is expressly made. Certainly not the major heirs, who are *sui juris*, and have joined in provoking the sale. We have, then, to consider only if the sale is binding as divesting the interest of the minors. Of this there can be no doubt. The proceedings comply strictly with the requirements imposed by the law for a valid sale of minors' property. These requirements are prescribed by articles 339, 340, 341, and 342 of the Civil Code, and are substantially as follows: (1) That a family meeting shall advise a sale as advantageous to the minors. This has been done. (2) That the judge should, on consideration, approve the advice of the family meeting, and fix the terms and other conditions of the sale. This has been done. (3) That the sale should be made at public auction, after due advertisement. This was fully complied with. (4) That the property should not be sold for less than the appraised value, as shown in the inventory. The price here was considerably larger than the appraisal. There are no other requirements prescribed by law; and, these being complied with, the minors are fully concluded. Under such proceedings, the minors' undivided interest in the property might have been validly sold separately. The advantage derived by the minors from a sale of the whole property, under the consent of the major heirs, is evident. Neither the appellant, nor we, under her appeal, are concerned with the reasons of the family meeting for advising the sale, or of the judge for approving them and ordering it. It is sufficient that the family meeting, the tutor, the under-tutor, and the judge have, in the exercise of the discretion vested in them by law, concurred in the sale, and that it has been made in compliance with all legal requirements. Even considering this as a proceeding for partition, a close study of the codal provisions on that subject reveals no valid objection to the sale here made. The sale is not a partition, but only a step preliminary thereto, and the actual partition, and the proceedings in response thereto, take place upon the proceeds, and are subsequent matters, with which appellant has no concern. *Dees v. Tildon*, 2 La. Ann. 412; *Kohn v. Marsh*, 8 Rob. (La.) 48. The Code gives to every heir the right to demand a partition. Rev. Civil Code, arts. 1289, 1307. Tutors of minors have the right to sue for a partition, provided they are thereto authorized by the judge on the advice of a family meeting. Rev. Civil Code, art. 1235; *Rachal v. Rachal*, 10 La. 458; *Segur v. Sorel*, 11 La. 446. Minors who do not demand a partition *inter se* of the share they are to receive may be properly represented by their common tutor. *Succession of Aguiard*, 13 La. Ann. 97. The first thing to be determined in a judicial partition is how it shall be made, whether in kind or by licitation or sale. The Code gives to each heir the privilege of claiming his share in kind, (article 1337;) but it does not require an heir to make such claim. If a tutor, with the concurrence of a family meeting, and the approval of the judge, concludes that it is for the advantage of the minors that the partition should be made by sale, he would have the right to urge that it be so made; and, if the major co-heirs concurred in the same view, then there would be no controversy, and the judge, also concurring, would surely be authorized to order the sale. The Code invests the judge with full authority and discretion

to determine this question. Article 1839; *Kohn v. Marsh*, 3 Rob. (La.) 48. In his order of sale, he would be required, on the advice of a family meeting, to fix the terms of credit and security. Article 1841. Now, in the instant case, we find the tutor of the minors, the under-tutor, the judge, and the major co-heirs all concurring that the property should be sold. It has been sold under judicial order, at public auction, on terms of credit fixed on the advice of a family meeting, and has brought a price exceeding the appraisement. What requirement of a valid sale, even for partition, is lacking, is not apparent. In a former case, we said: "We think the law exhibits sufficient watchfulness over the interests of minors, in the granting of such orders, in requiring—*First*, an application by the tutor, usually supposed to be concerned for the interests of his wards; *second*, a reference to a meeting of their relatives and friends to consider, advise, and report for or against it; *third*, the action of their under-tutor, specially appointed to protect their interests against any improper action of their tutor; *fourth*, the final approval of the judge, with all the prior proceedings before him. *Tutorship of McCormick's Heirs*, 32 La. Ann. 958. These requisites concur in the instant case. It is obvious that, upon new proceedings presenting the same conditions, a sale may be had, and I can see no reason for subjecting the minors to this unnecessary expense, and to the additional detriment of losing the advantage of a bargain which would not be litigated by the purchaser if it were not to her interest to be let out of it. I therefore dissent from the opinion and decree herein.

(40 La. Ann. 537)

## SMITH v. SELLERS et al.

(Supreme Court of Louisiana. May 7, 1886.)

## 1. MASTER AND SERVANT—RISKS OF EMPLOYMENT—ACCEPTANCE BY SERVANT.

A servant must be held to have accepted the service of his employer subject to such reasonable risk as may be incidental to the character of the employment; and, within that limitation, he cannot be awarded damages for the occurrence of an accident or resulting injury.<sup>1</sup>

## 2. SAME—HAZARDOUS UNDERTAKINGS—ASSUMPTION OF RISK.

An employer engaged in a hazardous enterprise cannot be required to give a laborer a positive guaranty against danger, and injury which may be suffered from accidental and fortuitous causes.<sup>1</sup>

## 3. SAME.

A servant necessarily assumes the risk only of such hazards as are apparently incidental to an employment intelligently undertaken; and, if he be aware that proper precautions have not been taken for his safety, and still continues the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security.<sup>1</sup>

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge. Suit by George Smith against T. J. Sellers & Co. for \$10,000 damages claimed for injuries received at the hands of defendants. The latter appeal. *Chas. S. Rice*, for appellants. *Harry H. Hall*, for appellee.

WATKINS, J. Plaintiff claims \$10,000 damages for injuries inflicted, at the hands of the defendants, under the following circumstances: That on or about the 12th of July, 1886, he was employed by the defendants as a laborer to assist in the demolition of the Exposition buildings in this city, and, while thus engaged, he was injured by a falling joist; that shortly prior to receiving the injury, "in order to protect himself from possible danger at the derrick, to which post he had been assigned by defendant's foreman, he rove the line of the fall intrusted to his care through a block fastened to the derrick platform, thus permitting him to effectively perform his duty at a safe distance from the derrick; that, arbitrarily, unreasonably, and unlawfully, the foreman of the

<sup>1</sup> See note at end of case.

defendants ordered him to remove said block, and would not permit him to work in a place of safety; and that he was subjected by the defendants to the authority of said foreman, their agent, and was compelled to obey him; and that, in consequence solely of the said unlawful acts of defendants and their aforesaid agent," he received the injury complained of; "that the danger, which alone could have been, or was, foreseen by him, in his employment, was the breaking or falling of timbers swung to the derrick, and being lowered; that the joist that fell and injured him was not swung, but would not have struck him had he been permitted to use the block, as above set out."

*In limine* the defendant tendered the plea of "no cause of action," and it was overruled, and we think incorrectly. The danger against which the plaintiff sought to guard himself by reaving the line of the fall through a block attached to the derrick platform "was the breaking or falling of timbers swung to the derrick, and being lowered," and not the falling of "the joist," that was not so swung, or being lowered. The unlawful act of the defendant that is assigned is that of its foreman in refusing to permit him to "perform his duty at a safe distance from the derrick," in the manner stated above. There is no charge that the falling of the joist was apprehended, and danger from that cause foreseen, by either the plaintiff or the defendants' manager. On the contrary, the petition contains the distinct averment "that the danger which alone could have been, or was, foreseen by him in his employment, was the breaking or falling of timber swung to the derrick, and being lowered." The danger from a falling joist was unforeseen, and not anticipated, by either. There is no charge that the falling of the joist was occasioned through the fault or negligence of the defendant, its servants, or agents. It is not averred that the falling of the joist should have been foreseen and provided against by the defendant and its manager. From the allegations of the petition we take it that the falling of the joist was the result of an accident; and it may have been caused by some latent defect in the construction of the building. This was a danger entirely independent of that which might have threatened the plaintiff by the falling or breaking of timbers swung to the derrick. The falling of the joist seems to have been altogether fortuitous. The place where the plaintiff was directed by the foreman to stand, was not alleged to have been more within the compass or area of falling joists than that he had chosen as a place of safety from "breaking or falling timbers swung to the derrick." *Non constat* that had he occupied that position, unrestrained by the defendants or their foreman, that or a similar accident would not have happened. The defendants must be held as innocent of the cause of the danger, and cannot be made responsible for the injuries sustained.

The defendants' counsel propound the following query, viz.: "In other words, let us suppose that there was reason to fear that timbers swung to the derrick would break or fall, and thus threaten danger to those working near the platform; that the plaintiff was refused the safeguards from that danger, as he alleges, but remained under such refusal at the place of supposed danger. —are the defendants liable to him because of some other danger that was not foreseen by him or by them, and for which neither knowledge, nor culpable ignorance, nor negligence in them is charged?" We are of the opinion that they are not. A servant must be held to have accepted the service of his employer subject to such reasonable risk as may be incidental to the character of the employment; and, within that limitation, he cannot be awarded damages for the occurrence of accident, and resulting injury. An employer, engaged in a hazardous enterprise like that of the demolition of the Exposition buildings, could not be required to give to every laborer a positive guaranty against danger, and immunity against injury, which might be suffered from accidental and fortuitous causes, over which he could exercise no control, and of the likelihood of which he could have entertained no apprehension at the time the contract of employment was entered into, or previous to the happening of

the accident occasioning injury. It has been well said by a distinguished author that "it has often been justly remarked that a man may decline any exceptionally dangerous employment; but, if he voluntarily engaged in it, he should not complain because it is dangerous." Cooley, Torts, 555. The servant assumes the risk only of such hazards as are apparently incidental to an employment, intelligently undertaken; and if he is aware that proper precautions have not been taken for his safety, and still continues the service notwithstanding the risk, he will be considered as having assumed the responsibility of his own security. *Leary v. Railroad Co.*, 139 Mass. 584, 2 N. E. Rep. 115; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Coombs v. Cordage Co.*, 102 Mass. 572; *Wood, Mast. & Serv.* 809. The falling of a joist cannot, in this instance, be considered as a latent or extraordinary danger not reasonably contemplated in the plaintiff's employment. We are of the opinion that the defendant was not responsible for the accident or the injury, and that plaintiff's petition does not state a cause of action against him. It is therefore ordered, adjudged, and decreed that the verdict of the jury, and the judgment thereon based, be set aside, annulled, and reversed, and that the plaintiff's and appellee's demands be rejected at his costs in both courts.

## NOTE.

MASTER AND SERVANT—RISKS OF EMPLOYMENT. A servant, knowing the hazards of his employment as the business is conducted, cannot recover from the master for injuries received while engaged therein, on the ground that there was a safer way for conducting the business, the adoption of which would have prevented the injury. *Naylor v. Railway Co.*, (Wis.) 11 N. W. Rep. 24; *Hewitt v. Railroad Co.*, (Mich.) 34 N. W. Rep. 359. No employer by an implied contract undertakes that his machinery and appliances are safe beyond a contingency, or that they are as safe as those of others using the same kind of machinery. *Richards v. Rough*, (Mich.) 13 N. W. Rep. 735. A master's liability for injuries to his servants for defective arrangements is not that of an insurer or of a guarantor. The question is one of reasonable care and diligence. *Batterson v. Railway Co.*, (Mich.) 13 N. W. Rep. 508, 13 N. W. Rep. 584; *Railroad Co. v. Wagner*, (Kan.) 7 Pac. Rep. 204; *Pierce v. Cotton-Mills*, (Ga.) 4 S. E. Rep. 881. If an employe knows that the materials with which he works are defective, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risks of such defects. *Railway Co. v. Peavey*, (Kan.) 8 Pac. Rep. 730; *Worden v. Railroad Co.*, (Iowa.) 33 N. W. Rep. 629. If the servant knows the defect or danger, and has reasonable grounds to believe that the master has cured, or would immediately cure, the defect, he is not guilty of contributory negligence by remaining in the service, and may recover for injury caused by such negligence of the master. *Hoffman v. Dickinson*, (W. Va.) 6 S. E. Rep. 53. But it is held in *Wootilla v. Lumber Co.*, (Minn.) 33 N. W. Rep. 551, that it is not enough that an employe knows the defective condition of the appliances with which he is working, in order to charge him with contributory negligence, but he must also understand, or ought in the exercise of ordinary prudence to understand, the risks to which these defects expose him. If a master, by his conduct, actions, or words, having knowledge of a danger of which the servant is ignorant, lulls the servant into a sense of security, by which he is injured, the master is answerable in damages. *Hoffman v. Dickinson*, (W. Va.) 6 S. E. Rep. 53. A master may conduct his business in his own way; and, when a servant takes service with a master who conducts his business in a way which the servant thinks is unsafe, he cannot recover from the master damages for any injury happening to him. He should refuse to enter upon the employment, or should leave it on discovery of the master's method of doing business. *Hawk v. Railroad Co.*, (Pa.) 11 Atl. Rep. 459.

(40 La. Ann. 457)

## LARQUIE v. LARQUIE.

(Supreme Court of Louisiana. May 7, 1883.)

## 1. DIVORCE—JURISDICTION—DOMICILE—HOW ACQUIRED.

A party who resides in this state, with the intention of fixing here his domicile for an indefinite period of time, and engages in active business pursuits for a number of years, acquires a domicile in the place in which he has thus lived, which becomes the conjugal domicile, if in the mean time he contracts marriage, even in a foreign country, with a wife, whom he brings to his residence, and who lives here with him a number of years.

**3. SAME—JURISDICTION—RETURN OF WIFE TO HER FORMER DOMICILE.**

The wife who visits and sojourns in her native country, and refuses to return to the domicile thus established, is amenable to the courts of this state in an action for separation from bed and board by the husband for her alleged abandonment of the conjugal domicile.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

This is a proceeding instituted by Henry Larquie for separation from bed and board. From a judgment dismissing his demand, plaintiff appeals.

*Frank D. Chrétien and Frank N. Butler, for appellant. Harry H. Hall, for appellee.*

POCHE, J. Resisting her husband's demand for a judgment of separation from bed and board, predicated on her alleged abandonment of the conjugal domicile, the defendant urges the following reasons, substantially: (1) That the conjugal domicile is not in Louisiana, but in France, where the marriage was contracted in June, 1872, and where the spouses resided for several years, upon the distinct promise of the plaintiff to continue to reside in that country; (2) that when she left the temporary abode in New Orleans, where the couple resided from 1876 to 1881, it was with the permission and at the request of plaintiff, who sent her to France, for reasons of her failing and impaired health; (3) that, under her present condition of health, in connection with climatic influences prevailing in New Orleans, her life would be endangered by a return to this city. Plaintiff appeals from a judgment which rejected his demand. The testimony is very conflicting; but the preponderance of the evidence establishes, to the entire satisfaction of the judicial mind, the following facts: Plaintiff, who is a native and is yet a citizen of France, came to New Orleans in the year 1846, since which time he has been actively engaged in active business pursuits of various kinds in this city, where he has continuously resided, save and except two years, during which he lived in France, immediately preceding and following the date of his marriage. In 1873, he returned to this country with his wife, with whom he lived here until 1875, when they together made a trip to France, whence they returned in 1876, bringing with them their first child, whom they had left in France in 1873. Their second child was born in this city, where the two spouses lived together, "keeping house," until 1881, when the defendant went to France with the consent of her husband, and where she has since sojourned, notwithstanding reiterated requests and demands from him to return to their home in this city. To these demands she has persistently resisted, under various pretexts; that of ill health being the reason given to the husband and to the court. During his long residence in this country, plaintiff has at divers times been the lessee of a portion, and is now the lessee of all, of the public markets of the city of New Orleans, and since the year 1880 he has also filled the functions of president of a street-railroad company in this city. In his contract with the city, in authentic form, plaintiff represents himself, and is dealt with, as a resident of New Orleans; and the nature of the contract itself requires a personal attention and control which a resident alone can give. The same may be said of plaintiff's functions as president of a city railroad company. On the occasions of two recent trips which he made to France, one in 1882 and the other in 1884, it became necessary for him to obtain a leave of absence from the board of directors of the railroad company. On both of these visits to his native country, but more particularly in 1884, plaintiff used every means within his power, including the assistance of other persons, to decide and induce his wife to return with him to his home in this city, but to no avail. In the examination of the record, due consideration has been given to testimony and other evidence showing that plaintiff has always had and manifested his intention that if he succeeded in retrieving his almost lost fortune, which he had earned in

this city, he would, in the remote and uncertain future, return to live and end his days in his native country, on property which he purchased there in 1872. But the proof is conclusive that, on his return from France in 1873, he resumed his permanent residence, and established his fixed domicile, for an indefinite time, in this city, where he owns considerable property, and which thus became the conjugal domicile. Hence the jurisdiction of this case properly and legally belongs to the courts of this state. Civil Code, arts. 38, 42, 43; *Verret v. Bonsvillain*, 33 La. Ann. 1305; *Muller v. Hilton*, 13 La. Ann. 1; *Gratillon v. Richards*, 18 La. 297; *Dugat v. Markham*, 2 La. 35; *Chretien v. Chretien*, 5 Mart. (N. S.) 61. Respectful consideration has been given to the conclusion reached by a competent court in France, in a suit for separation instituted in that country against the plaintiff herein by his wife, and in which it was held that the conjugal domicile was in that country. But it is very clear that the French tribunal did not have before it the testimony which is contained in the record before this court. But, at all events, the question presented here must be disposed of in accordance with our laws and our jurisprudence, under which it could never be held that plaintiff had not a fixed domicile in Louisiana at the time of bringing this suit; and hence that domicile must be held to be that of the wife also.

On the other points of contention the record shows that defendant did have the permission and consent of her husband to return to France in 1881, and that he then believed that the trip was necessary to her health. And there is testimony in the record to the effect that she has not yet entirely recovered her former robust health; and that, in the opinion of her physician there, the climate of Louisiana would not have a beneficial influence on her peculiar ailment. But on that point the evidence in the record is overwhelming in support of the proposition that her health would not suffer by a return to this city, and, above all, that her condition of health, such as it may be, is not the reason of her refusal to come back to her husband's domicile. She is entirely actuated by other reasons, which it is not necessary to mention, which have no force in law, and which cannot justify her persistent refusal to return to the conjugal domicile. Civil Code, art. 120; *Neal v. Her Husband*, 1 La. Ann. 315; *Gahn v. Darby*, 36 La. Ann. 70. In the latter case, article 120 of the Civil Code was construed by this court so as to require the wife to follow her husband to a new conjugal domicile which he proposed to establish, and to which she had never been. *A fortiori* will the rule apply to a case in which it appears that the husband has resided over 40 years in a place to which he brought his wife 15 years ago, and in which she lived with him, at the conjugal domicile, for 7 years. The record and the law governing the matter clearly lead to the conclusion that the case is with the plaintiff, and that he is also entitled to the custody of the children born of the marriage. All the formalities prescribed by article 145 of the Civil Code having been complied with, the proper judgment to be rendered is one of separation from bed and board.

It is therefore ordered that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered that plaintiff do have and recover a judgment of separation from bed and board against his wife, the defendant herein, with the custody of the children born of their marriage, and for costs in both courts.

Rehearing refused, May 28, 1888.

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(40 La. Ann. 376)

**HEIRS OF DOHAN v. MURDOCK.***(Supreme Court of Louisiana. March 5, 1883.)***EVIDENCE—RECITALS IN DEED—DOMICILE OF PARTIES.**

The recitals contained in a deed that is offered in evidence in proof of title cannot be considered as evidence of the domicile of the parties, when this is a necessary element of title. In this case their domicile should be affirmatively proved.

*(Syllabus by the Court.)*

Appeal from district court, parish of Tensas; S. CHARLES YOUNG, Judge. This is a petitory action, in which the heirs of Rebecca Dohan seek to be declared owners of the undivided one-half of a certain plantation now in the possession of Robert Murdock. Defendant appeals from an adverse judgment.

*Steele, Garrett & Dagg*, for appellant. *J. W. Montgomery and Wade B. Young*, for appellee.

WATKINS, J. This is a petitory action for the recovery of an undivided one-half interest in the property known as the "Ashland Plantation," situated in the parish of Tensas, this state. It is designated in the petition as "the same property [that was] sold by William Harris to Daniel J. Dohan, and to Mrs. Rebecca Dohan, on the 21st of February, 1850." Plaintiffs claim the property by inheritance from their deceased mother, Mrs. Rebecca Dohan; and it is alleged in their petition that one of them is a resident of the state of Texas, and the others of the state of Mississippi. They represent that the defendant has taken possession of their said one-half interest "without authority from them," and has used and cultivated same, and that the annual revenues thereof aggregate \$5,000 per annum. The answer of the defendant is, in substance, that he is in possession of the whole property, but disclaims title to more than one undivided half interest thereof; that he acquired said interest by purchase from Daniel J. Dohan, by deed of record, dated July 15, 1878; and possesses the remaining one-half "as the tenant at will of Michael J. Dohan, residing in Philadelphia, Pa." He represents that he purchased said property in good faith, for full value, and upon the written opinion of a reputable attorney at law that the title was perfect. There is in evidence a deed from William Harris to Daniel J. Dohan, and his wife, Rebecca Dohan, purporting to convey the whole property. This is the title of the common author of plaintiffs' ancestor, and of the defendant, and is affirmed by both. There is also in evidence a deed from Daniel J. Dohan to the defendant of an undivided one-half interest therein. Manifestly the plaintiffs rest their claim of ownership upon the title of Harris. But we are left in the dark as to the precise character of their pretensions. Whether they claim that the title was joint and several as to the two vendees, "Daniel J. Dohan, and his wife, Rebecca Dohan," or that it was community property, and their interest therein their mother's undivided one-half interest, is not quite clear.

There is neither averment nor proof of the residence of Daniel J. Dohan and wife at the date of their purchase from Harris on the 21st of February, 1850, nor at the date of Rebecca Dohan's death. There is a recital in the deed that he resided in the state of Mississippi. Such recital contained in a deed that is offered in evidence by the plaintiffs, in proof of title, cannot be considered as proof of domicile. *City v. Sheppard*, 10 La. Ann. 268; *Hill v. Spangenberg*, 4 La. Ann. 555; *Davis v. Binion*, 5 La. Ann. 248; *Jones v. Read*, 1 La. Ann. 200. If, in point of fact, Daniel J. Dohan and Mrs. Rebecca Dohan were citizens of the state of Mississippi at the date of their purchase from Harris, in 1850, and their title thereby taken out of the operation and effect of our community laws, plaintiffs should have proved that fact clearly and affirmatively. We think that their allegations are sufficiently broad to admit of the introduction of the needed evidence. They are to the effect that they

are the owners by inheritance from their mother, Mrs. Rebecca Dohan, of an undivided one-half interest in the "Ashland Plantation," purchased from Harris by Daniel J. Dohan, and his wife, Rebecca Dohan, in 1850. Under the circumstances, and for the purposes of justice, we think the case should be remanded for a new trial in pursuance of the views herein expressed. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and set aside; and it is further ordered, adjudged, and decreed that the cause be remanded to the court below for a new trial in pursuance of the views herein expressed, and that the cost of appeal be taxed against plaintiff and appellees.

(56 Miss. 443)

**BLAKE et al. v. McCROY.**

(Supreme Court of Mississippi. April 30, 1898.)

**FORCEFUL ENTRY AND DETAINER—WHEN LIES—POSSESSION OF PREMISES.**

Where the owner of an unfinished livery stable could not agree with one seeking to rent it, and, after the time when the proposed lease was to go into effect, rented it to another, who went into possession, the proposed lessee does not acquire the right to maintain an action against the party so entering, for unlawful entry and detainer, by hitching horses in the unfinished stable.

Appeal from circuit court, Coahoma county; J. H. WYNN, Judge.

One Toney owned a lot, and was about to build a livery stable on it, and Charles McCroy made a proposition to lease these premises, his term to begin on January 1, 1888; but nothing definite was arrived at. On January 1st, McCroy not having taken possession, Toney went to him for a definite understanding, but no agreement was had, and McCroy did nothing further. On January 2d, Toney rented the premises to Blake & Bouldin, but the stable was still in the hands of the contractor who was building it, and unfinished, and on that day, January 2d, McCroy sent two horses to the stable, and they were hitched to posts in the unfinished stable, but these horses were turned out or got away, and the next day McCroy sent other horses, and had them put in the unfinished stable, but the contractor directed the party who brought the horses to take them away, which was refused, whereupon he (the contractor) had the horses removed from the stable, and McCroy brought this action of unlawful entry and detainer against Blake & Bouldin, who went into possession, and a trial resulted in a verdict and judgment in favor of McCroy, from which Blake & Bouldin appealed.

*Cutrer & Cutrer*, for appellants. *Calhoon & Green*, for appellee.

COOPER, C. J. Under the uncontroverted circumstances developed by this record, the possession of the plaintiff, secured in the manner stated by himself, was not sufficient to entitle him to this action. It is immaterial whether, under the parol lease, he had a right to a term beginning on the 1st day of January; for that right was controverted by the owner, who was in possession of the premises. The plaintiff, for the unmistakable purpose of putting upon the owner the *onus* of evicting him, or of acquiring the right to a summary remedy in case he should be forcibly removed, resorted to the expedient of hitching a couple of horses in the unfinished stable as evidence and agencies of his "peaceful possession of" the premises. The authorities are numerous to the effect that a scrambling possession thus obtained is not sufficient to entitle the party to the action of unlawful entry and detainer. 8 Wait, Act. & Def. 397, where many of the cases are collected. Judgment reversed.

(65 Miss. 394)

**WELCH v. SMITH et al.***(Supreme Court of Mississippi. April 30, 1883.)***RECORDS—DESTRUCTION OF—PROCEEDINGS TO RESTORE—CODE Miss. § 2298.**

Under Code Miss. § 2298, providing for the substitution, by any person interested, of a lost record of a judgment or decree against defendant therein, upon motion and notice, the remedy of a plaintiff seeking to restore the record in a former action at law, which had been destroyed by fire, is by a proceeding in the court in which it was pending, as prescribed by such statute, though it has a different judge; and a bill in chancery for that purpose will not lie.

Appeal from chancery court, Tishomingo county; B. McFARLAND, Chancellor.

J. W. Welch filed a bill in the chancery court of Tishomingo county, setting forth the following averments: That said Welch had some time ago brought suit against Smith & Co. in the circuit court of said county on a proper cause of action; that a verdict and judgment was rendered in favor of said defendants, H. M. Smith & Co., and said Welch had prepared a bill of exceptions, executed bond, and prayed and obtained an appeal to the supreme court of the state for the purpose of having said cause reviewed, etc., but that, before the record of the proceedings in said cause was completed by the circuit clerk, the court-house of said county was destroyed by fire, together with all the original papers; that parties to the suit were unable to agree upon what said record contained, and the judge who tried the cause was not now the judge of that court; and, having no data, said complainant could not have the said record substituted under the statute. Wherefore he prayed that the chancery court should decree that said cause be reinstated on the docket of the circuit court of said county, and be tried anew on its merits. To this bill Smith & Co. interposed a demurrer, which was sustained by the chancellor, and a decree entered dismissing the bill, from which Welch appealed.

*G. C. Chandler*, for appellant. *J. B. Reynolds*, for appellees.

**ARNOLD, J.** Section 2298 of the Code provides that, "when the record of any judgment or decree has been lost or destroyed, the plaintiff or complainant, or other person interested therein, may have the same substituted against the defendant therein, upon motion, and such notice to the defendant as is required in actions and suits in the court in which such motion is made; and such judgment or decree, when substituted, shall have the same force and effect as before the loss or destruction of the first record thereof." The remedy of appellant was under this section, and in the circuit court where the cause was pending. He should have made such copy of the lost record as he could, and then entered a motion in the circuit court asking that the copy be filed, and substituted for the original. After notice to the defendant and hearing the proof, the court should have sustained the motion if the facts warranted it in doing so. If appellant had been unable to show substantially what the contents of the lost record were, it would have been a misfortune which resulted from defective proof, rather than from a want of power in the court to administer relief. The fact that the judge who tried the case is not now on the bench is no obstacle to such proceeding, since, if the record is restored, it must be done on proof, and not upon the memory or recollection of the judge who tried the cause. Without the statute quoted, the circuit court has power, on proper proof, to restore its own records which have been lost or destroyed. It is a power inherent in all courts of record. *Freem. Judgm. § 89; Borman v. McLaughlin*, 45 Miss. 461. But one court has no authority to replace the lost record of another court. The power to do so resides exclusively in the court where the lost record was made. Equity has no jurisdiction to supply the lost record of a court of law. 2 *Pom. Eq. Jur. § 827; Freem. Judgm. § 89a*. Affirmed.

**MILLER et al. v. REYNOLDS et al.***(Supreme Court of Mississippi. April 30, 1888.)***RECORDS—DESTRUCTION OF—PROCEEDINGS TO RESTORE—CODE MISS. § 2293.**

Under Code Miss. § 2293, providing for the substitution of a lost record of a judgment or decree upon motion and notice, and giving such judgment or decree the same force as the lost record, a proceeding to restore the record of a former action at law, which has been destroyed, must be instituted in the court where the judgment was rendered, and a bill in equity for that purpose will not lie.

Appeal from chancery court, Tishomingo county; B. McFARLAND, Chancellor.

This action, brought by Cynthia Miller against G. W. Reynolds and others, in the chancery court, had been contested, heard, and determined against plaintiffs; they had prayed an appeal, etc.; the record was destroyed by fire; parties were unable to agree on contents of record, wherefore appellants filed an original bill involving the merits of the former controversy; a demurrer was interposed, which was sustained, and the bill dismissed; and plaintiffs appealed. For provisions of the Mississippi statute as to substitution of judgments, etc., for lost records, see *Welch v. Smith*, ante, 340.

G. C. Chandler for appellants. J. B. Reynolds, for appellees.

ARNOLD, J. This cause is disposed of by the opinion just read in *Welch v. Smith*, ante, 340. The proceeding here was commenced in the court where the lost records were made; but it is by original bill, involving the merits of the controversy adjudicated on a former trial, the records of which have been destroyed. This is not the method prescribed by statute or the common law for the restoration of lost records. Affirmed.

**YAZOO & M. V. R. CO. v. BRUMFIELD et al.***(Supreme Court of Mississippi. April 23, 1888.)***1. RAILROAD COMPANIES—STOCK-KILLING CASES—SUFFICIENCY OF EVIDENCE.**

In an action against a railroad company for killing plaintiff's mules, it appeared that the mules were in plaintiff's pasture, through which the railroad ran, in a depression near the track; that, as the train emerged from a cut, the mules were startled, and ran along the track ahead of the engine, and afterwards got upon the track; that the engineer sounded the cattle alarm and for brakes, and did all in his power to avert the collision, but failed, and the train struck the mules, and killed one, and the other jumped or was knocked from the track, and killed. *Held*, that a verdict for plaintiff was not warranted by the evidence, and should have been promptly set aside.

**2. SAME—STOCK-KILLING CASES—INSTRUCTIONS—PUNITORY DAMAGES.**

In an action against a railroad company for killing plaintiff's mules, the trial court improperly charged that if the train could have been stopped, by the exercise of reasonable care, after the mules were in sight, from the train, near the railroad track, the jury should find for plaintiff the value of the mules, and interest thereon; and if the train could have been easily stopped after the mules were in sight, from the train, on or near the track, the jury should award plaintiff, not only the value of the mules, but punitive damages.

**3. SAME—STOCK-KILLING CASES—DUTY OF ENGINEER.**

In such case it was error for the court to refuse to charge that if the mules were in a depression below the track, from which the track was not easily accessible to the mules, it was not necessarily the duty of the engineer to stop the train as soon as the mules were seen, but it was a question of fact for the jury; but, when the mules indicated their purpose to go on the track, then it was the duty of the engineer to stop the train.

Appeal from circuit court, Yazoo county; T. J. WHARTON, Judge.

Action for damages by O. H. and J. M. Brumfield against the Yazoo & Mississippi Valley Railroad Company. Two mules belonging to the Brumfields were in their pasture through which the railroad runs. The mules were feeding in a depression near the track. As the train emerged from

a cut, the mules were startled, and started along and towards the track ahead of the engine. The engineer sounded the cattle alarm and for brakes, and did all in his power to avert the collision, the mules having got on the track ahead of the train, but failed, and the train struck the mules on a trestle, and killed one, and the other jumped or was knocked from the track and killed. A trial resulted in a judgment against the railroad company, which appealed to this court, where the judgment was reversed, and a new trial awarded, which will be found reported in 1 South. Rep. 905. On the second trial the circuit court instructed the jury to the effect (3) that if the train could have been stopped by the exercise of reasonable care after the mules were in sight, from the train, near the railroad track, the jury should award to plaintiffs damages to the extent of the value of the mules, and interest thereon; and (4) if the train could have been easily stopped after the mules were in sight, from the train, on or near the track, the jury will award to the plaintiffs as damages the value of the mules, and also such additional sum as to the jury seems just and proper as punitive damages; and refused to instruct for the defendant to the effect that, if the mules were in a depression below the track, from which the track was not easily accessible to the mules, it was not necessarily the duty of the engineer to stop the train as soon as the mules were seen, but it was a question of fact for the jury; but, when the mules indicated their purpose to go on the track, then it was the duty of the engineer to stop the train. The trial resulted again in favor of the plaintiffs, and judgment was so entered, including damages, from which the railroad company appealed.

*W. P. & J. B. Harris*, for appellant. *E. Drenning*, and *J. E. Everett*, for appellees.

**CAMPBELL, J.** The principles applicable to this case were settled when it was here before. 64 Miss. 637, 1 South. Rep. 905. The third and fourth instructions for the plaintiffs should not have been given, and that refused to the defendant should have been given, and the verdict should have been promptly set aside as not warranted by the evidence. Reversed and remanded.

(65 Miss. 407)

#### STEPHENSON v. SLOAN.

(*Supreme Court of Mississippi*, April 30, 1898.)

##### ATTACHMENT—WHEN LIES—REMOVING PROPERTY OUT OF THE STATE.

Under Code Miss. § 2415, subd. 2, providing that attachment will lie where the debtor "has removed, or is about to remove, himself or his property out of this state," a debtor who ships the only property which he has subject to execution, out of the state, to sell, is liable to attachment, although he acts in good faith.

Appeal from circuit court, Union county; *W. S. FEATHERSTON*, Judge.

*T. B. Sloan*, was indebted to *J. H. Stephenson*, and had no property subject to execution or attachment except some cotton, which he, in good faith, shipped to Memphis, out of this state, to be sold. *Stephenson* attached *Sloan*, alleging as ground for attachment that *Sloan* was about to remove or had removed his property out of this state, without leaving sufficient to pay his debts here. A trial was had, which resulted in a verdict and judgment in favor of *Sloan*, from which *Stephenson* appealed. Code Miss. § 2415, subd. 2, cited in the opinion, provides that attachment will lie where the debtor "has removed, or is about to remove, himself or his property out of this state."

*J. D. Fontaine*, for appellant. *Z. M. Stephens* and *Strickland & Bates*, for appellee.

**ARNOLD, J.** For a debtor to remove, or to be about to remove, himself or his property out of this state, is ground for attachment against him. Code, § 2415. Under this statute a debtor who removes his property, or a part

thereof, from the state, for the purpose of converting it into money, not having or leaving sufficient property in the state subject to execution to pay his creditors, is liable to attachment, whether his intent in doing so is fraudulent or not. Such is the construction placed on similar statutes in other states, as well as in this. *Drake*, Attachm. §§ 70, 71; *Wap.* Attachm. 55; *Mack v. McDaniel*, 2 McCrary, 198, 4 Fed. Rep. 294; *Randolph v. McCain*, 34 Ark. 696; *Haber v. Nassitte*, 12 Fla. 589; *Pickard v. Samuels*, 64 Miss. 822, 2 South. Rep. 250. The action of the court below in giving and refusing instructions was not in accordance with this view; wherefore the judgment is reversed, and the cause remanded.

(65 Miss. 435)

## BRYANT v. STATE.

(Supreme Court of Mississippi. May 7, 1888.)

## 1. INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION ACT—ADOPTION IN COUNTY WHERE OFFENSE WAS COMMITTED.

A conviction for violating the local option act of Mississippi cannot be sustained where there is no proof that the act has been put in operation in the county where it is charged that the offense was committed.

## 2. CRIMINAL LAW—APPEAL—REVIEW—MATTER NOT SPECIALLY EXCEPTED TO.

Code Miss. § 1433, providing that no judgment shall be reversed because of any error or omission in the court below, unless the record shows that the errors complained of were made a ground of special exception in such court, does not apply in a criminal case where there is no proof that an offense has been committed.

Appeal from circuit court, Union county; W. S. FEATHERSTON, Judge.

Appellant was indicted for selling whisky in violation of the local option act. It was proved that he sold whisky, but there was no proof that the local option act had been put into operation in said county. A verdict of guilty was rendered against Bryant, and he made a motion for a new trial "because the verdict was contrary to the law and the evidence." Said motion was overruled, judgment entered against him, and he appealed. Bryant did not make special exception to the want of proof that the local option act had been put into operation in the county.

Z. M. Stephens and Strickland & Bates, for appellant. T. M. Miller, Atty. Gen., for the State.

ARNOLD, J. The offense of which appellant was convicted, is charged to have been committed in violation of the local option act; but there is no proof whatever of that act having been put into operation in Union county, and in such case no penalty could be imposed or punishment inflicted under its provisions. *Norton v. State*, 14 Tex. 388; *Loughridge v. State*, 6 Mo. 294. The motion for a new trial, alleging that the verdict was contrary to the law and the evidence, should have been sustained. Section 1433 of the Code, to the effect that no judgment shall be reversed because of any error or omission in the case in the court below, unless the record shows that the errors complained of were made a ground of special exception in such court, does not operate in any case so as to supply the proof necessary to show that the offense charged has been committed. Reversed and remanded.

(65 Miss. 445)

## BROOKS v. STATE.

(Supreme Court of Mississippi. May 7, 1888.)

## INTOXICATING LIQUORS—SALE BY DRUGGISTS—CERTIFICATE BY PHYSICIAN.

A licensed druggist was indicted for selling alcohol in a county where the local option act of Mississippi was in force. He showed that the purchaser represented that the alcohol was to be used for medicine. The court charged that the jury must convict if defendant had no certificate from a physician to make the sale. Held, that the question of defendant's good faith in making the sale should have been submitted to the jury, and that the charge as given was erroneous, as act Miss. March 11, 1886, § 9, permits such sale without a certificate.

Appeal from circuit court, Lee county; L. E. HOUSTON, Judge.

Brooks was a licensed druggist. He sold to a certain party some alcohol on the representation of that party that it was to be used for medicine. The local option act was in effect in the county. On the trial the above facts were proved; and the court refused the instruction for Brooks to the effect that, if the jury believe from the evidence that Brooks sold the alcohol in good faith for medicinal purposes, they will acquit, and gave an instruction for the state to the effect that the jury should find defendant guilty if they believed he sold the alcohol without having a certificate from a physician to so do. Verdict and judgment were rendered against him, and Brooks appealed.

*J. L. Finley and A. J. Russell*, for appellant.

CAMPBELL, J. The instruction asked by the state should have been refused, and that asked by the defendant should have been given. A prescription by a physician is not necessary to enable one to purchase alcohol of a druggist for medicinal purposes. A licensed druggist may lawfully sell "pure alcohol for medicinal or scientific or mechanical purposes" by express authority of section 9 of "An act for preventing the evils of intemperance, etc.," approved March 11, 1886, which does not require any certificate of any person; and the only question in case of an indictment for such sale is whether the sale was for the purpose authorized. Reversed and remanded.

#### EVANS v. STATE.

(*Supreme Court of Mississippi. May 7, 1898.*)

##### 1. ARSON—EVIDENCE—ADMISSIONS.

On a trial for arson an instruction that the reason why defendant's admissions were received in evidence against him was that the law presumed that he would not make untrue admissions against himself, should not be given where the only evidence of that kind is that defendant said that "if he did not know that he had not made a track near the cotton-house, he would have said it was his own."

##### 2. SAME—INSTRUCTIONS—PROOF OF GUILT—PARTIAL CONSIDERATION OF EVIDENCE.

On a trial for arson it is erroneous to instruct the jury that if, on "a partial consideration of the evidence they were satisfied beyond a reasonable doubt of the guilt of the defendant, they should find him guilty."

Appeal from circuit court, Montgomery county; C. H. CAMPBELL, Judge.

Appellant, Evans, was indicted for arson. The evidence was circumstantial. The cotton belonged to him, having been picked and put in house in field which he had cultivated. It was burned at night. Evans, with others, went to inform the owner of the place with whom he worked of the fact of the fire. When parties were hunting for evidences as to who did the burning it was testified that Evans would try to efface a track when one was discovered. That he said "some one on the place did the burning." That a few days before he had said he would not care if it did burn. He was tried and convicted and sentenced, from which he appealed.

*Sweatman & Trotter*, for appellant.

COOPER, C. J. In view of the fact that the cotton in the house was the property of appellant, it is difficult to attribute a motive in him to commit the arson of which he has been convicted. The evidence is circumstantial, and though we do not now say that a verdict upon it ought to be vacated as not sufficiently supported, it should at least follow upon a trial in which no error has intervened. Such is not the case here. By one instruction the jury were informed that the reason why admissions by the defendant were admitted in evidence against him was that the law assumed that he would not make untrue admissions against his own interest. We have carefully examined the record in search of the admission of the defendant to which this instruction was intended to apply, but have failed to find anything that can be construed

into an admission of guilt, or of any fact tending to establish guilt. Ordinarily abstract propositions irrelevant to the issue joined cannot be said to have operated in securing the verdict, but where, as here, declarations of the party, which prove and tend to prove nothing, as that "if he did not know that he had not made a track near the cotton-house, he would have said it was his own," are put in evidence, the court ought not to give an instruction from which the jury make take warrant in dealing with the indeterminate evidence as "admissions" of the accused.

There is, however, a more serious error in the record. By one instruction the jury was told that if, upon "a partial consideration of the evidence, they were satisfied beyond a reasonable doubt of the guilt of the defendant, they should find him guilty." We have supposed the record to be defective in this respect, but have of our own motion caused a *certiorari* to run, and in reply the clerk sends up the instruction thus written. The judgment is reversed, and cause remanded.

(65 Miss. 447)

#### HIGNITE v. HIGNITE.

(*Supreme Court of Mississippi. May 7, 1888.*)

#### TENANCY IN COMMON AND JOINT TENANCY—ADVERSE POSSESSION OF JOINT TENANT—WHAT IS.

Defendant in a bill for partition was in possession of the land in question, claiming that he had held it adversely to his co-tenant, under a deed from the deceased owner's widow, during the statutory period, but it appeared that such deed had never been recorded, and there was no proof that plaintiff ever had notice of it. Held, that defendant's possession was not adverse to plaintiff, and partition should be decreed.<sup>1</sup>

Appeal from chancery court, Prentiss county; B. McFARLAND, Chancellor.

One John Hignite died seized and possessed of the land in controversy, leaving a widow and several children. The widow died, and appellant, Martha Hignite, exhibited her bill for a partition of the land, setting up her claim as a co-tenant with appellee, Needham Hignite, who was in possession of the land. Needham Hignite claimed the whole land, relying for his title on a deed from the widow of John Hignite to him, but which had never been recorded, and also set up the statute of 10 years' adverse possession. There was a decree in favor of Needham Hignite, from which Martha Hignite appealed.

*Clifton & Eckford*, for appellant. *B. B. Boone, B. A. P. Selman*, and *Brame & Alexander*, for appellee.

COOPER, C. J. The complainant should have had a decree for partition. There is no sufficient evidence of an adverse holding by the co-tenant in possession to put in operation the statute of limitations as against the others. True it is that he bought the land, or took a deed therefor, from the widow of the common ancestor; but there is no evidence that complainant had notice thereof, or ever heard that he claimed to be the owner of the whole interest in the land. A tenant in common out of possession has a right to rely upon the possession of his co-tenant as one held according to the title, and for the benefit of all interested, until some action is taken by the other evidencing an intention to assert adverse and hostile claims. If one enters upon the land of a sole owner, and without his consent, he must know that such possession exists, and within the time permitted by law take steps to vindicate his right. But the possession of a co-tenant is a lawful possession, and of and by itself is not evidence of an ouster. The decree will be reversed, and cause remanded.

<sup>1</sup> On the general subject of adverse possession as applicable to co-tenants, see *Berg v. McLafferty*, (Pa.) 12 Atl. Rep. 460, and note.

(65 Miss. 437)

**PREWITT v. STATE.***(Supreme Court of Mississippi. May 7, 1883.)***CRIMINAL LAW—NEW TRIAL—SEPARATION OF JURY.**

During the trial of a person for an assault and battery not felonious, the jury were allowed to separate during a recess of the court before verdict. One of the jurors, while at a distance of about 100 yards from his fellows, had some conversation with an attorney. *Held*, that a motion for a new trial because of such separation was properly denied where nothing improper was alleged; the separation of the jury in misdemeanor cases being within the discretion of the court.

Appeal from circuit court, Calhoun county; A. T. ROANE, Judge.

Prewitt was indicted for assault and battery. After the jury was organized, and during trial, the court instructed that the jury should not separate, but should be kept together, except that at recess of court the jurors might feed and water their horses. After the testimony was all in, the court took recess for dinner, and an attorney met one of the jurors about 100 yards from his fellows, and asked the juror what he was doing there, and if a verdict had been rendered, to which the juror replied that no verdict had been rendered, but that he was engaged in feeding and watering his horse. Nothing else is shown or charged to have occurred. Prewitt was convicted, and made a motion for a new trial on the ground of the separation of the jury, alleging that while nothing improper had been shown, yet they might have been subject to undue and improper outside influence. Judgment was rendered overruling the motion, and entered against Prewitt, from which he appealed.

I. T. Blount, for appellant. T. M. Miller, Atty. Gen., for the State.

ARNOLD, J. If appellant had been tried and convicted of a felony, instead of a misdemeanor, the exposure of the jury of which he complains would be a serious obstacle against affirming the judgment against him. Courts in this state have no authority to allow juries engaged in the trial of persons charged with felony to separate and disperse before verdict; but the law is different in regard to misdemeanors. As to the latter, it is within the discretion of the presiding judge, both under the English and American practice, to permit the jury to separate and disperse as in civil cases before verdict, under instructions from him that they shall not converse with any person about the cause, or suffer such conversation in their presence, or read newspaper reports or comments in regard to it, and the like. 1 Bish. Crim. Proc. § 996; 3 Whart. Crim. Law, §§ 3166a, 3901; Thomp. & M. Jur. § 317. We find nothing in the record to vitiate the verdict. There is no error in the record, and the judgment is affirmed.

(83 Ala. 595)

**MOBILE SAV. BANK v. McDONNELL.***(Supreme Court of Alabama. December 7, 1887.)***1. ASSIGNMENT—OF NON-NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSER—FAILURE TO SUE MAKER.**

Under Code Ala. 1876, §§ 2112, 2116, providing that, to charge an indorser of certain instruments, suit must be brought against the maker at the first court after making the indorsement to which suit can be brought, it is necessary, in order to hold an indorser on a note payable "at call," which, by custom, means on demand, to bring suit at the first court after the indorsement, not the first court after the demand for payment.

**2. NEGOTIABLE INSTRUMENTS—WHAT ARE—NOTES PAYABLE ON CALL.**

A note payable "at call" is not embraced in the statutory exceptions in Code Ala. 1876, § 2112, providing that "on all contracts assigned by writing, except bills of exchange or other instruments, and notes payable in money at a bank or private banking-house, or a certain place of payment therein designated, to charge the indorser or assignor, suit must be brought against the maker . . . to the first court to which suit can properly be brought."

Appeal from city court of Mobile; O. J. SEMMES, Judge.

Action against indorser on a promissory note. This action was brought by the Mobile Savings Bank, a domestic corporation, against James McDonnell, and was commenced on June 4, 1886. The cause of action was the defendant's indorsement of a note or due-bill, which is copied in the opinion of the court. By its several rulings on the pleadings, the court below held that the defendant was discharged, because of the plaintiff's failure to sue the maker to the first court. Judgment was for defendant, plaintiff appeals, and these rulings are now assigned as error.

*Messrs. Hamilton*, for appellant. *J. Little Smith* and *G. L. Smith*, for appellee.

CLOFTON, J. This action was brought by appellant against James McDonnell, in his life-time, the testator of appellee, as indorser of a note, of which the following is a copy: "MOBILE, May 19, 1884. Due the Mobile Savings Bank sixty-five hundred dollars, value received, payable at call. \$6,500. P. BURKE." The complaint contains several special counts, to each of which a demurrer was interposed and sustained. While the special counts present the claim in different forms, a decision of the case does not require the consideration of many questions raised and argued. The liability of the indorser is determinable on the sufficiency and legal effect of the following substantial averments, which, on demurrer, are assumed to be true: That the consideration of the note was a loan of money, and it was indorsed contemporaneously with the loan. By a custom prevailing among the banks in Mobile, known to the indorser, a note payable "on call" bore interest from date, and did not become due until payment was called for or demanded. Interest was paid to February 1, 1885, and in July thereafter payment of the note was called for. On failure to pay, suit was instituted, against the maker, to the first court to which suit could be brought after call for payment was made, and judgment obtained. Execution having been issued, and returned "No property," this action was instituted against the indorser. The defense is that the indorser is discharged by reason of the failure of the plaintiff to use the statutory diligence in bringing suit against the maker. This is the decisive question of contention, the solution of which depends on the applicability and construction of the statutes defining the liability of indorser on non-commercial paper; several terms of the circuit and city courts having passed after the making of the indorsement, and before call for payment, and institution of suit against the maker.

A note payable "on call" is the same as payable "on demand," and we shall so consider the note in suit. 1 Daniel, Neg. Inst. § 599. The status of a party whose name is irregularly indorsed on paper not mercantile—whether a co-maker, surety, guarantor, or strictly an indorser, or dependent upon intention—is now an unimportant and immaterial question in this state. By the doctrine, too well and long settled, by both judicial construction and legislative enactments, to be the subject of controversy, the contract of the indorser on such paper is conditional, and does not become an absolute undertaking except upon compliance with the requirements of the statutes regulating and determining the liability of such indorsers, or on a sufficient excuse for non-compliance. *Jordan v. Garnett*, 3 Ala. 610; *Price v. Lavender*, 38 Ala. 389; *Hooks v. Anderson*, 58 Ala. 238. And a complaint against the indorser, which fails to aver or excuse suit against the maker as required by the statutes, does not disclose a substantial cause of action. *Cook v. Insurance Co.*, 53 Ala. 37. The statute requires that "on all contracts assigned by writing, except bills of exchange or other instruments, and notes payable in money at a bank or private banking-house, or a certain place of payment therein designated, to charge the indorser or assignor, suit must be brought against the maker, in the county of his residence, to the first court to which suit can properly be brought after making the indorsement or assignment; and, if

judgment is obtained, execution must be issued returnable to the next court thereafter, and his inability to answer such judgment proved by the return of 'No property.'" Code, § 2112. This and the correlative sections of the Code had their origin in the act of 1828, and the judicial construction of the act, which was enacted, as stated in the preamble, because "much injury had been done to the citizens of this state by means of the uncertainty of the decisions of the courts of this state in relation to the proper time at which indorsees of bills, notes, bonds, and other instruments made negotiable by indorsement, by law, shall make demand of payment of the payers of such negotiable instruments." To remedy the evil, the act, after declaring that the remedy on bills of exchange and notes payable in bank shall be governed by the rules of the mercantile law, as to days of grace, protest, and notice, made assignable all other contracts in writing for the payment of money or property, or for the performance of any duty, and authorized the assignee to maintain such suit thereon as the obligee or payee could have done: "provided, suit be brought to the first court of the county where the maker resides to which suit can be brought; and if he shall fail to sue the maker to the first court, as herein provided for, the indorser shall be discharged from liability, unless suit shall be delayed by his consent." Clay, Dig. 382. In *Jordan v. Garnett*, *supra*, which was decided in 1842, the act was construed as not providing for an irregular indorsement on paper not mercantile; and it was held that the indorser was liable to pay the debt, if it could not be obtained from the maker by the use of proper diligence; but it was further held that, by analogy, to constitute such diligence, the maker must be sued to the first court after the maturity of the note, unless the failure to sue was excused by some valid reason. This interpretation of the statute was followed in the subsequent case of *Bulford v. Johnson*, 15 Ala. 385. By this judicial construction, such irregular indorsements were practically brought under the influence of the act of 1828, which was incorporated, by legislative enactment, in the Code of 1852, and now constitutes section 2116 of the Code of 1876. This section provides that all assignments or indorsements, in writing, of the contracts embraced by the provisions of sections 2112 and 2113, whether regular or irregular, must be construed as within the meaning of sections 2112 to 2115, inclusive, unless the contrary clearly appears from such assignment or indorsement; and, while the provisions are extended to both regular and irregular indorsements, the statute specifically enumerates the cause which shall excuse from bringing suit, obtaining judgment, and issuing execution, as thereby required, which is a significant and material departure from the act of 1828. Code, § 2115. The complaint does not aver either of these causes.

The terms of section 2112 are sufficiently comprehensive to include the note in suit,—“all contracts assigned by writing, except bills of exchange or other instruments, and notes payable in money at a bank or private banking-house, or a certain place of payment therein designated.” A note payable on demand is not embraced in the statutory exceptions, and to incorporate such exception by construction would be judicial legislation. This legislation has relieved us of the embarrassment which might otherwise arise from the contrariety in the decisions, and of having to choose between the conflicting rules maintained by different courts, independent of statute, in reference to the time presentment must be made and notice given to charge the indorser of a note payable on demand. Neither the convenience of the maker to pay, nor notion of credit, nor pleasure of the holder, nor the unexpressed intention of the parties, is to be considered or regarded. The statutory rule is simple and definite, operating to withdraw the question of time and mode of demand, and of excuses to be deemed valid, from the province of judicial interpretation and decision. Whether a note is payable at a designated time or on demand, the statute peremptorily declares that, in order “to charge the indorser or assignor, suit must be brought against the maker, in the county of his resi-

dence, to the first court to which it can properly be brought after making the indorsement or assignment." Which is the first court to which the holder can properly bring suit after making the indorsement? is the sole question which the statute submits to ascertainment by the court. This being determined, the statute operates to discharge the indorser, unless suit is brought to such court, or unless bringing suit is excused by reason of some one of the enumerated statutory excuses. Ordinarily, suit may be properly brought on a note payable on demand, without a previous call for payment. No day of payment being designated, a present duty is imposed. The statute of limitation commences to run from the date of the note. *Owen v. Henderson*, 7 Ala. 641. And in *Hunter v. Wood*, 54 Ala. 71, it is said: "It has been long settled, whether logically or not, that suit on a note payable on demand may be brought without previous request of payment; the bringing suit being itself considered a lawful demand." For the purposes of suit, such paper is regarded as presently due and payable. On the day succeeding the execution of the note and making the indorsement, the plaintiff could have properly and legally instituted suit against the maker, unless something intervened to take it without the operation of the general rule. The statute was enacted without modification or qualification, in view of the legal rule that the holder could properly bring suit on a demand note without a previous demand of payment. The legal rules governing the time when suit may be properly brought on any of the contracts embraced, are incorporated in the statute by general reference. Appellant contends that, by the usage among the banks in Mobile, the note in suit did not become due, and was not suable without a previous demand of payment, and that suit against the maker to the first court after such demand is a compliance with the statutory conditions. In considering the effect of the usage, it should be borne in mind that the controversy is between the holder and indorser, and relates to the contract of indorsement, and the question is whether it operates to change or modify the general rule, and to postpone the time when suit could have been properly brought against the maker. The office of a usage or custom in trade has been often considered, and may be regarded as settled. Generally, it is used as a mode of interpretation, and its proper office is to ascertain and explain the meaning and intention of the parties to a contract, when this cannot be done without the aid of extrinsic evidence. It may be used to incorporate a stipulation or element in respect to which the contract is silent, and in such case becomes a part thereof. Though the dealings of parties are presumed to be conducted in reference to an established and known usage, and the same may therefore be employed to supply the unexpressed, or to explain the dubious, terms of their agreements, it is inadmissible to vary, contradict, or explain the express or clearly-implied terms; and, while it may be admitted to modify the application of the general rules of law, usage or custom cannot effectually contravene or displace any of the general principles of statutory or common law. It is powerless to perform the office of legislation. *Railroad Co. v. Johnston*, 75 Ala. 596; *Grace v. Insurance Co.*, 109 U. S. 278, 8 Sup. Ct. Rep. 207. We have not stated the foregoing general principles for the purpose of testing the validity of the alleged custom, but to enable us, by construing it in harmony with them, to reach a correct conclusion as to its scope and operation. Under our construction, it becomes immaterial, and of unnecessary decision, whether or not, were its effect and operation as contended, the custom is repugnant to the statutes and to legal rules; whether or not, instead of modifying the application of the principles of statutory and common law, it abrogates the statutory provisions and the legal rule that a note payable on demand is properly suable without a previous request of payment, and contravenes and displaces the statutory conditions on which the liability of the indorser becomes an absolute undertaking. All customs in derogation of statutory or common law should be strictly construed, and

nothing will be presumed to be within them which is not clearly implied. The usage should be construed in connection with the statutory provisions, and a field of operation given limited to its proper office, if reasonable, without overriding or colliding with the statutes. The averments of the complaint are "that it was then; and for a long time before had been, the usage and custom of the several banks in the said port of Mobile to loan and advance money to their customers upon satisfactory paper, payable on call; and, according to such usage and custom of said banks, such paper bore interest from the date thereof, and payment was liable to be called for by the lender at any time, but, until called for, such paper, according to such usage and custom, did not become due." As to interest, the usage may avail, but it does not operate to postpone the suability of the note. The right of the holder to call for payment at any time is expressly recognized, and no particular mode of calling is fixed or prescribed. The implication is that he may make demand in any manner authorized by the law, independent of the usage. The usage does not conflict with the rule that the institution of suit is considered a lawful demand. If suit were brought without a previous request of payment, the usage would not avail to abate it as prematurely brought, nor to prevent the statute of limitations from commencing to run from the date of the note. While it may be that, as between the holder and the maker, the note does not become due for some purposes until call for payment, we are unable to see in what respect the usage varies or modifies the legal effect of the note as to its suability, to which alone the statute has reference in respect to the liability of the indorser. The purpose and policy of the statutes relate to the protection of the indorser, by requiring speedy suit against the maker, and the money obtained from him, if by such diligence it can be done; founded on the moral and equitable principle that the maker should pay his own debt, to the exoneration of the indorser. It is not the intention of the statutes to submit to the holder, in any case, the determination of the time when the suit shall be brought. The power to extend or waive is solely lodged with the indorser, and the extension and waiver is valid and binding only when he contracts in writing, signed by him. Code, § 2114. By the law and the usage the plaintiff had the right to demand payment at his will, and to make such demand by bringing suit. In such case the statute is mandatory that as between the holder and indorser, in order to charge the latter, the former shall exercise the right, and make demand, by bringing suit against the maker to the first court to which suit can properly be brought after making the indorsement. The date of making the indorsement is the initial point of time in the computation, and "properly" is the qualifying and controlling word in reference to the court to which suit must be brought. Suit can be properly brought when the law confers the right to sue. Under this construction of the usage, it does not contravene any of the statutory provisions. The plaintiff is not permitted to determine at pleasure the term of the court to which suit must be brought against the maker to charge the indorser, and the policy of the statute is upheld. No hardship nor uncertainty, in such transactions, results from this conclusion. Whoever accepts a note payable on demand, indorsed, may protect himself by requiring the written consent of the indorser to extend or waive the time for bringing suit. The result is an affirmation of the judgment.

(84 Ala. 228)

WILLIAMS v. GIBSON.

(Supreme Court of Alabama. May 30, 1883.)

**1. MINES AND MINING—GRANT OF MINERAL RIGHTS—RIGHT OF GRANTEE TO OPEN MINES AND OCCUPY SURFACE.**

An express grant of all the minerals and mineral rights in a tract of land is by necessary implication the grant also of the right to open and work the mines, and to occupy for this purpose as much of the surface as may be reasonably necessary.

and this right is not limited by a special grant of certain timber and water privileges and a right of way, such specifications tending rather to strengthen the implication of the right to occupy the surface.

**2. SAME—OCCUPATION OF SURFACE BY GRANTEE OF MINERAL RIGHTS—IMPROVEMENTS NECESSARY TO WORK MINES.**

What improvements are reasonably necessary for the profitable and beneficial working of a mine, and to what extent the surface may be reasonably occupied for this purpose, are questions of fact for the jury.

**3. SAME—OCCUPATION OF SURFACE BY GRANTEE OF MINERAL RIGHTS—EJECTMENT—EVIDENCE.**

In ejectment for the surface of a tract of land out of which minerals had been granted, evidence as to how much of the surface was or might be needed for the erection of coke ovens is properly excluded, the grant conveying no right to use the land for that purpose.

**4. SAME—EJECTMENT FOR SURFACE OF MINERAL LAND—EVIDENCE—MINING CUSTOMS.**

In ejectment for the surface of land used in working a mine it is incompetent, for the purpose of proving the extent of land necessarily occupied, to show that particular individuals in the neighborhood carried on a mine without a store-house for supplies, where the business of mining in the vicinity is of too recent date to establish a custom.

**5. SAME—EJECTMENT FOR SURFACE OF MINERAL LANDS—EVIDENCE—SUPPLY STORES.**

In ejectment for the surface of land used in working a mine, where it appeared that defendant had established a supply store, it is not error, for the purpose of testing the necessity of occupying the land for such purpose, to show that two other stores were located near the mine.

**6. SAME—EJECTMENT FOR SURFACE OF MINERAL LANDS—EVIDENCE—IMPROVEMENTS.**

In ejectment for the surface of land used in working a mine, evidence of the value of improvements made by defendant on the land in controversy is relevant as affecting its rental value.

**7. FRAUDS, STATUTE OF—CONTRACT FOR PURCHASE OF LAND—WHEN WITHIN STATUTE.**

A verbal contract for the purchase of land, having never been reduced to writing, nor accompanied by payment of any part of the purchase price, is within the statute of frauds, and confers no rights which would prejudice the parties to an ejectment suit for the land.

Appeal from circuit court, Walker county; S. H. SPROTT, Judge.

This was an action in the nature of ejectment under the statute, brought by appellee, Gibson, for the "surface" of certain lands out of which the "minerals," etc., had been previously granted, described in the complaint as follows: "The north-east quarter of south-west quarter, and all that part of south-east quarter of south-west quarter situate or lying north of the Georgia Pacific Railway, section 28, township 15, range 9 west, situate in said county of Walker, state of Alabama, except all the coal and other minerals in, under, and upon said lands; and also except all timber and water upon the same, necessary for the development, working, and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; also the right of way and the right to build roads of a description over the same, necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said land all material and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." The plaintiff deraigns title to the "surface," as above described, from Green B. Frost; and likewise, the defendant deraigns his title to the "minerals," etc., from the same ancestor, through several mesne conveyances. The witness Smith, mentioned in the last paragraph of the opinion, was one of the intermediary owners of the mineral rights, etc., between said Frost and appellant, Williams. Williams disclaimed all interest in the surface property sued for, excepting three acres, with the structures thereon erected. There was no evidence that any part of said three acres had coking ovens erected thereon, or that appellant was occupying any part thereof for such ovens.

*McGuire & Collier and Webb & Tullman*, for appellant. *Hewitt, Walker & Porter*, for appellee.

SOMERVILLE, J. The present suit, which is one of ejection under the statute, involves a controversy between the superjacent and subjacent owners of land upon which there is a coal mine, opened and in process of being worked by the defendant. The plaintiff, Gibson, is the owner of the surface, and the defendant, Williams, of the "coal and other minerals," with certain incidental and other rights, derived through various mesne conveyances from one Green B. Frost, the original owner in fee-simple of the premises. In November, 1881, Frost conveyed to one Peters "all the coal and other minerals in, under, and upon" these lands, which are fully described in the deed; "and also all timber and water upon the same, necessary for the development, working, and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; and also the right of way, and the right to build roads of any description over the same, necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." Subsequently, in August, 1884, Frost conveyed the same lands to one C. L. Frost and J. B. Reeves, reserving by exception from the land sold the mineral rights and other interest previously conveyed to Peters, using the same language of description adopted in the deed to him. The defendant is shown to have acquired by deed, through sundry mesne conveyances, the precise interest which Peters owned. This interest may be briefly described under three general heads: (1) A grant of all the coal and other minerals upon or in the land; (2) so much of the timber and water on the land as may be necessary (a) for the development, working, and mining of the coal and other minerals, and (b) for the preparation of the same for the market, and their removal from the soil and premises; (3) the right of way, by roads of any description, to and from the lands, so far as may be necessary for the transportation of all minerals mined, and of materials and implements needed in the business of mining and the preparation of the minerals for market.

The material question is what, if any, surface rights pass to the grantee under the first head, which is a grant of all the coal and other minerals upon and in the land. This is dependent in some measure upon the nature and characteristics of the thing granted. Minerals which are severed from the soil, or, as sometimes said, which are "in place," are parts of the freehold, and constitute landed property. They are capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance. The title of the soil, as such, including the surface, may be vested in one person; and that of the mines and minerals on it in another. It is only when the minerals are severed from the soil that they become personal chattels, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right or easement merely in the nature of a license. *Bainb. Mines*, (Amer. Ed.) \*3, \*261; *Massot v. Moses*, 3 S. C. 168, 16 Amer. Rep. 697; *Caldwell v. Fulton*, 81 Pa. St. 475; *Melton v. Lambard*, 51 Cal. 258; *Ryckman v. Gills*, 57 N. Y. 68, 15 Amer. Rep. 464. The express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also of the right to work them, unless the language of the grant itself repels this construction. This is the result of the familiar maxim that "when anything is granted, all the means of obtaining it, and all the fruits and effects of it, are also granted." 1 Shep. Touch. 89; 11 Coke, 52a. This involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and of the improvement in the arts and sciences, but without injury to the support for the surface or superincumbent soil in its natural state.

*Marvin v. Mining Co.*, 55 N. Y. 538, 14 Amer. Rep. 322; *Wilms v. Jess*, 94 Ill. 464, 84 Amer. Rep. 242; *Bainb. Mines*, \*85, \*62, \*63. It is said by a standard English author, touching this subject: "The right to work mines is so inseparable from the grant of them that it has been expressly decided, not only that the right to enter and work mines is necessarily incident to the grant of mines, without any express authority for that purpose, but that this power cannot be restrained by a special power given in the affirmative, which would authorize more acts than would be implied by law, but which will in nowise exclude the full operation of the law." *Id.* (Amer. Ed.) 84, 85.

It is contended that this incidental right to work the mines on the land is limited by the special grant of certain timber and water privileges, and of the right of way to and from the mines, and that the mention of these privileges under the maxim, *expressio unius, est exclusio alterius*, would rebut the grant of any right to occupy the surface of the soil for miners' houses, or other like purposes. It is often said that great caution is frequently necessary in the application of this maxim and of its twin legal aphorism of synonymous meaning, *expressum facit cessare tacitum*. *Broom, Leg. Max.* \*506. It is obvious that without the right of surface occupation to some extent the grant in question is rendered nugatory. The principle is well settled that one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations. *Turner v. Reynolds*, 23 Pa. St. 199; *Rogers Taylor*, 38 Eng. Law & Eq. 574; *Railroad Co. v. Railway Co.*, 75 Ala. 524, 525. To construe away this right would be to construe away the grant itself, which cannot be enjoyed without it. It is our opinion that the enumeration of these special privileges was not intended to exclude another which was absolutely necessary to the very life of the grant itself. The right to use timber would not pass by implication. *Bainb. Mines*, \*64. This was, therefore, the acquisition of a new and valuable right. The right of way and water privileges were also more comprehensive, possibly, than would have been yielded pacifically by mere construction. At any rate, these several grants themselves necessarily imply the right to occupy so much of the surface as might be needed to open and work the mines. There could be no use of timber, or water, or right of way, except in connection with working the mines, and there could be no working of the mines without an occupation of the surface in the vicinity of the shafts, slopes, or other requisite openings. These specifications strengthen, rather than repel, the implication in question. *Marvin v. Mining Co.*, 14 Amer. Rep. 329, *supra*; *Bainb. Mines*, \*84, \*85. The owner of the minerals and mining rights must use his own so not unreasonably to injure his neighbor, the owner of the surface or soil; and it is, we repeat, now settled by the authorities quite universally that he must conduct his mining operations so as to leave a sufficient support for the surface. *Carlin v. Chappell*, 101 Pa. St. 848, 47 Amer. Rep. 722, and cases cited; *Harris v. Ryding*, 5 Mees. & W. 69; *Rog. Mines*, 455. In other words, the exclusive grantee of minerals in lands is entitled to dig and carry away so much of them as he can excavate from the soil without injure to the surface owned by the grantor; the mining right being servient to the surface to the extent of sufficient supports to sustain it in its natural state. *Jones v. Wagner*, 5 Amer. Rep. 385. But he is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of his mines, not injurious to the surface, as, for example, the loss of springs by the owner of the soil, (*Coleman v. Chadwick*, 80 Pa. St. 81, 21 Amer. Rep. 93;) or the disturbance of the peace and comfort of the surface owner's dwelling by necessary blasting in the mines, (*Marvin v. Mining Co.*, 14 Amer. Rep. 322.) These incidental rights of the miner, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the

surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities, as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property. But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention. *Bainb. Mines*, 63, 64; *Marvin v. Mining Co.*, *supra*. It has been accordingly held in England that a reservation of mines of coal, (which is usually the same, in legal effect, as a grant,) with rights of way for transportation, involved the right to construct a modern railway, although this mode of transportation was unknown at the time of the grant. The ground of the decision seems to have been that, without use of the railway for shipment, the mines could not, under the evidence, have been worked beneficially or with reasonable profit.

We do not construe the language of the present grant or reservation, as it appears in the deeds of the plaintiff and those under whom he claims, to confer any right, by implication or otherwise, to use the surface of the land for the purpose of erecting coke ovens, designed for the conversion of coal into coke. His only right is to mine and transport coal in its marketable state. The contract clearly contemplated nothing else. Such is the usual construction placed upon similar grants; the principle being thus stated by *Bainb. Mines*, 63: "An owner of that kind cannot use the surface or any of the materials of the land for changing the character of the mineral to which he is entitled, as for converting coal into coke, clay into bricks, or for smelting the metallic ores, much less for any further purpose of manufacture."

The evidence shows that the defendant claimed the right to occupy as much as three acres of the surface of plaintiff's land as incident to his grant. Upon this area he had erected five two-story frame miners' houses, four log cabins for the occupancy of employees, an air-shaft for conveying smoke from and ventilating the mines, a powder-house for keeping powder used for blasting, a blacksmith shop, and a store-house for furnishing the miners with supplies. Which of these improvements are reasonably necessary for the profitable and beneficial working of the mines is a question of fact to be determined from the evidence by the jury; and so, likewise, the inquiry as to how much of the surface of the land may be reasonably needed for this purpose. It may be that other suitable lands, conveniently situated, could be obtained at a reasonable price for the site of the miners' houses, the cabins, and the store; or the contrary may be true. It may be that the mine was so far distant from the market for supplies, and that prices in neighboring stores were so extravagant, as to render necessary the establishment of a supply store, both for the economy of time and money of the employees. It may be that such a store was a mere convenience, and not a necessity, within the meaning of the law, for this necessity cannot be deemed to exist if a similar privilege can be otherwise secured by reasonable trouble and expense. *O'Rorke v. Smith*, 23 *Amer. Rep.* 446, note; *Tied. Real Prop.* §§ 606, 609. These and other like considerations it would be proper for the jury to consider in solving the question of necessity,—a word of relative import, which may mean, on the one hand, less than imperative need, and, on the other, more than mere suitable convenience. It is manifest that the rulings of the circuit court were not in harmony with these views, including both the instructions to the jury and the rulings on the evidence. The defendant should have been permitted to show to what extent his occupancy of the surface of the lands around the opening of the mine was reasonably necessary, under the above rules, to the prosecution of the mining business. The evidence as to how much of the surface was or might be needed for the erection of coke ovens was properly excluded. It was not competent to show that particular individuals in the neighborhood carried on a mine without a store-house for supplies, although a usage in the matter by other miners similarly situated might be relevant if

it had prevailed sufficiently long, and possessed the other requisite characteristics of an established custom. But the business of mining in this particular part of the state is probably of a date too recent at this time to give such a custom the age necessary to its validity. The court did not err in allowing evidence to be introduced showing that two other stores were located near the mine. It was quite as relevant to show that there were two stores near by as that there were two hundred, with the view of testing the urgency of the alleged necessity impelling the defendant to establish one for his own needs. The two cases differ only in degree, not in kind.

The value of the improvements erected by the defendant around the mines was relevant as affecting the rental value of the three acres of land sued for, the defendant being liable for rent by way of use and occupation in the event of plaintiff's recovery.

The verbal contract of purchase, which the witness Smith testifies he made, of a part of the surface in controversy, from Frost & Reeves, who sold to the plaintiff, was never reduced to writing, nor accompanied by a payment of any part of the purchase money. It was, therefore, void under the statute of frauds, and could confer no rights on the alleged purchaser which would prejudice those of either party to the present suit. The judgment is reversed, and the cause remanded.

(84 Ala. 449)

#### BOGAN v. STATE.

(*Supreme Court of Alabama. May 31, 1888.*)

##### 1. INTOXICATING LIQUORS—CRIMINAL PROSECUTION—INDICTMENT—SUFFICIENCY.

An indictment charging that defendant "sold vinous or spirituous liquors without a license" is sufficient; as within the express terms of Code Ala. 1886, § 4087, prescribing the form of indictment for the violation of special prohibitory laws.

##### 2. SAME—AVERMENTS OF INDICTMENT—EXCEPTIONS OF DRUGGISTS AND PHYSICIANS.

An indictment under Code Ala. 1886, § 4087, for retailing spirituous liquors without a license, need not aver that the defendant does not come under the exceptions of druggists and physicians, who may lawfully sell spirituous liquors under the provisions of Acts Ala. 1880-81, pp. 167, 168, but this matter may be set up in defense.

Appeal from circuit court of Cherokee county; JAMES AIKEN, Judge.

The indictment under which the defendant in this case was tried and convicted, was in the following language: "The grand jury \* \* \* charge that before the finding of this indictment, that Zack Bogan sold vinous or spirituous liquors without a license, and contrary to law, against," etc. On the trial of the cause in the court below, the defendant demurred to the indictment. The court overruled the demurrer, and the defendant duly excepted.

T. N. McClellan, Atty. Gen., for the State.

SOMERVILLE, J. The indictment was in the form prescribed by section 4087 of the Code of 1886, which constituted section 4806 of the Code of 1876, and by the express terms of the statute itself is made sufficient to cover "all violations of special and local laws regulating the sale of spirituous liquors within the place specified." *Powell v. State*, 69 Ala. 10; *Boon v. State*, Id. 226. If the defendant was a druggist or physician, and lawfully disposed of wine or liquors under the restrictions allowed in sections 2 and 3 of the act approved February 28, 1881, (Acts 1880-81, pp. 167, 168,) he should have set this fact up as a matter of defense. These particular cases were in the nature of provisos, rather than of exceptions incorporated in the enacting clause, and it, therefore, was unnecessary for the indictment to negative them by averring, in advance, that the defendant did not come within the operation of these excepted cases. *Carson v. State*, 69 Ala. 235; *Britton v. State*, 77 Ala. 202. If the last proviso of the act, contained in section 4, which permitted any citizen of Alabama to sell domestic wine, was void, as an unconstitutional discrimination against the citizens of other states, under the su-

thority of *McCreary v. State*, 73 Ala. 480, we should hold the remainder of the act to continue in full force and effect. See, also, *Powell v. State*, 69 Ala. 10, and *Tiernan v. Rinker*, 102 U. S. 123. We discover no error in the record, and the judgment must be affirmed.

(34 Ala. 173)

**ALABAMA G. S. R. CO. v. MOUNT VERNON CO.**

(*Supreme Court of Alabama*. May 23, 1888.)

**1. CARRIERS—OF GOODS—CONNECTING LINES—LIABILITY FOR LOSS.**

A railroad company which has undertaken to transport cotton from one point to another over connecting lines, without expressly limiting its liability, is regarded as contracting for the safe delivery at the point of destination, and a loss occurring on any of the connecting lines will not entitle the owner of the cotton, in an action for a breach of the contract, to recover of the connecting line, as he has no contract with such line.<sup>1</sup>

**2. SAME—CONNECTING LINES—WHEN LIABILITY ATTACHES.**

The evidence showed that defendant had received a car loaded with cotton upon its side track preparatory to shipment over its line, from the E. A. Ry. Co., which made the contract for transportation with the owner; that the two companies had made arrangements for shipping goods over each other's lines; and that defendant's agent had reported the car to the car accountant; but there was no evidence of any shipping directions from the E. A. Ry. Co. *Held*, that, though it was customary for defendant to receive such company's cars on its side track for transportation, yet it will not be presumed that the former assumed the responsibility of a carrier before knowing to whom and where to ship the cotton.<sup>1</sup>

**3. EVIDENCE—SECONDARY EVIDENCE—WHEN ADMISSIBLE—RESIDENCE OF PARTY OUT OF JURISDICTION OF TRIAL COURT.**

Where no effort is made to account for the absence of a bill of lading which had been attached to a draft paid by plaintiff, secondary evidence of its contents is inadmissible, and the fact that plaintiff resides without the jurisdiction of the court is no excuse for its non-production.<sup>2</sup>

**4. SALE—DELIVERY TO CARRIER—TITLE PASSES, WHEN.**

Where the evidence is conflicting as to whether property to be transported by a carrier was to be delivered to the vendors or the vendee, the fact that the bill of lading was deposited in the post-office attached to a draft drawn on the vendee for the purchase money does not, in the absence of evidence that the bill was properly indorsed, raise a conclusive presumption that the title has passed to the vendee, but the question of ownership is for the jury.<sup>3</sup>

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

This was an action brought by the Mount Vernon Company to recover from the Alabama Great Southern Railroad Company a certain amount alleged in the complaint for the destruction of cotton by fire while in the hands of the defendant, and alleged to be in its hands as a common carrier. Judgment for plaintiff, and defendant appeals. The second charge, referred to in the opinion, is as follows: "(2) The court charges the jury that if they believe from the evidence that the East Alabama Railway Company placed the car containing the cotton on the side track of the Alabama Great Southern Railroad Company at the usual place of putting cars loaded with freight to be transported by the Alabama Great Southern Railroad Company; that the local

<sup>1</sup> Respecting the liability of carriers for the negligence of connecting lines, see *Railway Co. v. Pritchard*, (Ga.) 1 S. E. Rep. 261, and note; *Wallingford v. Railroad Co.*, (S. C.) 2 S. E. Rep. 19; *Railroad Co. v. Rogers*, (Tenn.) 3 S. W. Rep. 680; *Association v. Wood*, (Miss.) 2 South. Rep. 78; *Knott v. Railroad Co.*, (N. C.) 3 S. E. Rep. 785; *Railroad Co. v. Avant*, (Ga.) 5 S. E. Rep. 73; *North v. Transportation Co.*, (Mass.) 15 N. E. Rep. 779; *Railway Co. v. Weekly*, (Ark.) 8 S. W. Rep. 184; *Railroad Co. v. Thomas*, (Ala.) 3 South. Rep. 802.

<sup>2</sup> As to what is necessary to render admissible secondary evidence of the contents of lost writings, see *Silva v. Rankin*, (Ga.) 4 S. E. Rep. 756, and note; *Roll v. Rea*, (N. J.) 19 Atl. Rep. 905, and note; *Crafts v. Dougherty*, (Tex.) 6 S. W. Rep. 850; *McCormick v. Joseph*, (Ala.) 3 South. Rep. 796; *Railway Co. v. Strickland*, (Ga.) 6 S. E. Rep. 27; *Roehl v. Haumesser*, (Ind.) 15 N. E. Rep. 845; *Village of Ponca v. Crawford*, (Neb.) 37 N. W. Rep. 609; *Leak v. Covington*, (N. C.) 6 S. E. Rep. 241.

<sup>3</sup> Respecting delivery to a carrier as vesting title on a sale of chattels, see *Bank v. McAndrews*, (Mont.) 14 Pac. Rep. 763; *Billin v. Henkel*, (Colo.) 13 Pac. Rep. 490, and note; *Allen v. Agee*, (Or.) 16 Pac. Rep. 687.

agent of the A. G. S. R. R. Co. checked said car, and reported the same to the car accountant of the defendant as a loaded car received from the East Alabama Railway Company; and that by this act the car was placed under the control of the defendant, and said local agent did this, and saw the car loaded with cotton before it was burned, then, in such case, this was an actual delivery of the cotton to the defendant, whether there was any custom between the defendant and the East Alabama Railway Company to receive cotton in any other manner or not."

*Samuel F. Rice* and *F. A. Dobbs*, for appellant. *W. H. Denson*, for appellee.

CLOPTON, J. When an instrument is executed in duplicate, proof of the loss or destruction, or a satisfactory excuse for the non-production, of both parts, is essential to let in parol evidence of the contents. 1 Greenl. Ev. § 558. The bill of lading under which the cotton in controversy was shipped was executed in duplicate. One part was attached to the draft drawn by the shippers on the plaintiff for the purchase money of the cotton, and was forwarded with it; the other was delivered to the attorney of the plaintiff about the time this suit was commenced. The draft having been paid, the presumption is that the bill of lading attached to it is in the possession, or under the control of, the plaintiff. While the proof was sufficient to show that the duplicate in the possession of the attorney had been lost or mislaid, there was no effort to account for the absence of the other part forwarded with the draft. The fact that the plaintiff resides beyond the jurisdiction of the court is no excuse for its non-production, when having custody thereof. In the absence of the requisite preliminary proof, secondary evidence of the contents should not have been admitted.

Appellee sues appellant to recover damages for the failure to deliver 30 bales of cotton, which the complaint avers were received by the defendant as a common carrier to be delivered to plaintiff at Mount Vernon Switch, Md. In legal effect, the complaint alleges a contract between plaintiff and defendant to transport and deliver cotton to plaintiff at the designated point of destination. The undisputed evidence shows that the cotton was received by the East Alabama Railway Company under a contract of shipment from Gadsden, Ala., to Mount Vernon Switch, the delivery of which at the point of destination necessitated transportation over connecting lines, the road of the defendant being the next intermediate line, each line receiving its proportion of the freight charged for the transportation of the cotton. On the evidence, the East Alabama Railway Company, having received the cotton to be delivered at a place beyond its own line of transportation, without expressly limiting its liability, is regarded as having contracted for safe delivery at the point of destination, and as having made arrangements with other carriers for this purpose. *Railroad Co. v. Copeland*, 63 Ala. 219. Such being the case, the obligation of the defendant was to safely transport the cotton to the terminus of its road, and deliver it to the next connecting line. There was no contract between the plaintiff and defendant to deliver the cotton at Mount Vernon Switch. The variance between the contract averred in the complaint and the contract as proved disentitles the plaintiff to recover on the complaint as framed. *Railway Co. v. Culver*, 75 Ala. 587.

Notwithstanding the judgment must be reversed for the reasons above stated, a decision of other questions presented by the record will probably serve to prevent the unnecessary embarrassment or protraction of this litigation. The cotton was carried from Gadsden to Attalla, December 22, 1884, where the car containing it was switched off on a side track connected with the road of defendant, and was destroyed by fire the third day thereafter. There was evidence tending to show that it had been the custom of the East Alabama Railway Company to transport loaded cars from Gadsden to Attalla,

and switch them off on defendant's side track, for transportation over defendant's road, before any bills of lading were issued, and shipping directions given, without objection on the part of defendant's agents; and the way-bill afterwards furnished. As to the existence of such custom the evidence was in conflict. There was evidence on the part of defendant tending to show that the East Alabama Railway Company, having no side track of its own, was permitted to switch off on the side tracks of defendant their loaded cars for Attalla, and for further transportation, as well as their empty cars, but that defendant did not receive them, and took no control over them, until furnished with way-bills or shipping directions. There was also evidence that the agent at Attalla was required to report to the car accountant department of defendant the number of each car, with the brand thereof, whether loaded or empty, that passed over the road daily, or were left on side tracks, and that in performance of this duty he noted the number or brand of the car containing the cotton, and reported it in his daily car report as loaded. On this state of the evidence, the court substantially instructed the jury that, if the agent of the defendant had been in the habit, and it had been his custom for several years, to receive from the East Alabama Railway Company cotton and other freights to be transported by defendant to points beyond Attalla, on its side tracks, without other notice than placing the car on such track, and the East Alabama Railway Company did so place the cotton on the side track, and the agent of defendant at Attalla, before the cotton was burned, checked the car containing it, and reported the same to the car accountant of defendant as a loaded car received from the East Alabama Railway Company, this was a delivery of the cotton to the defendant; and if, while it was so in the possession of defendant, to be transported over its road, the cotton was destroyed, the defendant is liable in this case, unless it shows the loss was caused by some act which exempts the defendant from liability.

The first proposition of the charge is that the custom of placing the car on the side track, and it having been so placed and checked as hypothetically stated, constitute a delivery sufficient to charge the defendant with the duties and responsibilities of a common carrier in respect to the cotton. It may be remarked that the charge is partly abstract, there being no evidence that the agent of the company reported the car to the car department as a loaded car received from the East Alabama Railway Company. The evidence in reference to this matter only shows that the agent reported the car, as his duty required, to give the car department information what cars of defendant passed Attalla, or were there, and whether loaded or empty. The general rule that, to complete a delivery, the goods must be placed in the custody of the carrier or his agents, so as to devolve on him the exclusive duty of safe-keeping, is subject to be varied by usage, or a particular course of dealing between the parties. If it was the usage of the defendant to receive loaded cars from the East Alabama Railway Company for immediate transportation at any particular place, this is tantamount to the acceptance of the freight, without further notice, when delivered at such place. But if loaded cars were switched off on a side track of defendant, there to remain until shipping directions were given, the defendant does not become a common carrier in respect to such freight until the shipping directions are furnished. "The delivery must be to the carrier or his agent, for immediate transportation; for, if the goods be delivered to him, to be stored by him for a certain time, or until something further is done, or until further orders are received from the owner, the carrier becomes a mere depository or bailee until the appointed time has expired, or the other contingency happened, upon which the carriage is to commence, or until further orders have been given, as the case may be." Hutch. Carr. § 88. Conceding the custom as shown by plaintiff's witnesses, the question remains, what is its extent and scope, and in what capacity did the defendant receive the cotton, by its terms, express or implied? When a usage or cus-

tom is in derogation of the common law, nothing will be presumed to be within its terms which is not clearly implied. *Bank v. McDonnell*, ante, 347. Assuming the custom to be as stated in the charge, it cannot be clearly implied that the defendant received the loaded cars, though placed on one of its side tracks, for transportation as a common carrier, before a way-bill or shipping directions were given. It should not be presumed that the defendant assumed the high responsibilities of a carrier, and the duty of immediate transportation, without knowing to whom and to what place to ship the cotton. Giving the usage its fullest scope, the defendant became a depository or bailee of loaded cars, placed on its side track, until further orders or directions were given.

The charge is erroneous in another respect. Whether a transaction is a sale, so as to pass the property, or a sale on condition, or an executory contract of sale, is generally regarded as a question of intention to be collected from the terms of the agreement and the attendant circumstances. Where the parties reside at a distance from each other, and the goods are to be transported by a common carrier, the bill of lading represents the property. If the goods, in pursuance of an order, are delivered to the carrier for delivery to the buyer, this is *prima facie* a constructive delivery to the vendee, and presumptively passes the property. But if, by the bill of lading, the goods are to be delivered to the order of the vendor, it clearly operates, in the absence of rebutting evidence, to retain the title in the vendor, and indicates an intention that the property shall not pass. *McCormick v. Joseph*, 77 Ala. 236. The evidence is conflicting as to whom the cotton was to be delivered to at Mount Vernon Switch. Coughland testifies that the cotton was purchased by him for and on account of Smith and Coughland, and that by the bill of lading it was to be delivered to their order at the point of destination. If this be true, they retained the *jus disponendi*. It is insisted, however, that the deposit in the post-office of the bill of lading attached to the draft, which was drawn by the vendors for the purchase money, directed to the plaintiff, is delivery of the cotton to the vendee. Such would be the presumption if the bill of lading was properly indorsed, of which there is no evidence. But this presumption may be rebutted by proof of an intention that the property should not pass until the draft was accepted, or paid, as the case may be. It does not follow from the mere deposit in the post-office of the bill of lading, unindorsed, attached to the draft, as a conclusion of law, that the property passed to the plaintiff. The payment of the draft subsequent to the burning of the cotton would not operate to vest in plaintiff the property at the time of its destruction, if it had not previously passed. The charge ignores the question of ownership, which it is incumbent on plaintiff to establish, and withdraws from the consideration of the jury the evidence tending to show that the property in the cotton had not passed to plaintiff at the time it was burned. It results that the second charge given at the request of plaintiff is also erroneous. Reversed and remanded.

(84 Ala. 159)

#### ALABAMA G. S. R. CO. v. ARNOLD.

(*Supreme Court of Alabama*. May 30, 1888.)

##### 1. RAILROAD COMPANIES—DANGEROUS PREMISES—DUTY OF COMPANY.

Where a railroad company has erected an office and platform, at a station, for the transaction of business with the public, they should be safe, and adapted for that purpose, and should, for the safety of passengers, be lighted a proper time before the arrival and departure of trains.<sup>1</sup>

<sup>1</sup>As to the duty of railway companies, as carriers of passengers, to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, etc., see *Moses v. Railroad Co.*, (La.) 2 South. Rep. 567; *Railway Co. v. Fairbairn*, (Ark.) 4 S. W. Rep. 50, and note; *Railroad Co. v. Fox*, (Tex.) 6 S. W. Rep. 560; *Fordyce v. Merrill*, (Ark.) 5 S. W. Rep. 320; *Leslin v. Railroad Co.*, (N. Y.) 12 N. E. Rep. 550, and note.

**2. SAME—DANGEROUS PREMISES—NEGLIGENCE—EXEMPLARY DAMAGES.**

In an action for damages against a railroad company for personal injuries, where the negligence complained of was the failure to provide lights at a station, in the absence of proof that the negligence on the part of the railroad was either willful, wanton, or reckless, an instruction that plaintiff cannot recover exemplary damages is improperly refused.<sup>1</sup>

**3. SAME—DANGEROUS PREMISES—NEGLIGENCE—INSTRUCTIONS.**

In an action for damages against a railroad company, where the alleged cause of injury was a failure to provide lights at a station, an instruction to find for defendant is properly refused where the evidence fails to show that in the construction and maintenance of its ticket office, platform, approaches, and lights, it conformed to what was customary at similar stations with well-regulated roads.

**4. SAME—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.**

Where there is evidence that plaintiff, in leaving a ticket office, was cautioned to "look out for the steps," and that he crossed the platform obliquely, and fell to the right of them, thereby sustaining injuries, the question of contributory negligence is for the jury. *STONE, C. J.*, dissents.

**5. DAMAGES—EXEMPLARY DAMAGES—PLEADING.**

Exemplary damages, to be recoverable, need not be specially pleaded.<sup>2</sup>

**6. PLEADING—INSUFFICIENT PLEA—AIDED BY VERDICT.**

Where the record shows no demurrer to a plea upon which issue was joined, and the testimony proved the truth of the material averments of fact, the insufficiency of the plea is cured by a verdict for the party interposing it.

Appeal from circuit court, Greene county; *S. H. SPROTT*, Judge.

This was an action against the appellant, the Alabama Great Southern Railroad Company, for personal injuries received by the appellee, John W. Arnold, in falling at night from the platform of the railroad station of said company at Boligee, which fall he alleged was due to the failure on the part of the railroad company to have the station or depot provided with a light. Arnold had gone to the ticket office, purchased a ticket for transportation on the train then about to arrive, and, on leaving the office, fell from the platform, and received the injury here complained of in this suit. Defendant demurred to the complaint on the ground that it was not the legal duty of defendant to provide good and safe platform and lights, or either such platform or lights, at Boligee station. This demurrer was overruled, and the defendant then filed the following pleas: "(1) That it is not guilty of the matter alleged in said complaint." Second and fourth pleas set up contributory negligence on the part of plaintiff. "(3) And, for a further plea to said complaint, defendant avers that all the injuries the plaintiff therein complained of were the result of accident." "(5) And, for further plea to said complaint, the defendant avers that, at the time of the said injury, \* \* \* there was no statute or law of force in Alabama imposing upon defendant the duty, nor any duty resting upon defendant as carrier of passengers, of furnishing any better platform or light or lights, at said station of Boligee, than was furnished at said station at the time of the alleged injury. (6) For further plea \* \* \* defendant \* \* \* says that \* \* \* said Boligee station, at which said injury occurred, is situated upon the said railroad between the capitals of the counties of Greene and Sumter; that the population of the

<sup>1</sup> Punitive damages may be given against a defendant when the injuries received by plaintiff were intended, or occurred through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse. *Ross v. Leggett*, (Mich.) 28 N. W. Rep. 695; *Boyle v. Case*, 18 Fed. Rep. 880; *Sullivan v. Navigation Co.*, (Or.) 7 Pac. Rep. 508; *McDevitt v. Vial*, (Pa.) 11 Atl. Rep. 645; *Traction Co. v. Orban*, (Pa.) 12 Atl. Rep. 816; *Railroad Co. v. Rice*, (Kan.) 16 Pac. Rep. 817. But the facts need not be such as would subject the defendant to a criminal prosecution. *Railroad Co. v. Randall*, (Ga.) 4 S. E. Rep. 674. Such damages, to be effectual, must have some relation to the financial ability of defendant. *Spear v. Hiles*, (Wis.) 80 N. W. Rep. 506; *Brown v. Evans*, 17 Fed. Rep. 912; *Webb v. Gilman*, (Me.) 13 Atl. Rep. 698. The fact that the plaintiff is a corporation is no objection to an award of exemplary damages. *Railroad Co. v. Telephone Co.*, (Tex.) 5 S. W. Rep. 517. Exemplary damages cannot be awarded where no actual damage has been suffered. *Shippel v. Norton*, (Kan.) 16 Pac. Rep. 804; *Kuhn v. Railroad Co.*, (Iowa,) 87 N. W. Rep. 116.

village at and about said station is small, being, to-wit, one hundred persons, and the business transacted at said station is small in proportion; that the village at said station of Boligee is not an incorporated town, and has no municipal organization; that there is in said village but few streets, upon which all the business coming thereto is conducted, and which lead up to said station and said station-house, and there are no difficulties therein, but which are free and open to the public, and that said village and station of Boligee is what is commonly called a country station; that said station of Boligee is not nor was lit by gas, electricity, or lamps or lights of any other kind upon the streets thereof, and that the only lights used in said station and village are used in the dwellings and other houses thereof, and are oil-lamps and candles; that, at the time of the alleged injury, said station-house had lamps burning therein, and were either portable or stationary, as the occasion demanded; that the said station-house was amply large for the business transacted at said point, and constructed with as much care as is usual, or required by law or statutes of the state, of such station, or custom or usage upon well-regulated railroads required; and, on account of the smallness of the village at such station in population and business, the defendant was not, by custom or law, required to have the same lighted by both indoor and outdoor light, provided they had indoor lights, which were convenient to the small traveling public, and ready to be used, and subject to their call at any time. And defendant avers that the said plaintiff and the public generally were well acquainted with said station-house, and the approaches thereto, and the habits and customs connected therewith for the regulation and use of said station, and for the use of the lights at and about the same. And the defendant avers that, this being its full duty in the premises, they provided such lights as were required by them at the station; and neither did the plaintiff, nor any one for him, demand any further or additional lights, nor ask to be lighted to or from the stopping place of said trains on said night. And defendant avers that it has done and performed each and every duty required of it by custom or law, and that said injury was not caused by any act, or omission to act, on its part." Plea No. 8, mentioned in the opinion as the plea to which a demurrer was sustained at a former term, set up the statute of limitations of one year to an amended count of the complaint. The amended count contained no new cause of action, and for this reason a demurrer was sustained to the plea. See 80 Ala. 600, 2 South. Rep. 837. The distance from the ticket-office door to the steps fronting the door was shown to be three feet seven inches; this distance being the width of the platform, which was sixteen feet long. The court refused each of the following charges requested by the defendant: "(1) If the jury believe all the evidence, they must find for the defendant under the first count of the complaint. (2) If the jury believe all the evidence, they must find for the defendant under the second count of the complaint. (3) If the jury believe all the evidence, the jury are not authorized to give the plaintiff exemplary damages. (4) If the jury believe all the evidence, they are not authorized to find that the injury to the plaintiff was wanton or intentional, or to assess exemplary damages against the defendant. \* \* \*

At the time of the fall of Arnold, for which damages are claimed in this suit, there was no law of the state by which a railroad company was required to light its stations or depot buildings at night, if the depot building was of such character as was of customary use by well-regulated railways at stations of like kind and business." There were many assignments of error; but the facts, as narrated above, are sufficient to show all the points as they are decided by the court in the opinion, and to show their bearing on the facts of this present case.

*Saml. F. Rice, Wood & Wood, and Thos. R. Roulhas, for appellant. Jas. B. Head and J. J. Altman, for appellee.*

STONE, C. J. This case was before us at a former term. 80 Ala. 600, 2 South. Rep. 337. The complaint consisted of two counts: one the original, and the other an amendment, adding a second count. The complaint is the same now as on the former appeal. On that appeal we held that the *gravamen* of each count was the same,—the failure to have the depot supplied with a light. The first or original count predicates negligence, on the part of the railroad, on the naked averments that Boligee was one of its stations for receiving and discharging passengers; that at that station the railroad had erected a platform and thereon its only ticket office at that place; that plaintiff, desiring to take passage on its train, soon to arrive, had entered the office, and procured a ticket; that it was night-time, very dark, and no light furnished; that the train “was about arriving;” and that the “plaintiff attempted to descend the steps of said platform for the purpose of entering the car, and, in attempting so to do, fell, and thereby received severe personal injuries.” The count then avers that “said fall and injuries were caused by the negligence of defendant or its servants, in failing to provide a light at said station, whereby plaintiff would have been able to see his way, and avoid said fall and injuries.” The amendment or second count differs from the first only in the following additional averments, giving a more minute description of the place where the injury was suffered: “That said office had in front of and attached to it, fronting its entrance, a platform about three and one-half feet wide, which was accessible by steps, about three and a half feet in width, reaching from the ground to the top of the platform in front of the door of said ticket office, over which steps and platform passengers were required to pass in entering the ticket office. The surface of said platform was elevated about four or four and a half feet above the ground; and plaintiff avers that the construction of said steps and platform, as above described, rendered the same unsafe and dangerous, and liable to cause personal injuries to persons passing over the same.” The count then described the injury as it was described in the first count, and complains of the absence of a light as the negligence which caused the injury. Speaking of these counts, we, on the former appeal, said: “The injury and the negligence complained of as the cause are the same as set forth in both counts; and, while it is averred that the construction of the steps and platform rendered them unsafe and dangerous, this does not constitute the negligence alleged to be the cause of the injury, but, as we interpret the count, the allegations are intended to show a greater and more imperative duty to provide a light, from the failure to do which it is distinctly and expressly averred, in the new count, the injuries resulted. Under neither count is the plaintiff entitled to recover for any negligence other than the failure to provide a light.” When this case was returned to the circuit court, the defendant demurred to the counts of the complaint collectively, and assigned as cause of demurrer that “there was, at the time mentioned in said complaint, no statute of force in the state of Alabama which required of or imposed upon said defendant the duty to furnish good and safe platform and lights, or either such platform or lights, at Boligee station; nor was there any duty at the common law to furnish said platform or lights.” There was, when the injury is alleged to have occurred, February 11, 1885, no statute relating to the subject in Alabama. Our first statute on that subject was approved February 28, 1887. Sess. Acts, 74. Was there a common-law duty resting on defendant at that time?

In *Railway Co. v. Thompson*, 77 Ala. 448, we said it was “the duty” of railroads “to provide safe waiting-rooms, and to keep the depot and platform well lighted in the night-time.” The injury we were considering in that case occurred at the Union depot in this city, Montgomery,—the common passenger depot of five railroads, with trains arriving and departing at different times; and the plaintiff in that suit had just alighted from the train on which he ar-

rived. In support of our views, we referred to the following authorities which bear on the question of lighting the depot and its platform: Thompson on Negligence (volume 1, p. 315) has this language: "It is the duty of the railway company to have its station-houses open and lighted, and its servants present, for the convenience of those who may wish to leave its trains, or to depart by the same." In support of this doctrine, the author refers to *Patten v. Railway Co.*, 32 Wis. 524. In that case the injury suffered was at a country depot, and the plaintiff, an elderly lady and unattended, was discharged from the train at 9:45 at night. The trial judge submitted it to the jury to determine whether the railroad was guilty of negligence in not having its depot lighted, or a person there to give information. The supreme court held there was no error in this. It will be observed that in the Wisconsin case there was at the depot neither a light, nor a person to give information. The case of *Knight v. Railroad Co.*, 56 Me. 284, also referred to by Thompson, arose as follows: Plaintiff was traveling under a ticket which secured her passage over two connecting railroads and a connecting steam-boat line. From the terminus of the railroad, where plaintiff had to leave the cars, to the steamboat, was "a considerable distance," which she had to walk. It was across a wharf, the property of defendant, provided and used for the purpose. Plaintiff, it being at night and dark, stepped into a hole in the planking, and was injured. The court said: "The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe." Another case referred to in *Railway Co. v. Thompson* is *Stewart v. Railroad Co.*, 2 Amer. & Eng. R. Cas. 497, 53 Tex. 289. The gravamen of the petition (plaintiff's complaint) was the negligent failure of the railroad company to provide "proper lights and accommodations for passengers at its depot." Held that, on general demurrer, the petition was sufficient. See, also, *Peniston v. Railroad Co.*, 84 La. Ann. 777; *Reynolds v. Railroad Co.*, 37 La. Ann. 694. The other cases cited do not refer to the question of lights. The case of *People v. Railroad Co.*, 104 N. Y. 58, 9 N. E. Rep. 857, is relied on as showing there is no common-law duty resting on the railroad in the matter we have in hand. That was an application for the extraordinary writ of *mandamus* to compel the railroad company to erect larger and more comfortable depot accommodations at Hamburg, one of its stopping places. The relief was denied; the court holding that there was neither statutory nor common-law obligations resting on railroads to erect depot buildings. So, in this case, if the defendant railroad company had neglected or refused to erect any depot building, any waiting-room, or any platform at Bolligee, we are not prepared to say there was any law under which it could have been compelled to do so. The foregoing is not this case. The defendant did not neglect or refuse to erect a ticket office, used as a waiting-room, with platform in front, and steps leading to it. All these were erected, and persons wishing to be carried on the railroad, or having other business with it, had a standing invitation to enter the office, and transact business thereat. Those desiring tickets, must obtain them there, and not elsewhere. And this invited right of entry cannot, at least without special warning, be restricted to the simple privilege of entering and remaining long enough to procure a ticket. It would include the right, authorized by custom, of using the office as a waiting-room, if none other was provided. Hence, although there may have been no law requiring the railroad to erect an office and platform at Bolligee, yet, having done so, and having thereby invited persons having business with it to enter for its transaction, the law required that they should be adapted for the purpose, and not dangerous, hazardous, or unsafe. This, under the enduring principles of the common law, which govern new exigencies that have arisen or may arise, equally with conditions that gave them form and expression centuries ago. *Railway Co. v. Railway Co.*, 87 E. C. L. 409. The expression in *Thompson's Case*, *supra*, was used in reference to the case we

were then considering. Thompson had just arrived, and left the train at a common depot of five railroads, and in a city. The train having just arrived, and passengers in the act of leaving it, and this in the night-time, it is manifest that a light should have been furnished; and, if the place was not otherwise sufficiently lighted, a light should have been provided at the place of debarkation. But this duty would have a limit. It would be incumbent only at the departure and arrival of trains, and for a sufficient time before departure to enable persons desiring to take passage to be in readiness and enter the cars without undue haste, and, after the arrival, to enable those leaving the train to do so in safety. Beyond this, the duty of the railroad to maintain a light at its depot would in no case extend. 1 Thomp. Neg. 814; *Batton v. Railroad Co.*, 77 Ala. 591. In the case we have in hand the complaint does not disclose the size of the place, Boligee, nor does it show for how many railroads it is a depot. It informs us of but the one. It is a rule of law, as it is a lesson of common experience, that precautionary requirements increase in the ratio that danger becomes more threatening. It is certainly true that less vigilance is demanded at a small country depot of a single road, visited but few times in the 24 hours, than is required in cities where many trains arrive and depart during each day and night. In each of the counts of the complaint it is averred that the plaintiff attempted to descend the steps when the train was "about arriving." "About," in the connection here used, means "nearly," "not far from;" that is, "near," "not far from," the arrival of the train. Now, as these words are indefinite, and do not imply that the time had come when it was reasonably or apparently necessary that plaintiff should descend from the platform to place himself in readiness to enter the car without undue haste, it is doubtful, if the question were properly and singly raised, if it sufficiently avers the time had arrived when it had become the duty of the railroad to have a light. The demurrer, however, does not point to this phase of the question, nor does it raise it singly. It takes the broad position that it was not the duty of the railroad to furnish "good and safe platform and lights, or either of them." We have shown above, that, if the road did furnish a platform, it must be good and safe; and that in certain conditions it was its duty to furnish a light. The demurrer does not sufficiently point out or specify any defect in the complaint, and it was rightly overruled.

The question of exemplary damages is raised in this case in two forms. It is first objected that such damages cannot be recovered unless specially claimed in the complaint. That is certainly the rule when special damages are awarded. And, if the question were an open one, there is much in the argument that exemplary damages, to be recoverable, should be specially claimed. Simple negligence, with damage, authorizes compensatory damages; while, to maintain a claim for exemplary or punitive damages, the negligence must be willful, wanton, or reckless. We have, however, settled the question otherwise, and we will follow our rulings. *Wilkinson v. Searcy*, 76 Ala. 176; 2 Thomp. Neg. 1245; *Leach v. Bush*, 57 Ala. 145; *Panton v. Holland*, 17 Johns. 92; *Railroad Co. v. Jones*, 83 Ala. —, 3 South. Rep. 902; *Taylor v. Holman*, 45 Mo. 371. In Texas the rule seems to be different. *Railway Co. v. Baker*, 57 Tex. 419; *Railroad Co. v. Le Gierse*, 51 Tex. 189. The following authorities declare the rule as to special damages: *Donnell v. Jones*, 13 Ala. 490; *Hooper v. Armstrong*, 69 Ala. 348; *Pollock v. Gantt*, Id. 373; *Squier v. Gould*, 14 Wend. 159; *Baldwin v. Railroad Corp.*, 4 Gray, 383; *Hart v. Evans*, 8 Pa. St. 13; *Good v. Mylin*, Id. 51; *Lindley v. Dempsey*, 45 Ind. 245; *Chicago v. O'Brennan*, 65 Ill. 160; *Johnson v. Gorham*, 38 Conn. 513; *Adams v. Gardner*, 78 Ill. 568; *Wood v. Rice*, 24 Mich. 423. The other phase of the question is presented on the evidence. It is contended for appellant that, taking the extreme view the testimony admits of, the conduct of the railroad company does not rise above simple negligence, as contradistinguished from gross negligence, which must be either willful, wanton, or reckless. Taking into the

account the fact that the negligence complained of was the failure to furnish a light, there is no evidence in this record tending to prove either willful, wanton, or reckless negligence on the part of the railroad. *Wilkinson v. Searoy*, 76 Ala. 176; *Barbour Co. v. Horn*, 48 Ala. 576; *Railroad Co. v. McLendon*, 68 Ala. 266; *Lienkauf v. Morris*, 66 Ala. 406; 1 *Suth. Dam.* 469, 730; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Biles v. Holmes*, 11 *Ired.* 16; *Avera v. Sexton*, 13 *Ired.* 247; *Seymour v. Railway Co.*, 3 *Biss.* 43. The circuit court erred in refusing to give charges 3 and 4.

When this case returned to the circuit court, the defendant interposed new pleas, and among them plea No. 6. That plea truly sets forth the size of the village of Boligee, the nature of the business done there, that it is what is commonly called a country station, is without a municipal government, and has neither gas, electric, nor other outdoor lights. It then avers that the station-house and its attachments were amply sufficient and well appointed for the place, its travel and business, and were constructed with as much care as is required and observed at similar places by well-regulated railroads; that they had indoor lights at the station-house, and that it was not customary, on well-regulated railroads, to maintain outdoor lights at such country stations. It further avers that their lights were portable, and subject to the call of the traveling public, and that "said plaintiff, and the public generally, were well acquainted with said station-house, and the approaches thereto, and the habits and customs connected therewith for the regulation and use of said station, and for the use of the lights about the same. And defendant avers, this being its full duty in the premises, it provided such lights as were required by [of] it at said station; and neither did the plaintiff, nor any one for him, demand any further or additional lights, nor ask to be lighted to or from the stopping place of said train on said night." The plea is very full, and covers the whole ground it relies on as a defense to the action. That ground is that it had conformed strictly to the usage and custom of well-regulated railroads at similar country stations in the construction of its station-house, and the approaches to it, and in providing lights; and that the lights provided were sufficient, and at the service of plaintiff, if he had called for them. On this plea, as we understand the record, the plaintiff took issue. At all events, the record shows no demurrer to it. There was a demurrer to the complaint and to plea No. 3, and these were ruled on. The record shows that issue was joined on the five pleas, and this was the number left after the court, at a former term, had sustained the demurrer to plea No. 3. If the testimony proved the truth of the material averments of fact contained in plea No. 6, under a well-settled rule of law that would have entitled the defendant to a verdict, whether the plea was sufficient or not. *Irion v. Lewis*, 56 Ala. 190; *Mudge v. Treat*, 57 Ala. 1; *Jones v. Collins*, 80 Ala. 108. Is the plea insufficient if it had been demurred to? Railroad companies and other corporations are persons, artificial persons, it is true, but yet clothed with all the rights, as well as bound by all the obligations, which protect and govern natural persons. Their liabilities are the same, no greater, no less, than those which rest on natural persons in like conditions. An hotel keeper, merchant, shop-keeper, or any other person engaged in business which invites patronage and personal calls, is under an obligation, corresponding to that of a railroad company, to provide for the safety of its visiting customers. If doing business, keeping open doors, and inviting and receiving customers in the night-time intensifies the diligence of the one, it equally intensifies the diligence of the other, the surroundings being similar. If there is a difference, it is only such difference as the number and frequency of invited calls may make; not a difference in kind, but in degree. If railroad corporations, in the administration of their affairs, conform to the rules adopted or in general use by prudently conducted railroads, they are free from blame, unless they violate or disregard some positive requirement of the law, and thereby inflict an injury. *Railroad Co.*

*v. Allen*, 78 Ala. 494; *Railroad Co. v. Propst*, 83 Ala. —, 3 South. Rep. 764. In the case of *Burke v. Witherbee*, 98 N. Y. 562, the plaintiff's intestate had been killed while working in a mine. A hook had become detached, and a car descended from above, causing the homicide. It was shown that in other mines, as well as this, this appliance was used, and that for over a year it had been in use in this mine night and day, without an accident. It was held that this was a full defense to the action. The court, (EARL, J.), in commenting on the facts of the case, said: "It seems to us quite inadmissible, if not proposterous, to attribute negligence to a mine-owner for using an implement which had been employed in different mines, and which under varying conditions, upon countless occasions, uniformly answered its purpose, without injury to any one." In *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. Rep. 599, it was said to be a general rule that "where an appliance, machine, or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, it may be continued without the imputation of negligence." That case is a strong authority bearing on the merits of the present suit. See, also, *Loftus v. Ferry Co.*, 84 N. Y. 455. What we have said above is, at best, but the corollary of the generally accepted definition of negligence, "the want of such care as men of ordinary prudence would use under similar circumstances." *Shear. & R. Neg.* 12. See, also, *Cornman v. Railway Co.*, 4 Hurl. & N. 781. It would be monstrous to hold that, notwithstanding the railroad company did precisely and fully what men of ordinary prudence were in the regular habit of doing under similar circumstances, yet this defendant is liable for the injury the plaintiff suffered therefrom. We cannot affirm that the circuit court erred in refusing to give charges 1 and 2, for the record does not show that in the construction and maintenance of the ticket office, platform, its approaches and lights, the defendant railroad company conformed to what was customary, at similar stations, with well-regulated railroads.

Pleas Nos. 2 and 4 raise the defense of contributory negligence. There was testimony, not disputed, that the platform was only three and a half feet wide; that the steps were of equal width with the door, and immediately in front of it; and that plaintiff was familiar with the place. Going straight out from the door, the plaintiff could not have missed the steps, would not have fallen, would not have been injured. He testified himself that, as he was crossing the platform, he was cautioned to "look out for the steps." There is testimony that he crossed the platform obliquely to the right. But this needed no proof. The fact that he missed the steps, and fell to the right of them, is proof conclusive that he did deflect to the right. Was this not proximate contributory negligence? Was he not the author of his own injury? *O'Brien v. Tatum*, ante, 158; *Tanner v. Railroad Co.*, 60 Ala. 621; *Iron Co. v. Jones*, 80 Ala. 123; *Lilley v. Fletcher*, 81 Ala. 234, 1 South. Rep. 273; *Toomey v. Railway Co.*, 91 E. C. L. 146; *Stuer v. Railway Co.*, L. R. 8 Exch. 150; 1 Add. Torts, § 34; *Wilds v. Railroad Co.*, 24 N. Y. 430; *Hulbert v. Railroad Co.*, 40 N. Y. 146; *Van Schatok v. Railroad Co.*, 43 N. Y. 527; *City of Indianapolis v. Cook*, 99 Ind. 10; *Seymour v. Railway Co.*, 3 Biss. 43. My own opinion is that the plaintiff was guilty of proximate contributory negligence, and that, on the testimony as deposed to by his witnesses, the general charge ought to have been given in favor of the defendant. My brothers, however, think this was a question for the jury. Reversed and remanded.

(84 Ala. 190)

**COLLIER *et al.* v. McCALL.**

(*Supreme Court of Alabama. May 31, 1898.*)

**1. PARTNERSHIP—POWER OF ONE PARTNER TO BIND FIRM—EVIDENCE.**

Where one of the conditions of a loan negotiated for plaintiff by a partnership was the insurance of a dwelling-house, and plaintiff paid the premium to one of the partners, who receipted therefor in the name of the partnership, and promised to obtain the insurance, but failed to do so, after loss by fire and suit for damages against the partnership, its liability cannot be avoided on the ground that the act of the partner was outside the partnership functions, without explanatory proof to that effect.

**2. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—FAILURE TO REQUEST CHARGE.**

In an action for breach of contract in failing to procure insurance on a dwelling-house which was afterwards destroyed by fire, a judgment for plaintiff will not be reversed where the evidence showed that defendant, who had negotiated a loan for plaintiff, had received the premium, and promised to procure the insurance, and defendant testified that he merely promised to forward the premium money to a company for whose security for the loan the policy was to be taken out, and that he had done so, and where no charge on the discrepancy in the evidence was requested.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Collier & Pinkard, who were engaged in negotiating loans, undertook to and did obtain a loan for Mrs. Laura A. McCall, who secured the payment of said money loaned her by executing a mortgage on lands in Lowndes county, upon which there was a dwelling-house. Mrs. McCall, or her agent, who was her husband, was informed that, as part of the security, this dwelling-house must be insured against fire, and she gave Collier, one of the defendants, the money with which he was to take out an insurance policy in the sum of \$1,000 for three years, and pay the premium. Collier or the firm failed to procure the insurance, and the house was burned the following year. Mrs. McCall brought suit for damages resulting from a breach of the contract, and obtained judgment, from which defendants appeal.

*Roquemore, White & Long*, for appellants. *E. P. Morrisett and Watts & Son*, for appellee.

STONE, C. J. There appears to have been no dispute in this case, that one of the conditions on which Mrs. McCall obtained the loan of \$7,000 was that the dwelling on the mortgaged plantation should be insured, at Mrs. McCall's expense, for the sum of \$1,000. Nor is there dispute that \$18, the sum necessary to pay the premium on that amount of insurance for a term of three years, was furnished by McCall, acting for his wife; and it is proved that this money was paid to Collier, of the firm of Collier & Pinkard. Nor is it pretended that the insurance was ever taken out. Up to this point there is neither conflict nor divergence in the testimony. Collier & Pinkard were and are attorneys at law, engaged in the business of negotiating and obtaining loans of money for their customers or clients, for a reward or commission. It is through their agency that borrower and lender are brought together. They are not the agents of the loaning capitalists or syndicate. They are the agents of the borrower. The borrower retains them and their services; through them submits his proposition, put in shape under their directions; places his security at their disposal; and need not, and generally does not, know from whom the money is obtained. Till the loan is fully agreed on in all its terms, he knows and need know only the soliciting attorneys. Such is the relation, as the testimony in the record before us tends to show. It is contended for appellants that the act of Collier in receiving Mrs. McCall's money, and in promising to have the dwelling insured, was outside the pale of their powers as partners and attorneys at law, and therefore the act of Collier did not bind the firm. To this it may be answered that the whole transaction is somewhat outside of the routine of ordinary professional attorneyship. As retained can-

vassers for the loan, it would seem that the duty was on them to present the security offered in such form as to invite favorable consideration and acceptance. It was surely their duty to so conduct the negotiation as to secure the loan if possible. We cannot, as matter of law, declare precisely what duties the trust imposed upon them. That would depend largely upon the terms of their employment, as either expressed in the contract or implied in the nature of the service, and the usages connected therewith. Was it not their duty to see that the title was unincumbered, and that the mortgage security contained the requisite stipulations? Could less than this be a proper discharge of their duty as soliciting attorneys? And if insurance was one of the conditions on which loans were granted, was it not equally their duty to inform the borrower, and look after its performance? Collier requested that the policy should be taken out as one of the securities of the loan, and he received the money with which to pay the premium. This he admits in his testimony. He thus not only accepted Mrs. McCall's money, but he lulled her into inaction and repose in the matter of taking out the policy. And he receipted for the money in the firm name of Collier & Pinkard, saying it was "to be used in purchasing an insurance policy for \$1,000." We cannot, in the absence of all explanatory proof, and as matter of law, declare that this act of Collier was outside of the partnership functions, or that the partnership is not bound thereby. *Woodruff v. Scatfe*, 83 Ala. 152, 3 South. Rep. 311.

It is further contended for the appellants that there is a variance between the averments and proof, which rendered it proper that the general charge should have been given in their favor. There is no material variance between the substantial parts of the second count and the testimony in the cause. McCall testified that Collier, when he received the money, promised to take the insurance on the dwelling. Collier testified that his promise was to forward it "to the American Freehold Land & Mortgage Company of London, Limited," the lender, and that he had done so. No charge is shown to have been asked as to this discrepancy, nor specially on either phase of the testimony. This did not present a case for the general charge. 3 Brick. Dig. 110, § 55. If the policy had been taken out as agreed, it would have been made payable to the American Freehold Land & Mortgage Company of London, Limited. Such was the requirement, and such the agreement. It was intended to be, and that would have been its effect, a mere strengthening of the mortgage security. The loss, in case the dwelling thus insured had been burned, would have been payable to the lender, and not to Mrs. McCall. It would have inured to her benefit, however, in this: that, having paid the premium, the thousand dollars insurance payment of the loss would have entitled her to a credit *pro tanto* on her borrowed money debt. *Insurance Co. v. Insurance Co.*, 81 Ala. 320. Hence her interest which enables her to maintain this suit. Affirmed.

(34 Ala. 428)

WOODSTOCK IRON CO. v. REED *et al.*<sup>1</sup>

(Supreme Court of Alabama. June 14, 1888.)

## 1. CONTRACTS—INTERPRETATION—MANUFACTURE AND SALE OF CHARCOAL.

Where, in an action on a contract for cutting wood and making it into charcoal, plaintiffs, by the contract, were not to pay for cutting wood not manufactured into coal, or nothing was said or agreed about paying for cutting such wood, plaintiffs are not liable for the amount paid by defendant for cutting wood which was destroyed by fire before it was made into coal.

## 2. EVIDENCE—BOOKS—IDENTIFICATION.

In an action on a contract, a book produced by defendant, under a *subpoena duces tecum*, requiring him to produce all books and papers in his possession relating to the contract, is admissible in evidence without further identification; the production, under these circumstances, being an admission that such book belonged to and was kept by defendant.

## 3. SAME—PROOF OF PAROL CONTRACT—PARTIES.

In an action on an oral contract, testimony by plaintiffs in their own behalf, showing the terms of the contract as agreed on by the parties, is competent.

Appeal from circuit court, Calhoun county; LEROY F. BOX, Judge.

*Assumpsit*, by Reed & Partlow against the Woodstock Iron Company, for amount due for coal delivered. The court charged the jury, among other things, "that if they believe from the evidence that under the contract the plaintiffs were to pay defendants, for chopping the wood made into coal, fifty cents per cord, and that plaintiffs were not to pay for chopping of any wood not made into coal, the plaintiffs would not be liable for the chopping of so much of the wood as was burned in August, 1888, by the fire which broke out in the coaling, and which was not made into coal." To the giving of this charge by the court the defendant excepted. The court, at the request of the plaintiffs in writing, gave the following charge, which recites substantially the tendency of the evidence as produced on the trial: "If the jury believe, from the evidence in this case, that Reed & Partlow delivered the coal to the Woodstock Iron Company under a contract that the Woodstock Iron Company would pay them \$5.75 for every one hundred bushels of coal delivered, less \$1.50 for the wood that was actually used in the burning of each one hundred bushels of coal so delivered, and that nothing was said or agreed between them about wood not used in the burning of the coal, then they must find for the plaintiffs, for the amount of coal delivered, at the rate of \$5.75 for every one hundred bushels so delivered, after deducting, for the wood actually used in the burning of the coal, at the rate of \$1.50 for every one hundred bushels of coal so delivered, and for orders filled and payments made for the coal delivered." The defendant excepted to the giving of this charge by the court; and now assigns the rulings of the court on the evidence, and the giving of these charges, as error. On the trial the plaintiffs were examined as witnesses in their own behalf, and, after having stated that the contract on which the suit was brought was a verbal contract, were asked, on direct examination, to state what was the said contract between them and the defendant. The defendant objected to the question and answer on the ground that the question called for a legal conclusion, and that it was left with the witness to state what was the legal effect of the contract, and that the evidence was irrelevant. The court overruled the defendant's objection, and the defendant duly excepted.

*Knox & Bowie*, for appellant. *Kelly & Smith*, for appellees.

CLOPTON, J. The contract between the plaintiffs and defendant rested in parol, and it was competent to prove the terms of such agreement by oral evidence. No rule of evidence was thereby offended. It was not the statement of a conclusion, or of the legal effect of the contract, but of facts,—the terms

<sup>1</sup>See 1 South. Rep. 116.  
v. 480. no. 11—24

agreed on by the parties. If the opposite party desired to test the accuracy or credibility of the testimony, or to show the true nature of the contract, what was said and done by each party could have been drawn out on cross-examination. The credibility and sufficiency of the evidence were for the jury. *Anderson v. Snow*, 9 Ala. 247; *Saltmarsh v. Bowen*, 84 Ala. 613. A *subpoena duces tecum* was issued and served on the secretary of the defendant corporation, requiring him to produce "all books and papers belonging to defendant containing any entries, or having any reference, to the coaling contract between the plaintiffs and the defendant." When the case was first called for trial, the defendant's counsel stated that the book called the "Coal Delivery Book" had been overlooked, and asked that the case stand over until the next day, when they gave assurance that it would be brought into court. The case was postponed, and again called for trial the next morning, when plaintiffs' counsel called for the book; and, in response thereto, defendant's counsel produced the book offered in evidence, and delivered it to plaintiffs' counsel in open court. The defendant certainly claimed an interest in and under the books in which were kept its business transactions. The production of the book under such circumstances, as a book belonging to defendant, was an admission that it belonged to and was kept by defendant. Having been produced in open court, when called for, it was admissible in evidence, without further proof of identification. *Ward v. Reynolds*, 82 Ala. 884; 1 Greenl. Ev. § 71; *Betts v. Badger*, 12 Johns. 223. The main point of contention was whether the plaintiffs or defendant should lose the amount paid by the latter for cutting the wood which was consumed by the fire that occurred in August, 1883. If, by the contract, the plaintiffs were not to pay the defendants for cutting wood which was not manufactured into coal, or if nothing was said or agreed about paying for cutting wood not used in the burning of coal, the plaintiffs are not liable for the amount paid by defendant for cutting the wood which was destroyed by the fire; otherwise if the duty to contract for and look after the cutting rested on the plaintiffs. *Iron Co. v. Reed*, 81 Ala. 305, 1 South. Rep. 116. The legal proposition asserted in the instructions was founded on these hypotheses, which the jury found by their verdict to be true. There is no error in the charges given. Affirmed.

(84 Ala. 537)

**HORTON v. MILLER et al.**

(Supreme Court of Alabama. May 23, 1888.)

**1. ATTACHMENT—AFFIDAVIT AND COMPLAINT—VARIANCE.**

In attachment to recover for advances made to defendant as tenant, by plaintiffs as landlords, by leave of the court the plaintiffs struck out the words "as his tenant," abandoning the claim as landlords. Held, that defendant could properly plead in abatement the variance between the complaint as amended and the affidavit in attachment.

**2. SAME—OBJECTION TO AFFIDAVIT—WHEN TO BE MADE.**

A defective affidavit, in an attachment commenced before a justice of the peace, cannot be objected to after the case has been appealed to the circuit court.

**3. LANDLORD AND TENANT—RENT—WHEN DUE.**

Upon an agreement that the advances made by a landlord to his tenant should be paid out of the crop, the claim therefor matures when the crop is ready for market, although, in the absence of such an agreement, the claim for advances would, under Code Ala. 1886, § 3067, fall due December 25th.

**4. SAME—ACTION FOR RENT—RECOURPMENT.**

A tenant, sued by his landlord for rent and advances, may file a plea of recoupment, and prove thereunder that the plaintiff had promised to furnish him five acres of land and two good horses, which he had failed to furnish.

**5. EVIDENCE—SHOP BOOKS—PARTNERSHIP.**

Where partnership books are kept partly by one partner and partly by another, one will not be allowed to testify as to entries made by the other, unless he knows the sales were actually made, or can show in some other way that the entries speak the truth.

## 6. PARTNERSHIP—POWER OF PARTNER—ORDERS.

An order signed only by one member of a partnership may be credited on the partnership account if the goods obtained were advanced by the partnership, or supplied on their joint account.

Appeal from circuit court, Cherokee county; JOHN B. TOLLY, Judge.

This was an action by the appellees, T. G. Miller & Bro., against the appellant, A. J. Horton, for the recovery of advances made the defendant as tenant, by the plaintiffs as landlords, for the purpose of enabling him to make his crop. The suit was commenced by attachment issued from a justice's court. There judgment was rendered for the plaintiffs, and the case was taken to the circuit court by *certiorari*, and this appeal is now brought from the circuit court. The original complaint, as filed in the circuit court, sought to recover as a landlord from his tenant for advances made to him during the year. By leave of court, plaintiffs amended the complaint by striking out the words "as his tenant;" thereby abandoning the claim as landlord, and claiming a recovery on account stated, and for goods sold and delivered. The defendant objected to this amendment of the complaint, but the court overruled his objection, allowed the amendment to be made, and defendant duly excepted. The defendant then asked leave to file a plea in abatement on the ground that there was a variance between the affidavit on which the attachment was issued and the amended complaint. The court refused to entertain this plea in abatement, and defendant excepted. The defendant then pleaded the general issue, payment, set-off, and recoupment. The defendant's plea of recoupment, set up in defense of the action, sought to recoup for damages done him by the plaintiffs' failing to comply with their contract of tenancy, alleging in said plea that plaintiffs refused to let defendant cultivate five acres of the land which they had agreed to do, and failed to supply him with two good horses, according to the terms of the agreement. On motion by plaintiffs, the said plea of recoupment was stricken from the file, on the ground that it was no answer to the complaint. On the trial, it was shown that plaintiffs and defendant had entered into an agreement for the defendant to work a certain tract of land belonging to plaintiffs, and that the plaintiffs were to advance to the defendant during the year; that the plaintiffs did so advance to him; and that the defendant did not meet the whole of the indebtedness so incurred to the plaintiffs. There was some conflict as to the time when the defendant was to pay for the advances so obtained. The plaintiffs introduced in evidence certain orders given at defendant's request, one of which was signed by T. G. Miller, and the other by J. P. Miller, directed to one P. S. Elliott. The defendant objected to the introduction in evidence of these orders, on the ground that they were signed by T. G. Miller and J. P. Miller, as individuals, and not by the firm name. The court overruled the defendant's objection, and the defendant excepted. The plaintiffs proved that these orders were orders of the partnership for the use of the defendant. Upon examination of T. G. Miller, one of the plaintiffs, being shown a book, he testified that the entries in the book were correct; that he had made some of the entries; and that his brother had made the others. The defendant objected to the witness' testifying anything about the entries in the book made by his brother. Upon the defendant attempting to prove that the plaintiffs had not fulfilled their agreement as to amount of land he was to have, and the two good horses he was to be given with which to cultivate the crop, (in substantiation of the plea of recoupment,) the plaintiffs objected, and the court sustained their objection. A number of charges were asked, which are sufficiently set out in the opinion.

*J. L. Burnett*, for appellant. *Walden & Sons*, for appellees.

STONE, C. J. This suit was commenced by attachment, and is governed by sections 3056, (3467,) 3075, (3479,) Code 1886. The affidavit for attachment is

very defective; and, if the objection had been raised at the proper time, the attachment ought to have been dissolved. It is not shown, however, that the question was made before the justice of the peace. It was too late to raise it after the case was carried to the circuit court by appeal. *Staggers v. Washington*, 56 Ala. 225. But the appeal did not change the character of the suit. It was still an attachment proceeding instituted under sections 3467, 3480, Code 1876. Only such right could be asserted as is conferred by section 3479 of that Code; and, to justify its maintenance, the statutory conditions must have existed, and must have been substantially set forth in the complaint. Code 1876, § 3479; Code 1886, § 3075. The plea in abatement filed to the complaint ought to have been entertained. *Wright v. Snedecor*, 46 Ala. 92; *Summerlin v. Dowdle*, 24 Ala. 428. In *Mooney v. Hough*, ante, 19, (at the present term,) we had occasion to consider and construe section 3075 (3479) of the Code of 1886, and to determine its extent. We refer to that case as an interpretation of the statute, and we do not propose to repeat what we then said. Code 1886, § 3057, (3468:) "Unless otherwise stipulated, such rent and advances shall become due and payable on the 25th day of December of the year in which the crop is grown." This section applied to the claim we are considering; but, if there was an agreement that the advances should be paid out of the crop, the claim for balance of advances would mature when the crop was marketed, or ready for market. The defense of recoupment ought to have been entertained. If, by the terms of the agreement, Miller & Bro. agreed to furnish land which they did not furnish, or to furnish two good horses, and furnished inferior ones, either of these was a breach of their contract, the actual damage resulting from which furnishes ground of defense. *Wilkinson v. Ketter*, 59 Ala. 306; *Railway Co. v. Clanton*, Id. 392; *Wilkinson v. Ketter*, 69 Ala. 435; *Culver v. Hill*, 68 Ala. 66; *Vandegrift v. Abbott*, 75 Ala. 487; *Sledge v. Swift*, 53 Ala. 110. T. G. Miller should not have been allowed to testify to entries made in the books by his brother, unless he had knowledge that the sales were actually made, or, unless he could show in some other way that he knew the entries spoke the truth. As to the orders, and in whose name they were drawn, that was immaterial, provided the goods obtained under them were an advance by Miller & Bro. That would be the case if the articles furnished under them either belonged to Miller & Bro., or were supplied on their joint account. What we have said will be a sufficient guide for another trial, without commenting on the charges given and refused. Reversed and remanded,

(84 Ala. 544)

#### HARDY *et al.* v. INGRAM.

(Supreme Court of Alabama. May 31, 1888.)

#### 1. TRIAL—STATUTORY CLAIM—SPECIAL FINDINGS BY COURT—CODE ALA. §§ 2743-2745.

On trial of a statutory claim suit by the court upon an agreed statement of facts, a jury being waived, the court found specially that the property in question was the claimant's. *Held*, that said finding was within Code Ala. §§ 2743-2745, which provide that when an appeal is taken from the decision of the court without a jury, and the finding is special, the supreme court must examine and determine whether the facts are sufficient to sustain the judgment.

#### 2. EXECUTION—LEVY—TRIAL OF RIGHT TO PROPERTY.

Code Ala. 1886, § 3004, as amended by act Feb. 28, 1887, providing that one who holds a lien upon property levied upon may give bond, and have his claim thereto tried, is not retrospective, and a person holding a landlord's lien for rent and advances cannot so proceed where the levy was made before the passage of said amendatory act.

Appeal from circuit court, Clay county; LEROY F. BOX, Judge.

This was a claim suit instituted under the statute. The appellants here, Hardy & Co., plaintiffs in the court below, obtained a judgment against one Nolen, and, under the authority of this judgment, execution was levied on certain property found in the possession of the said Nolen. Upon the levy be-

ing made, the appellee, William Ingram, made affidavit and gave bond, as required by the statute, claiming the property so levied on in the possession of the said Nolen as his. The claimant based his claim and right to the property on a lien he held on the property for rent due and advances made by him to the defendant. The case was submitted to the judge presiding for decision upon an agreed statement of facts; and, upon the hearing, the court held that the claimant was entitled to the property, as claimed. The plaintiffs appealed from this decision by the judge, and assign the same as error.

*Pearce & Kelly*, for appellants. *Lackey & Hood* and *Smith & Smith*, for appellee.

CLOPTON, J. The statute authorizes parties to a civil action to agree in writing that an issue of fact may be tried and determined by the court without the intervention of a jury, and the finding may be general or special, unless one of the parties requests a special finding. On the trial, either party may reserve, by bill of exceptions, any ruling, opinion, or decision of the court to which an exception could have been reserved if a trial by jury had not been waived, and is entitled to an appeal from the judgment of the court; and "if the finding is special, on appeal, the supreme court must examine and determine whether the facts are sufficient to sustain the judgment." Code 1886, §§ 2743-2745. This proceeding was a statutory trial of the right of property. The sole question was whether, on the facts which were admitted, the property levied on was liable to the execution, or was the property of the claimant. On the admitted facts, the court found specially that the property was not the property of the defendant in execution, and was the property of the claimant. We regard this a special finding in the meaning of the statute, and the appeal devolves on us the duty of examining and determining whether the facts are sufficient to support the judgment.

The levy was made, and the claim interposed, prior to the enactment of the statute of February 28, 1887, which constitutes section 3004, Code 1886, which provides that the right of trial to property provided by the statute shall include any person who holds a lien upon, or equitable title to, such property. We have heretofore held that the act is not retrospective, and that a claimant must maintain his claim on the title he had when it was interposed, and that the rights of the parties must be determined by the law then in force. *Wetzel v. Kelly*, 83 Ala. 440, 3 South. Rep. 747. By the law in force at the time the proceedings were instituted, the claimant must show a legal title to the property, with actual possession, or a right to possession, such as would maintain trespass, trover, or detinue. At the time of the levy the property was in the possession of the defendant in execution. The only claim or right to the property of the claimant, as shown by the admitted facts, is a landlord's lien for rent and advances. Such lien does not confer on the landlord a right of property sufficient, prior to the adoption of section 3004, to support a claim under the statute. *Treadway v. Treadway*, 56 Ala. 890. The facts do not support the judgment of the court. The parties agreed that, if the judgment was reversed, this court should render the proper judgment. This we cannot do, as there is no proof from which we can ascertain and assess the value of each article of the property separately, as required by the statute. Reversed and remanded.

(83 Ala. 493)

#### STEWART v. LOUISVILLE & N. R. CO.

(*Supreme Court of Alabama*. January 6, 1888.)

#### MASTER AND SERVANT—LIABILITY OF MASTER FOR DEATH OF SERVANT—PARTIES.

Under the act of February 12, 1885, (Sess. Acts Ala. 1885, p. 115,) providing that in case of injury to a workman resulting in death "the heirs at law of the workman shall have the same right of compensation and remedies against the employer as if the workman had not been \* \* \* in the service of the employer," the only

remedy theretofore possible being that given to the personal representatives by Code 1876, § 2641, an action for the death of a person must be by the personal representatives, not the heirs.

Appeal from city court of Mobile; WILLIAM E. CLARKE, Judge.

Action for personal injuries causing death. This action was brought by Louis Stewart, Joseph Russell and others, infants, suing by their mother as next friend, as the heirs at law of Charles Russell, deceased, to recover damages for the alleged negligence of the defendant, the Louisville & Nashville Railroad Company, which caused the injuries resulting in his death. Said Charles Russell was, at the time of his death, in the employment of the defendant corporation as a brakeman; and he was killed on the night of September 26, 1886, being struck by the timbers of a bridge while on the top of a freight car in discharge of his duties as a brakeman. The action was commenced on the 19th February, 1887, and was founded on the act approved February 12, 1885, entitled "An act to define the liabilities of employers of workmen for injuries received by the workmen while in the service of the employer." Sess. Acts 1884-85, p. 115. The court sustained a demurrer to the complaint on the ground that the right of action, if any existed, was in the personal representatives, and the plaintiffs appeal.

*G. L. & H. T. Smith*, for appellant. *Gaylord B., Frank B., & Levert Clark*, contra.

STONE, C. J. In the absence of statutes, no one could maintain an action for the injury complained of in this case, followed, as that injury was, by the death of the party injured. Hence, we must consult the statutes, alike for the right of action and for the manner of its enforcement. 3 Wood, Ry. Law, § 419. In England, and in many of the states, statutes have been enacted giving a right of action where death has ensued from the wrongful or negligent act of another, or of a corporation. 3 Wood, Ry. Law, § 410. A remedy was provided in this state in cases "when the death of a person is caused by the wrongful act or omission of another," by the act "to prevent homicides," approved February 5, 1872. Sess. Acts, 88; Code 1876, § 2641. It was held, however, and has been uniformly so ruled in most, if not all, the states, that "there can be no recovery of the master by one for an injury inflicted upon him through the negligence of his co-servant," unless the master or employer is chargeable with the employment of an incompetent person, through whose negligence or incompetency the injury is inflicted. 3 Wood, Ry. Law, p. 1494, § 388; *Railway Co. v. Smith*, 59 Ala. 245; *Tyson v. Railroad Co.*, 61 Ala. 554; *Smoot v. Railway Co.*, 67 Ala. 13; *Blake v. Railroad Co.*, 70 Me. 60, 85 Amer. Rep. 297; *Brown v. Railroad Co.*, 27 Minn. 162, 6 N. W. Rep. 484; *Smith v. Potter*, 46 Mich. 258, 9 N. W. Rep. 273; *Crutchfield v. Railroad Co.*, 78 N. C. 300. The imperfection in the law was attempted to be remedied by the "Act to define the liability of employers of workmen for the injuries received by the workman while in the service of the employer," approved February 12, 1885. Sess. Acts, 115. That statute declares that, in case of such injury "by reason of any defects in the condition of the ways, works, machinery," etc., "the workman, or, in case the injury result in death, the heirs at law of the workman, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work." We encounter several difficulties in interpreting the foregoing language. "Heirs at law" is not a technically accurate term for defining distributees,—next of kin,—upon whom the law devolves the succession, when a decedent leaves personal effects. Such effects pass to the personal representative for administration, and reach the legatees or distributees only through him. But the statute presents a greater difficulty. It declares that, "in case the injury result in death, the heirs at law of the workman shall have the same right

of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work." Treating, as we think we must, the phrase "heirs at law" as intended to mean next of kin, we encounter the obstacle that such next of kin, even when their ancestor died from injuries improperly inflicted by some other person, or by a corporation, have no known direct remedy against such person or corporation, even when the ancestor losing his life was not in the service of such person or corporation. The common law gave no such remedy, and our older statutes, (Code 1876, § 2641,) did not give it directly to the next of kin, or heirs at law. So, if we give to the act of February 12, 1885, a strict narrow interpretation, it confers no rights, and has accomplished nothing. It is our duty to give to every part of any act of the legislature some meaning and some operation, if we can. And if language admits of more interpretations than one, we should adopt that which gives it some effect, rather than another which defeats all operation. *Lehman v. Robinson*, 59 Ala. 219; *Ex parte Dunlap*, 71 Ala. 73. And the statute we are construing, being remedial, we should construe it liberally, in promotion of the remedy intended to be conferred. Potter's Dwar. St. 73; Sedg. St. & Const. Law, (2d Ed.) 308 *et seq.*; *Blakeney v. Blakeney*, 6 Port. (Ala.) 109; *Felrath v. Schonfeld*, 76 Ala. 199. We do not feel at liberty to deny to the statute all operation, while, at the same time, we feel it to be our duty to supply as few apparent omissions—to correct as few verbal inaccuracies—as will enable us to give operation to the statute. The controlling purpose of the statute was to give to workmen, laborers, employes, a remedy against their employers for injuries suffered through the wrongful or negligent conduct of the latter; in other words, to relieve them of the discriminating disabilities under which they had heretofore labored; to give for the benefit of their heirs at law,—next of kin,—in the event death had ensued from the injury, the same compensation and remedy against the employer as if the decedent had not been a servitor, workman, or laborer for the person or corporation offending. As we have seen, the common law gave no compensation or remedy for negligent or tortious acts causing the death of another. The statute, therefore, could have had no reference to the common law. An older statute (Code, § 2641) had provided compensation, and a remedy, when the decedent was not an employe, was not a retained servant or laborer. True, the action was to be prosecuted in the name of the personal representative, but the recovery was not subject to the debts of the deceased. It was to be distributed "as personal property of an intestate is now [was then] distributed;" that is, it was to go to the next of kin,—heirs at law. To this statute, the act of February 12, 1885, referred, or it referred to nothing. It provided compensation and a remedy to the heirs at law,—next of kin,—but it provided it through a suit by the personal representative. The suit in the present case ought to have been by the personal representative. We have not considered any other question in the cause. The judgment of the city court is affirmed.

(34 Ala. 336)

BYRD *et al.* v. JONES *et al.*

(Supreme Court of Alabama. May 23, 1888.)

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT AND ACCOUNTING—RIGHT OF CREDITOR TO CONTEST.

Under Code Ala. 1886, § 2143, which allows "any person interested" to appear, and contest any item of account in a settlement by a personal representative of one deceased, a creditor of an estate not declared insolvent may appear, and contest a settlement by the retiring administrators, on the ground that allowing credit for certain unauthorized payments would render the estate insolvent.

2. SAME.

On the contest of a final report of certain retiring administrators of an estate by a creditor, the fact that a petition was pending in a chancery court, alleging that such creditor's claim had been paid, does not bar him from maintaining his contest in the probate court.

3. SAME—INSOLVENCY OF ESTATE.

A creditor contesting the final account of outgoing administrators may show the insolvency of the estate, although it has not been formally declared insolvent, to determine whether such administrators are entitled to credits for the payment of unpreferred debts.

4. SAME.

In such a case the proof required to establish the insolvency need not be so positive as when the insolvency is directly in issue; but, upon a showing of claims of *prima facie* validity against the estate, the court will not, in the absence of creditors, enter upon any inquiry as to any alleged defense to the claims.

5. SAME—PAYMENT OF UNPREFERRED CLAIM.

The probate court may strike from the final account of retiring administrators items of credit for the payment of unpreferred debts when there is proof before the court that the estate is probably insolvent.

6. SAME—PAYMENT TO WIDOW IN EXCESS OF HER ALLOWANCE.

Two notes delivered to the intestate's widow, amounting, at the time of settlement, to near \$3,000, were charged in full against the administrators. The intestate left no children. In such case the administrators are only liable for the excess of the notes over \$1,000, and legal interest from the time the notes were delivered to the widow, since she was entitled to that amount, with or without an administration, under Code 1886, § 2544.

7. SAME—EVIDENCE.

In such a case the court properly refused to admit declarations of the widow to explain how she came into possession of the notes.

8. FRAUDULENT CONVEYANCES—DECLARATIONS OF GRANTOR IN POSSESSION.

Upon a settlement of the estate of one who in life had conveyed certain lands, but was permitted to retain possession thereof, and collect and use the rents until his death, his declarations, that the transfer was made to defraud certain creditors, are admissible, since the facts show a *prima facie* case of fraudulent combination between vendor and vendee.

Appeal from probate court, Wilcox county; JAMES T. BECK, Judge.

The appellants in this case were the administrators in chief of the estate of Stephen Byrd, deceased. They were removed, and R. C. Jones, appellee, was appointed administrator *de bonis non* of the said estate. The questions raised and presented in this case are raised on the application by appellants for final settlement of their administration of the estate of said Stephen Byrd, deceased. The appellee Isaac Owens, as creditor of the said estate, contested the said final settlement by the appellants, and moved the court to strike from the account current filed by them certain credits, and sought to charge the said administrators with the same, on the ground that the same had been wrongfully paid; at the same time alleging that the said estate was in fact insolvent. The said Owens based his claim, as a creditor of the said estate, upon a judgment he had obtained against the appellants' intestate during his life-time, and introduced in evidence the record of the chancery court, showing the same to be true. The said Owens also proved that he had filed his claim against the said estate, in the office of probate, in due time, and within the period required by the law, and introduced the record of the probate court to show the same. The appellants resisted the petition and motion of the said Owens on the ground that he was not a creditor of the estate under the requirements of the statute; and, if he was such a creditor, he was in no way made a party to the settlement by the appellants, and that he could not, of his own merits, as such creditor, become a party; the estate never having been declared to be insolvent. The principal ground of the appellees' contesting the settlement of the appellants was that they had been guilty of a *devastavit* of the estate; had paid claims against the estate which were not preferred, and that, too, when the estate was *prima facie* insolvent,—the claims against the estate being in excess of the assets of the estate. The appellants resisted this charge of the alleged insolvency, at the same time objecting to the introduction of the claim of the contestant, Owens, on the ground that the same was now in litigation in the chancery court to decide whether or not an alleged compromise on the part of the appellants should be allowed in con-

tradition of the said claim. The court overruled this objection on the part of the appellants, and they excepted. The appellees also showed, among other claims, that the widow of the intestate held notes belonging to the estate of the deceased, which had never been accounted for by the administrators, and sought to charge them with the amount of these notes. The administrators sought to introduce evidence showing how the said notes came into the possession of the said Mrs. Byrd; that they were given to her by agreement between her and the heirs of the deceased; but, upon objection from the contestants, the court refused to allow them to make such proof. The other facts are sufficiently shown in the opinion. Upon the hearing of the cause and all the evidence, the court allowed Owens to contest the settlement as a creditor of the estate; decreed that the estate was insolvent; that the motion of the appellees to strike certain items of credit from the account current filed by the administrators, as unauthorized payments against the estate, be granted; and that the appellants be charged with said credits, and that they be also charged with the two notes proved to be in the possession of Mrs. Byrd. From the many rulings of the court raising these many points the appellants appealed, and assign the same as error.

*Gamble & Richardson and S. J. Cumming*, for appellants. *Jones & Jones and Howard & Horn*, for appellees.

SOMERVILLE, J. 1. While a creditor of a solvent estate is not a party, either necessary or proper, to a proceeding in the probate court having in view the settlement of such estate, he may nevertheless become a party by appearing, and inaugurating a contest of the account of the personal representative, under the authority of section 2143 of the present Code, (1886.) Code 1876, § 2519. This section authorizes "any person interested" to appear and contest any item of the account, to examine witnesses, and introduce any legal evidence in support of his contest. That a creditor may often be "a person interested" within the meaning of this statute, there can, in our opinion, be no doubt. Our whole system of legislation in reference to estates of decedents rests on the theory that creditors have a primary interest in all proceedings pertaining to settlements of such estates, and the policy of the law, as expounded by this court, has been to afford them every reasonable opportunity to protect that interest by intervening as parties. *Kelly v. Garrett*, 67 Ala. 304; *Phillips v. Smith*, 62 Ala. 575; *Smith v. Phillips*, 54 Ala. 8; Code 1886, §§ 2157, 2180, 2228. The case of *Owens v. Thurmond's Adm'r*, 40 Ala. 289, in nowise conflicts with this view. It is there decided that a creditor of one of the distributees of a decedent's estate is not a person interested in such estate, within the meaning of this statute, which appeared in the Code of 1852 as section 1812; such interest being regarded as too uncertain and remote. In that construction of the statute we fully concur. The interest which creditors have in settlement of this estate is manifest. The original and outgoing administrators, Byrd and Stringfellow, are being brought to a final settlement. If certain claims are allowed to them by the probate court, the estate will probably be rendered insolvent. If objections are sustained to these claims, a different result may follow. Their final discharge will acquit them of liability to creditors for any damage or *devastavit* suffered by their negligence or wrongful acts. Under this state of facts, we hold that any creditor of the estate is interested in the settlement proposed to be made, because he is interested in preventing the estate from becoming insolvent by the improper allowance of illegal claims, which would operate to reduce the *pro rata* amount to be distributed among such creditors.

2. The probate court, in our judgment, properly decided that Isaac Owens was *prima facie* such a creditor of the estate of Stephen Byrd, deceased, as entitled him to appear and contest the administrator's account. The decree rendered on December 19, 1874, in the chancery court of Monroe county,

against Byrd in his life-time, and in favor of Isaac Owens and Brainard Owens, for over \$3,600, which had been presented as a claim against the estate within the time required by law, was presumptive evidence of this fact. Nor was this presumption affected by the fact that a petition had been filed in the chancery court by the administrators of Byrd, alleging the satisfaction of this decree by compromise with the solicitor of the claimants; they being then minors, under 21 years of age. That question was one within the equitable jurisdiction of the chancery court, and entirely collateral to the present proceeding. The probate court very properly declined to enter upon the investigation of this litigated issue, which was shown to be pending and in process of adjudication by the chancery court. The *prima facie* validity of the debt is all that is requisite. *Phillips v. Smith*, 62 Ala. 575. The decision, moreover, of that court in sustaining the demurrer to the petition of the administrator was itself *prima facie* favorable to the validity of Owens' claim. It would be bad policy, we may add, to permit an administrator to escape the pursuit of a vigilant creditor, by dragging him into a court of chancery, as it might often tempt him into selfish and unnecessary litigation.

3. There is no error in the ruling of the probate court allowing Owens to intervene on the final settlement, and to contest the account of the appellants. The assignments of error based on the various exceptions growing out of this phase of the case must, accordingly, be overruled. The creditor, having a right to appear and contest any item of the outgoing administrators' account, could prove any neglect of duty, or failure to discharge the trust, that would operate to deprive the administrators of the right to any credit claimed. The solvency or insolvency of the decedent's estate was a material fact bearing on this point. If the estate was solvent, the administrator would be justified in paying all the valid and subsisting claims, and, after these, the remainder only *pro rata*. The fact that the estate had not been formally declared insolvent by judicial ascertainment would not preclude the contesting creditor from showing it to be so in fact. No one has the right to invoke the jurisdiction of the probate court so as to establish this fact judicially, except the administrator on his own report of the *status* of the estate, and it is attributable to his own neglect if he fails to do so. Code 1886, § 2223. His breach of duty ought not to prejudice the rights of creditors. All unpreferred claims paid by appellants were paid at their own risk of the solvency of the estate; that is, of the sufficiency of the property of such estate to pay its debts. There was no error in the action of the probate court in allowing this issue to be collaterally made for the purpose of presumptively ascertaining the administrators' right to credits claimed by them for the payment of the unpreferred debts.

4. The evidence, in our opinion, was sufficient to show a *prima facie* case of insolvency; the fact presented on this inquiry arising, as it does, collaterally. As said in a former case touching this point: "When a fact arises collaterally, the rules of evidence never exact as cogent proof in affirmation of its verity as where it is directly in issue. If the notes of the intestate, and other presumptive evidences of his indebtedness, which are presented for payment to the administrator, exceed in amount the assets of the estate which are available for the payment of debts, a *prima facie* case of insolvency exists. It is immaterial that some of these claims are in litigation, and are alleged to have been settled. If they are in the forms of promissory notes, or other like written acknowledgments of indebtedness, which are in the possession of the creditor, the law does not presume they are paid, but the *onus* of such a defense is cast upon the maker." *Association v. Neville*, 72 Ala. 517. On such a collateral issue, the claims presented in the forms of itemized accounts, properly verified by affidavits showing their correctness, may now be considered as a portion of the indebtedness, presumptively at least, until the contrary is proved, (Code 1886, §§ 2143, 2773,) although on a direct issue a higher measure of proof might be required. *Prima facie* validity being es-

tablished, the court will not, in the absence of creditors, enter upon any inquiry as to any alleged defense to the claim, whether it be payment, the bar of the statute of limitations, or other matter of mere confession and avoidance.

5. In view of the probably insolvent condition of the estate, the administrators were not justified in paying in full the unpreferred debts. They could do this only by themselves assuming the risks of a deficiency of assets. Code 1886, §§ 2079, 2080. The most they can now claim is to be subrogated to the rights of the creditors whose claims they have satisfied, and to receive their *pro rata* dividends, as in the case of a judicially ascertained insolvency. *Shelton v. Carpenter*, 60 Ala. 201; *Bates v. Vary*, 40 Ala. 421, 437; *Kimball v. Moody*, 27 Ala. 180, 188; *Smith v. Bryant*, 60 Ala. 235. There was no error in the action of the court striking from the administrators' account the various items of credit of this class.

6. The testimony of the witnesses Watkins and Moreland as to the declarations of Stephen Byrd, claiming ownership of the land conveyed by him to A. P. Byrd, and asserting the transfer to have been to defraud certain of his creditors, was admissible. He, as vendor, was allowed to remain in possession of the premises for many years, extending to the day of his death, and asserted his ownership by the collection, and presumptively also the appropriation, of the rents. This raised such a *prima facie* case of fraudulent combination on the part of the vendor and vendee as to authorize the declarations of the vendor to be admitted in evidence against the vendee as if the declarations were his own. *Weaver v. Yeatmans*, 15 Ala. 539; *Goodgame v. Cole*, 12 Ala. 77; *Humes v. O' Bryan*, 74 Ala. 65.

7. The court properly refused to allow proof to be made as to the declarations of Mrs. Byrd explanatory of the mode by which she came into possession of the notes of Chapman and Mixon. Sources of title cannot be proved in this manner. *Guy v. Lee*, 81 Ala. 163, 2 South. Rep. 273; *Daffron v. Crump*, 69 Ala. 77.

8. We have examined the other rulings of the court, and, after rejecting all evidence to which objection was properly taken, we are of the opinion that the other rulings of the court are free from error, with one important exception. This relates to the notes of Chapman and Mixon, allowed to be retained by Mrs. Byrd, the widow of the decedent, with the full value of which the administrators were charged, aggregating, with interest, nearly \$2,000. There being no children, the widow was entitled, under the statute, to select for herself, in addition to exemptions of certain specific property, personal property of any kind, including money or choses in action, not exceeding in value the sum of \$1,000. Code 1886, §§ 2546, 2547. This right she could exercise either prior or subsequent to any formal administration of her husband's estate, (*Mitcham v. Moore*, 73 Ala. 542; *Little v. McPherson*, 76 Ala. 552;) and, if the property selected exceed in value the amount to which she was entitled, she would be liable to creditors of the estate only for the excess in value over her lawful exemptions. *Cameron v. Cameron*, 82 Ala. 392, 3 South. Rep. 148. The retention of these notes by the widow was tantamount to such selection. This was done under the form of a compromise of her claim of interest in the decedent's estate, which necessarily included her exemptions. The arrangement was consummated by the distributees, and was reduced to writing under date of April 7, 1888. It was fully acquiesced in by the administrators, and their consent to it is sought to be converted, on the present settlement, into a *devastavit* to the full amount of these notes, with interest. The probate court erred in charging the administrators with the full amount of these notes. They should have been credited with a deduction of the widow's exemption to the extent of \$1,000, with interest from April 7, 1883, to the date of settlement, August 15, 1887, which would amount to \$348.43; making a total of \$1,348.43. The measure of the administrators' liability in this proceeding cannot be permitted to exceed the injury which the creditors, and

others interested in the estate, have sustained by the alleged *devastant*. *Bank v. Clark*, 78 Ala. 73.

The judgment will be corrected to this extent, and, as corrected, will be affirmed, at the costs of the appellees.

(85 Ala. 236)

*ANTHE et uxo. v. HEIDE et al.*

(*Supreme Court of Alabama. May 31, 1888.*)

1. TRUSTS—ACTIONS TO DECLARE—AGREEMENT TO PURCHASE LAND JOINTLY.

Under evidence that complainant furnished part of the money with which defendant purchased a lot, that it was agreed that complainant should have a half interest therein, but that defendant, instead, took bond for title in his wife's name, and made the last deferred payment, before due, without complainant's knowledge, defendant will be decreed trustee, and compelled to convey title to an undivided half interest to complainant, and the last payment will be considered an implied loan to the extent of the difference between what complainant has paid and one-half the entire purchase money.

2. MORTGAGES—WHEN BONA FIDE—ADVERSE POSSESSION OF PREMISES.

Where a lot is purchased with money partly furnished by complainant, with the understanding that she and defendant were each to have a half interest therein, a mortgage executed by defendant for a pre-existing debt cannot be protected as *bona fide* against complainant, whose actual possession of the premises was constructive notice to the mortgagee.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Bill by Frank Anthe and Carrie Anthe, his wife, against Frank Heide and Christine Heide, his wife, and John Knaus, for specific performance of a contract for the purchase of a lot in the city of Birmingham; that Christine Heide, one of the defendants, may be declared a trustee of the legal title to an undivided half interest in said lot for the benefit of the complainant Carrie Anthe; that the title to the undivided half interest may be divested out of the said Christine Heide, and invested in the said Carrie Anthe; that the mortgage of the said John Knaus on the lot in controversy may be declared to be invalid as an incumbrance on Carrie Anthe's undivided half interest in the lot, and removed as a cloud on her title thereto. The defendant Knaus was made a party defendant to the bill as being a mortgagee under Heide and his wife. On June 5, 1883, before the filing of the bill in this case, a verbal agreement was entered into between the complainants and the defendants for the joint purchase by them of the lot in controversy, with the stipulation that the complainants were to pay one-half the cost of the purchase, and all improvements thereon, and that said Frank and Christine Heide were to pay the other half; and upon the full payment of the purchase money, as agreed upon, the title to the said lot in controversy was to be conveyed to the said Carrie Anthe and Christine Heide,—each having an undivided one-half interest in the lot, and the improvements thereon. The evidence shows that, in pursuance of said agreement, the lot in controversy was purchased from the Elyton Land Company, a part of the purchase money being paid in cash,—the complainants paying half, and the Heides paying the other half,—and notes having been executed to the company for the deferred payments; and that the complainants paid one-half of the amounts due on each of the purchase notes, except the last one, which was paid in full by Frank Heide and Christine Heide; this last note being taken up before the maturity of the same, and without the knowledge or consent of either of the complainants. There was no agreement that there was to be a conveyance to either of the complainants, but the understanding was that the Elyton Land Company was to convey the title to Mrs. Anthe and Mrs. Heide; each having an undivided half interest in the said lot. Mrs. Christine Heide held the bond for title for the lot in controversy; it being conveyed directly to her from the Elyton Land Company at the request of Frank Heide, her husband. As to the other testimony, there was some conflict; but the conclusions, which are corroborated by a decided preponderance of the testimony, are fully stated in the opinion.

On final hearing, the chancellor dismissed the bill, and this decree is assigned as error.

*J. J. Garrett*, for appellants. *Weaver & Selheimer* and *R. H. Pearson*, for appellees.

SOMERVILLE, J. There is practically but one question in this case, and upon the solution of that turns the correctness or incorrectness of the conclusion reached by the chancellor, who dismissed the complainants' bill. If the money paid for the lot in controversy was the money of Heide, then no trust in the land could result in favor of the complainants by reason of any alleged parol promise by Heide to purchase the land, and hold it for the use of Mrs. Anthe, or to convey it to her on her request. Such an agreement would be void by virtue of our statute of frauds. *White v. Farley*, 81 Ala. 563; *Patton v. Beecher*, 62 Ala. 579; Code 1886, § 1845. But if, on the contrary, any portion of the money paid to the Elyton Land Company as the consideration for the purchase of the land was the money of Mrs. Anthe, as alleged in the bill, although the bond for title was taken by Heide in his own name, a resulting trust in the land would inure to the benefit of Mrs. Anthe to the extent of the consideration advanced by her. And if Heide himself advanced any part of the consideration by the way of a loan to Mrs. Anthe, under an agreement, express or implied, he would hold the property upon a resulting trust in her favor, to the extent of her interest in such money consideration, which is alleged in the bill to be an undivided half interest. *Bates v. Kelly*, 80 Ala. 142, and cases there cited. We have examined the testimony with great care, and are unable to resist the conclusion that the chancellor erred in holding that the complainants were not entitled to the relief prayed for in the bill. We are clearly and satisfactorily convinced that the property in controversy was bought on joint account between Mrs. Anthe and the defendant Heide, and that she is, under the testimony, entitled to an equity in an undivided half interest in it. A portion of the consideration was paid for with her money,—hers, we mean, so far as her husband and these defendants are concerned,—and the other portion with the money of Heide. The last payment made by Heide, being anticipated by him, without the consent or knowledge of the complainants, must, in justice and good conscience, be considered as a fraud on the rights of complainants, and an advance by way of implied loan to Mrs. Anthe to the extent of the difference between what she had paid and one-half of the entire purchase money, with interest. This conclusion seems to us to be corroborated by a decided preponderance of the testimony, including the written evidence introduced, the clear, deliberate, and frequent admissions of the defendant Heide, and the testimony of many disinterested witnesses in the case. The testimony of the defendant Heide to the contrary, we think, is successfully impeached by strong contradictory evidence not reconcilable with his phase of the case. To our minds, the evidence establishing the trust in complainants' favor is full, clear, and convincing, and this is all that is required. *Carter v. Challin*, 83 Ala. 135, 8 South. Rep. 313, and cases cited. The defendant Knaus cannot claim to be protected as a *bona fide* purchaser by reason of his mortgage, so far as the equity of Mrs. Anthe is concerned, for two reasons: *First*, the mortgage debt is an antecedent or pre-existing one; and, *second*, the complainants were in actual possession of the premises, claiming to own an undivided half interest in it, and this operated as constructive notice of their equity. Mrs. Heide is a mere volunteer under the deed taken to her from the Elyton Land Company. She can be in no better condition than if the deed had been made to Heide, and he had conveyed to her by way of mere gift. The title of the complainants cannot be affected by such a transfer, especially by one who is shown to be insolvent. A mere donee can never be protected as a *bona fide* purchaser for value.

The decree of the chancellor must be reversed, and a decree will be rendered in this court decreeing the complainants to be entitled to the relief prayed. The cause will be remanded, that a reference may be made to the register to state an account, with a view of ascertaining how much the complainant Mrs. Anthes owes to the defendant Heide in the purchase money of said land, paid by him on her account.

(84 Ala. 430)

## BANKS v. STATE.

(Supreme Court of Alabama. May 28, 1888.)

## 1. LARCENY—EVIDENCE—ACTS OF PRISONER AFTER ARREST.

On a trial for larceny, evidence that defendant offered to conduct the parties who had him under arrest to the place where the stolen goods were concealed, that he did so, and that the goods were discovered there, is admissible, though such offer was preceded by an assurance that it would be best for him to tell all he knew about the matter.

## 2. CRIMINAL LAW—EVIDENCE—CONFESSIONS.

A confession, made by one under arrest for crime, to persons who had previously given him an assurance of hope, should be excluded from evidence at the trial, it not being shown that the influence of the assurance on the mind of the prisoner had been entirely obliterated at the time of the confession.<sup>1</sup>

Appeal from circuit court, Calhoun county; LEROY F. BOX, Judge.

The appellant, Banks, was indicted, tried, and convicted for burglary. The only evidence against him, as shown by the bill of exceptions, was his own confessions.

*Brothers, Willett & Willett*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

CLOPTON, J. In respect to the admissibility in evidence of the confessions of a person charged with a crime, the following rules have been repeatedly declared, and are well established, by our decisions: Confessions are *prima facie* inadmissible, and it must be satisfactorily shown to the court that they are voluntary—were made when the mind of the accused was free from the influence of hope or fear—before they can be received in evidence. Any menace, or hope excited by encouragement that the prisoner would be more favorably dealt with if he confesses, is sufficient to exclude them. When a confession has been obtained by appliances of hope or fear, a subsequent confession, made within a reasonable time thereafter, should be excluded, unless it is clearly shown that all undue influence had been fully withdrawn, or explained away, and that the mind of the accused was as free therefrom as if no effort had been made to extort a confession. And, though a confession may be obtained by the influence of threats or promises, if they disclosed extraneous facts, which show their truth and tend to prove the commission of the crime, so much of the confession as relates strictly to the facts discovered, and such facts, are admissible in evidence, but not the entire confession. *Owen v. State*, 78 Ala. 425; *Murphy v. State*, 63 Ala. 1. The offer of defendant to conduct the parties who had him under arrest to the place where the stolen goods were concealed, his having done so, and the discovery of the goods at such place, were properly received in evidence, though such offer was preceded by an assurance that it would be best for him to tell all about it. This can scarcely be regarded a confession, though the result was the discovery of criminative facts. *Spicer v. State*, 69 Ala. 159. But, if considered in the nature of a confession, the evidence was admissible under the forego-

<sup>1</sup>On the general subject of the admissibility of confessions, see *Mitchell v. State*, (Ga.) 5 S. E. Rep. 130, and note; *Corley v. State*, (Ark.) 7 S. W. Rep. 255; *Amos v. State*, (Ala.) 8 South. Rep. 749; *Jackson v. State*, Id. 847; *Steele v. State*, Id. 547; *People v. Deacons*, (N. Y.) 16 N. E. Rep. 676; *State v. Rush*, (Mo.) 8 S. W. Rep. 221; *Wilson v. State*, post, 383.

ing rules. The confession, however, made after finding the goods, and while the prisoner was still under arrest, to the same parties who had given the previous assurance of hope, should have been excluded. It was not shown that the influence of such assurance, and of the hope engendered thereby, had been fully withdrawn, or explained away, and that it was entirely obliterated from the mind of the prisoner. Reversed and remanded.

(84 Ala. 426)

## WILSON v. STATE.

(Supreme Court of Alabama. June 11, 1888.)

## 1. INDICTMENT AND INFORMATION—DESCRIPTION OF OFFENSE—ALTERNATIVE ALLEGATIONS.

Under Code Ala. 1886, § 4383, relating to indictments, which provides that, where an offense may be committed by different means, such means may be alleged in the alternative, an indictment alleging the commission of a murder, by striking in the head or by choking with a cord, is good.

## 2. CRIMINAL LAW—EVIDENCE—CONFESSIONS—WHEN VOLUNTARY.

Defendant, a penitentiary convict working in the mines, being under examining trial in the prison for an offense committed in the mines, made certain statements of an inculpatory nature to M., who had charge of the convicts, and whose duty it was to inflict corporeal punishment for violation of the prison rules, to prove which statements M. was introduced as a witness. M. stated that he did not think he made any promises or threats, nor gave any inducements to defendant before or at the time of the confessions, to obtain them. *Held*, that the admissions, being made to one in authority, were *prima facie* involuntary, and, that presumption not being clearly rebutted, the evidence was inadmissible.<sup>1</sup>

## 3. SAME—CONFESSIONS—IGNORANCE OF DEFENDANT AS TO HIS RIGHTS.

During such examination defendant was sent out of the room, and brought back in charge of one prison official, and interrogated by another in the presence of a third prison official and of another magistrate. Defendant was not sworn, nor did he request to be allowed to testify. He was not informed of his right to refuse to answer, nor that he could not be prejudiced by such refusal. No threats, promises, or inducements were proved. *Held*, that the confessions thus obtained must also be regarded as involuntary, and therefore incompetent.

Appeal from criminal court, Jefferson county; S. E. GREEN, Judge.

The appellant, Tom Wilson, was indicted for murder, the language of the indictment being as follows: "The grand jury charge \* \* \* George Williams, Nathan Collins, and Tom Wilson did unlawfully, and with malice aforethought, kill Cash Mosley, by striking him in the head with some hard substance unknown to the grand jury, or by choking him with a piece of fuse or cord; against," etc. The defendant demurred to the indictment on the ground that it alleged in the alternative the means by which the offense was committed. The court overruled the demurrer, and the defendant excepted. The defendant objected to and excepted to the admission by the court in evidence of certain confessions, alleged to have been made by him, on the ground that they were not voluntarily made. The facts and circumstances accompanying these confessions are fully set out in the opinion.

R. H. Fries, for appellant. T. N. McClellan, Atty. Gen., for the State.

CLOPTON, J. The indictment is not defective because it avers in the alternative the means by which the offense was committed. "When the offense may be committed by different means, or with different intents, such means or intents may be alleged in the alternative." Code 1886, § 4383.

We cannot regard the statements of the defendant, made to witness Moore, and during the progress of the preliminary investigation, as acknowledgments of facts not inculpatory in their nature,—admissions, as distinguished from confessions. They make direct allusions to the deceased, and are narratives of the facts and circumstances of his death which tend to implicate the defendant in the crime. Being in the nature of confessions, their admissibility

<sup>1</sup> See *Banks v. State*, (Ala.) ante, 382.

in evidence should be determined on the same principles as direct confessions of guilt. It is within the province of the court to determine, in the first instance, whether or not a confession is voluntary. Being, *prima facie*, involuntary and inadmissible, the burden is on the prosecution to establish the competency by showing, on a preliminary inquiry, that the mind of the accused was free from influence of hope or fear applied by another when he made the confession. The court should take care that the confession proceeded from volition, and not as the result of any influence improperly exerted, and should not admit them unless they clearly appear to have been made in such manner as to constitute them competent evidence. What questions were propounded to the witness Moore, and his answers thereto, are not disclosed by the record, which only shows a statement by him as follows: "I don't think I made any promises, gave any inducements, or made any threats," against the defendant, before or at the time of the confession. The guarded and cautious words of the witness implied doubt in his own mind, and are an admission that his recollection is not so clear but that he may be mistaken; or may be regarded as an admission that he had given promises, or made threats, but whether before or at the time of the confession, or subsequently, he does not recollect. While the character of the confession is ordinarily shown by answers to appropriate questions, the court should look beyond these to the condition, situation, and character of the accused, and the circumstances surrounding him. The defendant was a convict working at Pratt Mines. The witness had charge of all the convicts at the mines, and it was his duty to inflict corporeal punishment for violation of the rules of the prison. He stood to the defendant as one having authority. The offense was committed in the mines where the defendant was at work. When the guarded and doubtful language of the witness is considered in connection with the condition and situation of the prisoner and the attendant circumstances, we do not regard it as sufficient to make it clearly appear that the confession was voluntary. Other facts and circumstances may possibly be shown removing such doubt as to the character of the confessions, but if they exist they are not shown by the record. Our decisions do not favor the admissibility of confessions, and, if there be any doubt of their competency, it should be resolved, in accordance with the humane principles of our criminal law, in favor of life and liberty, and confessions should not be admitted unless plainly shown to be voluntary. In *Seaborn v. State*, 20 Ala. 15, it was held that the fact that a confession was made to an examining magistrate, when voluntarily made, is not sufficient to exclude it. In that case the prisoner pleaded guilty, and voluntarily made a confession of the circumstances of the killing in response to an inquiry by the magistrate. There was no special interrogation with a view to obtain a confession. In *Kelly v. State*, 72 Ala. 244, the admissibility of confessions made during the progress of the preliminary investigation came again before the court, and was fully considered and discussed. It was then held that the practice of interrogating the accused during such examination is unwarranted by the principles of the common law, unauthorized by statute, and contrary to the spirit of the declaration of rights; and that "confessions elicited by such a censurable practice are to be taken as involuntary, and should be excluded as criminative evidence against the person making them." In the present case the preliminary examination was had in the prison. After having examined the witness for the prosecution, the defendant, with two other persons, who were on trial at the same time, were sent out of the room with Williamson, who was then "task-master and mining boss," and also a witness. The defendant was brought in alone by Williamson, and interrogated by Moore, to whom the other confession we have above considered is alleged to have been made. In addition to Williamson and Moore, Rogers, the manager of the convict department at the mines, and another magistrate, were present." The defendant was not

sworn, and did not request to be examined as a witness. From these facts and circumstances, it is evident that the case cannot be distinguished in principle from *Kelly v. State*, *supra*. It is true that no threats were made, nor promises given; but the defendant was not apprised of his rights, nor informed that his case would not be prejudiced by his refusal to answer the questions, or that such refusal could not be construed as an evidence of guilt. In 1 Greenl. Ev. § 226, the author observes, in reference to confessions made by an accused under such circumstances: "Being a prisoner, subject to an inquisitorial examination, and himself at least in danger of an accusation, his mind is brought under the full influence of those disturbing forces against which it is the policy of the law to protect him." Self-possession, and the free and uninfluenced exercise of volition, cannot be expected in a prisoner so situated, under such circumstances, and subjected to such inquisitorial interrogation by persons who had authority over him as a convict. The confessions of defendant, implicating him in the crime charged, made during the progress of the preliminary investigation, must be regarded as involuntary and incompetent. Reversed and remanded.

(84 Ala. 254)

*PARSONS et al. v. JOHNSON et al.*

(Supreme Court of Alabama. May 28, 1886.)

## 1. EQUITY—PLEADING—BILL—REDUNDANCY.

Where a bill to have a trust deed declared a general assignment of the grantor's property for the benefit of creditors contains no other prayer, but abounds in charges that defendant's wife holds property assigned to her by defendant in fraud of creditors, the wife not being made a party to the bill, such charges, though redundant and impertinent, are not ground for demurrer.

## 2. SAME—AMENDMENT.

In such case, after the proof was all taken and published, an amendment making the wife a party defendant, and seeking to have property claimed by her, which was not embraced in the trust deed, sold for the husband's debts, was properly disallowed.

Appeal from chancery court, Tuscaloosa county; THOMAS COBBS, Judge.

Action by C. S. Parsons & Sons and others against Nelson D. Johnson and others. The decree was in favor of defendants, and plaintiffs appeal.

*Vanhooose & Powell*, for appellants. *Wood & Wood*, *McEachin & McEachin*, and *J. M. Martin*, for appellees.

STONE, C. J. A mortgage or trust deed bearing date November 8, 1880, was executed by Nelson D. Johnson to Rankin, as trustee, conveying a stock of merchandise, and authorizing its sale for the benefit of certain named creditors of the mortgagor. It is not denied that the debts named in the mortgage are *bona fide*, and it is admitted that the property conveyed is not of sufficient value to pay the secured debts in full. The complainants in the present suit are certain other creditors of Johnson not provided for in the trust deed. They make no attack on the *bona fides* of the conveyance. The *gravamen* of their bill is that the deed conveys substantially all the property of the debtor that is subject to his debts, and that it is therefore a general assignment, which inures alike and equally to the benefit of all the grantor's creditors. The original bill contains but a single prayer for relief, in the following language: "That your honor will decree the said assignment made by said N. D. Johnson to said David P. Rankin, trustee, on the 9th November, 1880, to be a general assignment for the benefit of all the creditors of the said N. D. Johnson who make themselves parties to this bill." The controlling purpose of the bill is to have the trust administered for the benefit of all the creditors, *pari passu*. A bill for such a purpose assumes the burden of the issue; and it is essential to success that complainant prove affirmatively that the instrument conveys, not absolutely, but as security, substantially all the debtor's property which is subject to the payment of his debts. *Trust Co. v.*

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*Foster*, 58 Ala. 502; *Shirley v. Teal*, 67 Ala. 449; *Danner v. Brewer*, 69 Ala. 191; *Ordway v. White*, 80 Ala. 244. The chancellor, in weighing the testimony, reached the conclusion that this indispensable charge was not made good, and we concur with him in this conclusion.

The original bill contains many charges, very general in form, to the effect that Nelson D. Johnson had other effects, fraudulently or secretly conveyed away, which ought to be made subject to his debts. It more than insinuates that, in property held in his wife's name, the rightful ownership was in him, the said Nelson D. Interrogatories were propounded to him, which he was required to answer under oath, in reference to property so fraudulently held for him. Yet Mrs. Johnson was not made a party defendant to the bill, nor was any relief, general or special, prayed as to property so alleged to be fraudulently held for his use or enjoyment. As we have said, the original bill has but one prayer for relief,—that copied above. The bill not seeking to follow the property, so alleged to have been fraudulently conveyed, to any logical result,—not seeking to condemn it to the payment of the said Nelson's debts,—it furnished no ground for a demurrer. Perhaps the proper practice would have been a motion to strike it from the bill as impertinent. It surely had no office to perform germane to the purposes of the bill, but, if true, tended to disprove the fundamental averment on which relief was prayed. Framed as the original bill was, these averments were redundant.

An amendment of the bill was offered after the proof was all taken and published. By that amendment it was proposed to make Mrs. Johnson a party defendant, and to have certain property claimed by her sold in payment of her husband's debts. The property thus sought to be reached is not embraced in the trust deed, which the original bill sought to have declared a general assignment. If that feature had been embraced in the original bill, or the amendment had been allowed, it would have presented a most palpable case of repugnancy and multifariousness. In the original bill, only the trustee and the creditors provided for in the trust deed were proper parties defendant; for only their interests were sought to be injuriously affected by the proceedings. Mrs. Johnson could not possibly have any interest in that question. Under the amendment offered, the proposition was to recover, and utilize in the payment of Johnson's debts, property outside of the trust deed, which Mrs. Johnson claimed, while the beneficiaries asserted no right to it. This would affect Mrs. Johnson injuriously, but could not injure the beneficiaries under the trust deed. If they had any interest in that question, it was on the side of complainants, because its object and tendency were to augment the assets for the payment of Johnson's debts. *Seals v. Phetiffer*, 77 Ala. 279. The chancellor did not err in disallowing the amendment. Affirmed.

(84 Ala. 529)

**JEFFERSON COUNTY SAV. BANK *et al.* v. EBOEN.**

(*Supreme Court of Alabama. May 29, 1888.*)

**1. ATTACHMENT—WRONGFUL ATTACHMENT—ACTION FOR DAMAGES—SALE OF GOODS.**

In an action on an attachment bond for the wrongful suing out of an attachment, no recovery can be had for damages caused by the sheriff's selling the goods in quantity, and not in detail; such damages not being the natural and proximate consequence of the act of suing out the attachment.

**2. SAME—PLEADING.**

In such action, an allegation in the complaint that plaintiff was prevented by the attachment from settling with his creditors, by paying them with the goods, is not ground for demurrer.

**3. SAME.**

In such action, an allegation of the complaint that the goods were seized under a writ of detinue issued at the instance of defendant, which was dismissed and the attachment levied, is irrelevant.

**4. SAME—EVIDENCE.**

In such action, evidence that plaintiff, prior to the issue of the attachment, offered to convey certain property, at a specified price, to defendant in settlement of its claim, is irrelevant.

**5. SAME.**

In such action, it is an incompetent method of proving the quantity of goods in the store to show the percentage of profits on the goods sold, and thus approximate the amount on hand.

**6. SAME.**

In such action, the return of the sheriff is not conclusive as to the amount of goods seized, and it is competent to show that other goods, omitted from the inventory, were also seized.

**7. SAME.**

In such action, where it appears that the goods seized are the same as those formerly taken in detinue, an officer who made the inventory in such former suit, and testified that it was correct, may give his opinion as to the value of the goods, based on his knowledge thus acquired, in connection with his experience as deputy-sheriff in taking other inventories, and making sales of similar goods.

**8. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—CONSIDERATION.**

Where a party who owes a *bona fide* pre-existing debt transfers property to his creditor in payment of such debt by an absolute sale, at a fair price, and in quantity not more than enough to pay the debt, the transaction is not fraudulent, no matter what the intent of the parties, and is no cause for suing an attachment against the debtor.

**9. SAME—CHATTEL MORTGAGE.**

A sale of goods made in payment of a *bona fide* pre-existing debt, at a fair price, and in quantity not more than enough to pay the debt, by one who has previously executed a bill of sale of such goods as mortgage security, the mortgagee allowing him to retain possession of and sell them for his own benefit, is valid, and does not justify the suing of an attachment against him by the mortgagee, as the bill of sale is fraudulent and void as to creditors.

**10. DAMAGES—EXEMPLARY—CORPORATIONS.**

A corporation may become liable in exemplary damages for wrongfully suing out an attachment.<sup>1</sup>

**Appeal from city court of Birmingham.**

This was an action brought by the appellee, B. F. Eborn, against the appellants, the Jefferson County Savings Bank and others, to recover both actual and punitive damages for the wrongful and vexatious suing out of an attachment by the defendant corporation against the said Eborn. There was a demurrer to the complaint on several grounds. The first three grounds of demurrer are shown by the opinion. The other grounds were as follows: "*Fourth*. That it is no cause of action against these defendants that the sheriff sold the goods levied upon in quantity, and not in detail, as set forth in the first specification under the third assignment of breach of condition of bond in the complaint. *Fifth*. That the ground of damage in said first specification is speculative and conjectural, and not the proximate result of the wrongful or vexatious suing out of said attachment." "*Seventh*. That the grounds of damages set forth in the fifth specification of damages under the third assignment of breach of the condition of said attachment bond, to-wit,

<sup>1</sup> The fact that plaintiff is a corporation is no objection to an award of exemplary damages. *Railroad Co. v. Telephone Co.*, (Tex.) 5 S. W. Rep. 517.

To recover exemplary damages for suing out and levying a writ of attachment on plaintiff's goods, it must be shown, not only that the attachment was issued without probable cause, but that it was done with malicious intent to injure the plaintiff. *Kauffman v. Babcock*, (Tex.) 2 S. W. Rep. 878; *Rice v. Miller*, (Tex.) 8 S. W. Rep. 817. See, also, on the subject as to when exemplary damages may be awarded in action for wrongful attachment, *Binn v. Stein*, (Tex.) 5 S. W. Rep. 454; *Tynberg v. Cohen*, (Tex.) 2 S. W. Rep. 734; *Biering v. Bank*, (Tex.) 7 S. W. Rep. 90.

On the general subject of exemplary damages, see *Webb v. Gilman*, (Me.) 13 A. Rep. 698; and note.

that by said attachment plaintiff was prevented from making a settlement with his creditors, by paying them with the goods, is speculative and conjectural, and is not ground of action against these defendants. *Eighth.* That the seizure of said stock of goods under a writ of detinue set forth in the complaint is no ground of action or of damages in a suit upon the attachment bond." The court overruled all of these grounds of demurrer, and the defendants excepted. Issue was then joined on the pleas of the defendants, which set up the general issue, and specially of not having sued out the attachment wrongfully and vexatiously, and that the goods were seized, under a writ in detinue, on account of the defendants' rights therein given them under the power of a bill of sale made to them by the plaintiff. On the trial, plaintiff first introduced in evidence the writ of detinue, which was issued and levied on the goods on the 15th of September, 1886, and also the sheriff's return thereon, and also showed that the same had been dismissed. There was then evidence to show that the defendants, after dismissing the detinue suit, instituted the attachment proceedings. The plaintiff offered to prove that, at the time the attachment was levied on his stock of goods, he had a sufficient quantity of goods in his store to pay off all of his indebtedness, and then offered to prove this by stating the amount of profits he had made on the goods sold, and in this way approximating the amount of goods he then had on hand. The defendants objected to this mode of proving the quantity of goods in the plaintiff's store, but the court overruled their objection, and they excepted. Upon the plaintiff, as witness, being asked "if he did not offer to settle with the bank;" "and, if so, at what offer did he make," the defendants objected to this question, but the court overruled their objection, and allowed the plaintiff to answer the question; whereupon the defendants excepted. The plaintiff undertook to prove that the return of the sheriff of the goods seized by him under the writ of attachment was not complete, and did not contain all the goods levied on by him. The defendants objected on the ground that the written return of the sheriff was conclusive as to the goods so levied on; but the court overruled the objection of the defendants, and allowed the plaintiff to testify as to the goods not so contained in the return of the sheriff, and the defendants excepted. In attempting to prove the value of the goods levied on, there was some conflict, and upon the deputy-sheriff, Brown, who was examined as a witness, being asked to state the value of the goods levied on, under the circumstances as shown in the opinion, the defendants objected to this evidence by the witness Brown; but the court overruled their objection, and they excepted. It was proved that when the plaintiff gave the bill of sale to the defendants, upon which the detinue suit was instituted, and which witnessed the indebtedness which was the foundation of the attachment, he was indebted to his mother in a large amount; and that before the attachment was levied, and before the goods were seized under the writ or detinue, (just a very short time before,) he made a bill of sale to a part of his goods to his mother. The court charged the jury, among other things, as follows: (1) "If you find that the plaintiff owed his mother a *bona fide* debt pre-existing, and he transferred the goods to her, in payment of such debt, by an absolute sale at a fair price, and in quantity not more than enough to pay her debt, then the transaction was not fraudulent, and it does not matter with what intent he did so, nor with what intent his mother received the goods; and in that case, if there was no other cause for suing the attachment, then it was wrongfully sued out, and the plaintiff would be entitled to recover." (2) "If you find that the plaintiff owed his mother a *bona fide* pre-existing debt, and paid her in goods by an absolute sale at a fair price, and in quantity not more than enough to pay the debt, the mere fact that the plaintiff paid his mother in goods on which the defendant bank had a mortgage was not a fraud authorizing the defendant Jefferson County Savings Bank to sue out an attachment." (3) "That corporations, although they act by agents, may be

subjected to punitive damages." To each of these charges given by the court the defendants separately and severally excepted. At the request of the plaintiff, the court gave the following charge, which was in writing: "Although the jury believe that B. F. Eborn had executed a bill of sale, as mortgage security, to the Jefferson County Savings Bank, upon the stock of goods prior to the 15th September, 1886, and was permitted by the bank to remain in possession and sell said goods, [this] would not render a sale of goods by him in payment of a *bona fide* debt to a creditor, at a fair price, fraudulent, so as to justify an attachment against him." The defendant excepted to the giving of this charge; and then asked the court to give the following charges, which were in writing, and duly excepted to the court's refusal to give each of them: (2) "That if, from the evidence, the jury believe, after the making of said bill of sale, the plaintiff added other goods to his stock covered by said bill of sale, not separating the new from the old, but mixing them so the mortgagee or the bank could not distinguish them, then the Jefferson County Savings Bank would be entitled to seize the goods, under its bill of sale, without being a trespasser." (3) "That if the jury believe that the said bill of sale covered or was upon the goods that the plaintiff, Eborn, by his bill of sale to his mother, conveyed and sold to her, and if the jury believe that the said Eborn, by the sale of said goods so mortgaged, did so for the purpose of hindering, delaying, and defrauding the Jefferson County Savings Bank or other person, then there was ground for the suing out of the attachment; and the levy of the attachment on the stock of goods was not wrongful, and the jury must find for the defendants." (4) "That in this case, if the jury believe from the evidence that said Eborn disposed of his said goods with the intent to defraud any creditor, then the levy of the attachment upon said stock of goods was not wrongful, and the plaintiff cannot recover, and the verdict must be for the defendants." (6) "That, in considering the question whether the sale of goods mentioned in the inventory or list attached to the bill of sale to Mrs. Eborn was fraudulent, the jury will look at all the facts and conduct of Eborn connected with the transaction, such as concealment, secrecy, making up the list or inventory in the night-time, and the removal of the goods at unusual hours." (7) "If the jury find that Eborn intended, by his sale to his mother, to hinder, delay, and defraud the defendant the Jefferson County Savings Bank, that although the jury believed Mrs. Eborn did not intend to commit a fraud, the attachment was not wrongful, and the jury must find for the defendants." (8) "That although Eborn owed his mother, yet, if he made the sale to her of his goods with the intent to hinder, delay, and defraud his creditors, then the attachment was not wrongful, and the jury must find for the defendants." (9) "That a man is presumed to intend the natural consequences of his own acts; that if the sale of the goods to Mrs. Eborn, that Eborn had mortgaged to the Jefferson County Savings Bank, tended to hinder, delay, and defraud the defendant the Jefferson County Savings Bank, then the jury may conclude that Eborn by his sale intended to commit a fraud." (10) "That if the jury believe the Jefferson County Savings Bank had a mortgage upon said stock of goods, so attached, for the amount of the debt due it, (the Jefferson County Savings Bank,) then the plaintiff cannot recover unless the attachment was levied on more goods than was sufficient to pay its debt." (11) "That the jury, in considering the amount of goods levied upon under the attachment, will not refer to the inventory made by the sheriff under the writ of detinue. The jury, as best they can, will ascertain the quantity of goods levied on, under the attachment, from the sheriff's return, and the proof as to the quantity of goods seized under the attachment." There was a judgment in the lower court for the plaintiff. The defendants thereupon appealed, and now assign the several rulings of the court upon the evidence, and the giving and refusal to give the several charges asked, as error.

*R. H. Sterrett and W. C. Ward, for appellants. Webb & Tullman, for appellee.*

SOMERVILLE, J. The suit is one on attachment bond, claiming damages, both actual and exemplary, for the wrongful and vexatious suing out of an attachment by the defendant corporation against Eborn, the plaintiff.

1. The objection is raised by demurrer that the defendant, being a body corporate, cannot be made liable for exemplary or punitive damages in the action. The court properly overruled the first three grounds of demurrer suggesting this objection, and charged the jury that corporations, although they act by agents, may be liable for damages of this character. There was no error in these rulings. *Glass Co. v. Paulk*, 88 Ala. —, 8 South. Rep. 800; *Jordan v. Railroad Co.*, 74 Ala. 85, 49 Amer. Rep. 800; *Reed v. Bank*, 130 Mass. 443, 39 Amer. Rep. 468; *Williams v. Insurance Co.*, 57 Miss. 759, 34 Amer. Rep. 494, and note; *Railroad Co. v. Quigley*, 21 How. 210.

2. If the defendant, by wrongfully intervening after the levy upon the goods, induced or "caused" the sheriff to sell the goods in unreasonably large quantities, and not in detail, and this operated to depreciate the price for which they were sold, resulting in their sacrifice, this would be a tort for which the defendant might be liable in a different form of action, or even the sheriff himself, but not the sureties on the attachment bond, because the resulting damages would not be the natural and proximate consequence of the act of suing out the attachment. It would rather be the result of an intervening cause in nowise connected with the levy of the process, or such as might be naturally expected to follow from it. The fourth and fifth grounds of demurrer were well taken, and should have been sustained. There is nothing in the seventh ground of demurrer assigned.

3. The seizure of the plaintiff's goods by the sheriff, under a writ of detinue issued from the city court of Birmingham at the instance of the defendant, was a fact irrelevant to any issue properly triable in the present action. The introduction of this averment in the complaint was prejudicial to the defendant, as tending to lay the foundation for the aggravation of damages, which were recoverable, if at all, in a separate action on the detinue bond, and not in this suit. It was a purely collateral fact, incapable of affording a reasonable presumption or inference as to the principal matter or fact in dispute,—the wrongful or vexatious suing out of the process of attachment, and the proximate damages resulting therefrom. And for this reason it tended to draw away the minds of the jurors from the true issue before them, and to mislead them, as well as to excite their prejudice.

4. The testimony of the plaintiff to the effect that, prior to the issue of the attachment, he made an offer to settle the defendant corporation's claim by conveying to it certain property at a specified price, which was declined, was irrelevant to any of the issue in the cause. It did not tend to shed any light upon the question of his intention to defraud the bank by the subsequent act of preferring another creditor.

5. It was not competent for the plaintiff to prove the percentage of profits on goods sold, for the colorable purpose of determining the quantity of goods seized by the sheriff, although it was permissible to prove, for this purpose, the amount of the goods on hand at any given time, and the quantity sold by way of diminution of the stock, with all additions made to it by accretion in the mean time; and in making proof of these facts, if they be within his personal knowledge, the witness could properly be allowed to refresh his memory by referring to his books, shown to have been correctly kept during the time in which he was carrying on his mercantile business.

6. The return of the sheriff was not conclusive as to the amount of goods seized by him under the writ of attachment. If other goods were seized, and were omitted from the inventory, whether by fraud or mistake, this fact could

be proved as between the parties to the present action. *Hensley v. Rose*, 76 Ala. 378.

7. Inasmuch as the evidence tends to show that the goods seized in the detinue suit were the same as those taken under the attachment writ, the witness Brown, who made out the inventory in the former suit, and testified that he knew it to be correct, was competent to state the value of the goods, based on his knowledge thus acquired, in connection with his experience as deputy-sheriff in taking other inventories, and making sales of similar stocks of goods.

8. The charges given by the court below conform to the principles announced by this court touching the subject of transfers and conveyances made by insolvent debtors, by way of preference, in absolute payment of debts due by them to *bona fide* creditors. *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, Id. 120; *Levy v. Williams*, 79 Ala. 171; *Carter v. Coleman*, 82 Ala. 177, 2 South. Rep. 354. The various charges requested by the defendant, although many of them announced propositions of law generically correct, were properly refused on account of their misleading tendencies, under the facts of this case. They ignored the particular rule settled in the cases last above cited, which is a qualification of the general rule as to fraudulent conveyances.

9. The bill of sale executed by the plaintiff to the bank being intended as a mere mortgage for the security of a debt, and the plaintiff having been allowed to retain possession of the mortgaged goods, and to sell them from day to day for his own benefit, this transfer was obviously fraudulent and void as to Mrs. Eborn, who was a creditor of the plaintiff at the time the instrument was executed. *Benedict v. Henfro*, 75 Ala. 121, 51 Amer. Rep. 429; *Sims v. Gaines*, 64 Ala. 392; *Lumber Co. v. Insurance Co.*, 77 Ala. 184. It could therefore confer no rights on the fraudulent mortgagee, as against existing creditors, including Mrs. Eborn, to whom the plaintiff sold his goods. It necessarily follows that the sale made to her by the plaintiff, if fair and valid, under the rule declared in *Hodges v. Coleman*, 76 Ala. 103, and other cases above cited, could not be made fraudulent by reason of this void bill of sale. A second conveyance, made upon a valuable consideration and in good faith, is always allowed to prevail over a prior conveyance which is fraudulent. *Eddins v. Wilson*, 1 Ala. 237. These views cover all the questions of importance likely to arise on another trial. Reversed and remanded.

(84 Ala. 346)

#### HEADLEY v. BELL et al.

(Supreme Court of Alabama. May 31, 1883.)

##### 1. INJUNCTION—TO RESTRAIN COLLECTION OF JUDGMENT—PLEADING.

A bill to enjoin the collection of a judgment obtained against one for refusing to enter satisfaction of a mortgage, and alleging simply that there was a valid defense of which complainant had no knowledge till after judgment was entered against him, is fatally defective, as not setting out facts from which it would appear that complainant was prevented from making his defense by fraud, accident, or the act of the opposite party, without fault on his own part.

##### 2. SAME—WHEN LIES—TO RELIEVE AGAINST A JUDGMENT.

Such bill will not be entertained on the ground that the mortgagor had no title to the property, and that such defense was not known to complainant till after judgment against him, where it appears that another than the mortgagor was in possession of the premises; as such fact was sufficient to put complainant on inquiry, which would have revealed the want of title.

Appeal from chancery court, Chilton county; S. K. McSPADDEN, Chancellor.

W. A. Collier, for appellant. Watts & Son, for appellees.

STONE, C. J. In March, 1884, Headley executed a mortgage to the Bells, to secure them for advances made and to be made, to enable the former to

make a crop that year. The mortgage conveyed the crop to be grown by Headley and 80 acres of land. The advances made by the Bells on the faith of this mortgage amounted to about \$60. After taking this mortgage, and making the advances, the Bells discovered that Headley had made an older mortgage of his crop to one Robertson, to secure him in a debt of about \$60. The Bells thereupon purchased the Robertson debt and mortgage, paying the face value of the debt therefor. After the maturity of the crop, the Bells obtained possession of it by attachment, and had it sold. The net proceeds of the crop, after paying expenses of seizing and selling, amounted to about \$95, leaving an unpaid balance on the two mortgage debts of \$23 or \$25. The Bells thereupon advertised the land for sale under the power contained in the mortgage, sold it, and themselves became the purchasers, at \$40. This, added to the proceeds of the crop, overpaid the mortgage debts. Headley requested the Bells to enter satisfaction on the record of the mortgage of March, 1884, which, for insufficient reasons, they refused to do. He thereupon sued them, and recovered a judgment for \$200, the statutory penalty. The present suit is a bill by the Bells against Headley and seeks to enjoin the collection of said judgment on the ground that they had a valid defense to the suit, and did not know of its existence until after the judgment was rendered and the court had adjourned. The particular ground relied on is, that Headley had neither right nor title to the land conveyed in the mortgage, but that the same belonged to another; that, in making the mortgage he had represented that he owned it, and that it was his homestead; and he conveyed it as such. The bill avers that in fact he never had resided on the land, and had no valid claim to it whatever.

A bill such as this, to be sufficient, must not rest on the simple averment that there was a valid defense, of which defendant had no knowledge until after judgment. Suitors must be diligent; and, to make a case for relief, it must appear in the averred facts that the complainant was prevented from making his defense by fraud, accident, or the act of the opposite party, unmixed with fault or neglect on his part. *French v. Garner*, 7 Port. (Ala.) 549. The bill in this case, if the question had been raised, is not sufficiently specific in negation of neglect on the part of the Bells in preparing their defense in the law court. 1 Brick. Dig. p. 666, § 376; 3 Erick. Dig. p. 347, § 280. The sufficiency of the bill, however, was not raised by demurrer, nor by motion to dismiss for want of equity. The proof shows that the land mortgaged belonged to Brittle and Howell; that there was a tenant on it holding under them; and that Headley was not in possession of it. This was enough to put the Bells on inquiry, which, if followed up, would have led to the knowledge that Headley had no title, and would have enabled them to defend at law on the very ground that they rely on in this suit. It is no answer to this that they did not know of these facts. It was negligence in them that they made no effort to find out the true facts of their defense. The law favors the vigilant, but not the slothfully indolent.

The decree of the chancellor is reversed, and a decree here rendered dismissing the complainant's bill, at their costs in the court below and in this.

(84 Ala. 182).

#### MEMPHIS & C. R. CO. *et al.* v. HEMBREE.

(Supreme Court of Alabama. May 28, 1888.)

#### 1. RAILROAD COMPANY—KILLING STOCK—MEASURE OF DAMAGES—INSTRUCTIONS.

In an action against a railroad company for the killing of an ox, a refusal to instruct that "if the jury find that the plaintiff was informed of the accident on the evening of the day when it occurred, and could by reasonable diligence have used the hide, or the meat for beef, and did receive the hide, then the value of the hide, and of the meat that was or could have been used, should, in assessing the damages, be deducted from the value of the ox when killed," is error.

## 2. EVIDENCE—BEST AND SECONDARY—DOCUMENT IN ANOTHER STATE.

Where a written document is shown to be in the possession of a person in another state, and not to be, in any manner, subject to the control of the party wishing to introduce it in evidence, the latter may prove its contents by parol.<sup>1</sup>

## 3. COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Under Const. Ala. art. 3, § 5, and Code, § 756, providing that the circuit court shall have original jurisdiction in civil cases only when the matter or sum in controversy exceeds \$50; and Code, § 2739, providing that if suit be brought for such jurisdictional amount, and a less sum be recovered, the judgment must be set aside, and the suit dismissed, where the amount claimed in the complaint, and for which judgment was rendered, exceeds \$50, a motion to dismiss for want of jurisdiction is properly denied, although the evidence is conflicting as to whether the amount in controversy is within the jurisdictional limit.

Appeal from circuit court, Jackson county; L. W. DAY, Special Judge.

This was an action brought by the appellee, A. J. Hembree, against the appellants, the Memphis & Charleston and the East Tennessee, Virginia & Georgia Railroad Companies, to recover damages for the alleged killing of an ox, the property of the plaintiff. The plaintiff claimed in his complaint the sum of \$60 as damages for the alleged killing, and, upon a verdict of the jury to that effect, a judgment was entered up for the plaintiff, giving him the full amount of his claim. On the trial of the case, plaintiff was a witness in his own behalf, and there was evidence tending to show that the ox alleged to have been killed was the property of plaintiff; that, when the said ox was killed, the plaintiff was away from home, but that he returned in the evening of the day when the said ox was killed, and found that it had been killed; that the ox had been skinned, and his hide placed in a house which belonged to plaintiff, but that plaintiff did not order that the ox be skinned, that there was some of the flesh of the ox used as meat; and there was evidence tending to show that, if the ox had been properly butchered, he would probably have been worth, after being killed, about \$25, but that the plaintiff did not take off the meat so used, nor was he paid for any of it. There was evidence also produced tending to show that, shortly after the ox was killed, the plaintiff made out his claim, under oath, for the ox killed, and presented the same to a Mr. McGaughey, who was the agent of the Nashville, Chattanooga & St. Louis Railway Company, and that the plaintiff regarded the ox as worth about \$40 or \$45. The said claim, so presented to the agent of the Nashville, Chattanooga & St. Louis Railway Company, was made out on one of the blanks of that company, but was made against the defendants. On the introduction of James B. White as a witness for the defendants, he testified that he was the "law and stock agent" for the defendants, and that his duties required him to look after the claims against the defendants for the killing and alleged killing of stock by the defendants. The witness stated that he had seen the claim for the killing of the ox which had been made out and presented to McGaughey, and that it was now in the possession of the "law and stock agent" of the Nashville, Chattanooga & St. Louis Railway Company, in Nashville, Tenn.; that he tried to get the said claim from the said agent, but was unable to do so; that he had seen the said claim there; and that he knew the contents thereof. But when he undertook to testify as to the contents of the claim, to the effect that the said claim alleged the killing of the ox to have taken place on January 31, 1883, the plaintiff objected on the ground that the claim itself was the best evidence, and that the defendants had not laid a sufficient predicate to introduce secondary evidence of its contents. The court sustained the objection of the plaintiff, and the defendants excepted. The de-

<sup>1</sup> On the general subject of the admissibility of secondary evidence of the contents of written instruments, see *Roll v. Rea*, (N. J.) 12 Atl. Rep. 905, and note; *Silva v. Rankin*, (Ga.) 4 S. E. Rep. 756; *Crafts v. Dougherty*, (Tex.) 6 S. W. Rep. 850; *McCormick v. Joseph*, (Ala.) 8 South. Rep. 796; *Railway v. Strickland*, (Ga.) 6 S. E. Rep. 27; *Roehl v. Haumesser*, (Ind.) 15 N. E. Rep. 345; *Village of Ponca v. Crawford*, (Neb.) 87 N. W. Rep. 602; *Leak v. Covington*, (N. C.) 6 S. E. Rep. 241.

fendants made a motion to dismiss the suit on the ground that on the evidence the amount in controversy, at the time the suit was brought, did not exceed \$50, and that the court was without jurisdiction. The court overruled the motion, and the defendants excepted. On the evidence as produced on the trial, the defendants asked the court to give the following charges, among others: (2) "If the jury find that the plaintiff was informed of the accident on the evening of the day when it occurred, and could by reasonable diligence have used the hide, or the meat for beef, and did receive the hide, then the value of the hide, and of the meat that was or could have been used, should, in assessing the damages, be deducted from the value of the ox when killed." (3) "If the jury find from the evidence that the animal killed was worth a certain sum, and was plaintiff's property after it was killed, and that the hide was taken from said animal, and was in a house belonging to plaintiff, or under his control, and that the hide was worth several dollars, and could have been sold by plaintiff if he had desired to do so, or that he could have used or disposed of said hide, or of a part of said ox as meat, then the value of the hide and of the meat, or either, must be deducted from the value of the ox when it was killed." The court refused to give these charges. Const. Ala. art. 6, § 5, and Code, § 756, provide that the circuit court shall have original jurisdiction in civil cases only when the matter or sum in controversy exceeds \$50. Code, § 2739, provides that if suit be brought for an amount of which the court has jurisdiction, and a less sum be recovered, the judgment must be set aside, and the suit dismissed, except in certain specified cases.

*Humes, Walker, Shaffey & Gordon*, for appellant. *Brown & Kirk*, for appellee.

SOMERVILLE, J. 1. It is an established rule, many times reiterated by this court, that, if any documents or papers which are necessary as evidence in a court in one state be in possession of a person residing in another state or jurisdiction, secondary evidence may be admitted to prove the contents of such documents or papers, without giving any preliminary notice to produce them. *Young v. Railway Co.*, 80 Ala. 100; *Martin v. Brown*, 75 Ala. 442; *Gordon v. Tweedy*, 74 Ala. 236; Steph. Dig. Ev. (Reyn. Ed.) art. 71; *Burton v. Driggs*, 20 Wall. 125. The court, under this principle, erred in refusing to permit the defendant to prove by the witness White the contents of the written claim which the plaintiff had filed with McGaughey for the alleged killing of the ox. The paper was shown to be in the possession of a person in another state, and not to be, in any manner, subject to the control of defendant.

2. Under the rule for the measure of damages laid down by us in *Railroad Co. v. Fullerton*, 79 Ala. 298, in cases where cattle, or stock of any kind, are killed by railroad companies, the circuit court erred in refusing to give the second charge requested by the defendant. The third charge requested was faulty only in not permitting any inquiry by the jury as to the question of reasonable diligence being exercised on the plaintiff's part in utilizing for his own benefit the hide and carcass of the animal killed.

3. The motion to dismiss the case for want of jurisdiction was properly overruled; the amount claimed by the plaintiff in his complaint, and the amount recovered by the judgment, each being as much as \$60. *Morris v. Robinson*, 80 Ala. 291; *Haws v. Morgan*, 59 Ala. 508; *Mills v. Long*, 58 Ala. 458; *King v. Farmer*, 84 Ala. 416; Code 1886, § 2739; Const. 1875, art. 6, § 5; Code, § 756. The judgment is reversed, and the cause remanded.

(84 Ala. 559)

THOMASON v. GRAY.

(Supreme Court of Alabama. June 11, 1888.)

JUDGMENT—AFFIRMANCE ON APPEAL—MERGER OF JUDGMENT OF TRIAL COURT.

Where an infant sued by next friend, and recovered a judgment, which was affirmed by the supreme court, but the opinion and judgment of affirmance made no

mention of the next friend, treating the judgment as one for plaintiff in person, execution properly issued in the name of the infant alone. The judgment of the supreme court being a merger of the former judgment, execution properly followed it.

Appeal from circuit court, Calhoun county; LEROY F. BOX, Judge.

Motion to quash execution in favor of Rolan B. Gray against Robert P. Thomason. Motion refused, and Thomason appealed. The opinion upon a former appeal in this case, referred to in the opinion, will be found in 3 South. Rep. 38. Code Ala. § 2579, provides that an infant must sue by his next friend.

*E. H. Hanna*, for appellant. *Kelley & Smith*, for appellee.

SOMERVILLE, J. The circuit court, in our opinion, did not err in refusing to quash the execution against the appellant, Thomason, which was issued in the name of the appellee, Rolan B. Gray. The contention of the petitioner was that Gray being a minor, and having brought the suit by his next friend, as required by statute, (Code 1886, § 2579,) and recovered judgment in the circuit court in this form, the execution should follow that judgment, although, on appeal taken to the last term of the supreme court, the judgment was here affirmed as one in favor of Gray, omitting all allusion to his next friend. A full answer to this suggestion is found in the settled principle, many times decided, that where the judgment of a lower court is affirmed, on appeal taken to this court, it is merged in the judgment of the appellate court, so that it cannot be altered by the lower court; nor by this court after expiration of the term at which it was rendered. *Werborn v. Pinney*, 76 Ala. 291; *McArthur v. Dane*, 61 Ala. 539; *Wiswell v. Munroe*, 4 Ala. 19; *Stephens v. Norris*, 15 Ala. 79. It may be that the judgment of this court is subject to amendment *nunc pro tunc* so as to show the intervention of the plaintiff's next friend; but this omission cannot affect the validity of the judgment, or the execution sought to be quashed, which follows the judgment as affirmed. The next friend of the minor is not the real and true party plaintiff to the cause. The purpose of his intervention is to guide the discretion of the minor, give him suitable advice, and protect his interests, by acting for him in many things connected with the suit which he is incompetent to do by reason of his disability as an infant, chief among which is his inability to employ or act by an attorney. *Cook v. Adams*, 27 Ala. 294. Another purpose is to have before the court, on the record, some person *sui juris* who can be held responsible for the costs of the suit, as well as for the conduct of the cause. *Cooper v. MacIn*, 25 Ala. 298; *Riddle v. Hanna*, Id. 484. It is obvious that the execution is not so irregular as to affect its validity, and its payment by the defendant to the sheriff would be a full defense to any subsequent attempt of the minor's *prochein ami* to enforce any supposed claim in his favor based on the same judgment, whether amended *nunc pro tunc* or otherwise. Affirmed.

(84 Ala. 432)

#### PFISTER v. STATE.

(*Supreme Court of Alabama. June 11, 1888.*)

##### 1. LARCENY—INDICTMENT—DESCRIPTION OF STOLEN GOODS.

Under Code Ala. 1886, § 4368, which provides "that the indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of ordinary understanding to know what is intended," the indictment charging the larceny of "one gold watch" is a sufficient description of a watch which the proof shows to be 10 carat gold; it appearing that such a watch is commonly called a gold watch, though it is not so called by jewelers.

##### 2. SAME—INSTRUCTIONS—VARIANCE.

In such case the court properly charged that "an indictment which describes stolen property by name or classification by which it is generally known and called, is sufficient, and when proof is made to correspond with this description, there is no variance such as would acquit the defendant."

**3. SAME—INSTRUCTIONS—DESCRIPTION OF STOLEN PROPERTY.**

In such case the court properly charged the jury "that in determining whether or not the watch was a gold watch, they must look to all the evidence, and it was not necessary that they should believe that it was made entirely of gold, but that if it was partly of gold, and such as is usually known and described as a gold watch, then this is sufficient to warrant the jury in finding that it was such as was described in the indictment."

**4. CRIMINAL LAW—TRIAL ON LEGAL HOLIDAY—VALIDITY.**

A trial is not invalid because held on February 23, a legal holiday not being *dies non juridicus*.

Appeal from criminal court, Jefferson county; S. E. GREEN, Judge.

The appellant was indicted, tried, and convicted for grand larceny in stealing a watch and chain, alleged to be gold. The case was called for trial on the 22d day of February, 1888, and the defendant objected to be put to a trial on the 22d of February, that day being a legal holiday. The court overruled this objection, and forced him to go to trial, and the defendant excepted to this action on the part of the court. There was evidence produced on the trial showing that the watch was not solid gold, which evidence is sufficiently set out in the opinion. Upon this evidence, as shown in the opinion, the defendant asked the court to give the jury the following charge, which was in writing: "If the jury believe from the evidence that the watch alleged to have been stolen by the defendant was a ten-carat watch, then the defendant cannot be convicted for stealing said ten-carat watch, when the allegation in the indictment is a gold watch." The court refused to give this charge, and the defendant duly excepted. The state then asked the court to give the following charges, in writing, which the court did give, and the defendant then and there duly excepted: (1) "An indictment which described stolen property by name or classification by which it is generally known and called, is sufficient; and when proof is made to correspond with this description, there is no variance such as would acquit the defendant." (2) "In determining whether or not the watch was a gold watch, the jury must look to all the evidence, and it is not necessary that they should believe that it was made entirely of gold; but if it was partly of gold, and usually known and described as a gold watch, then this is sufficient to warrant the jury in finding that it was such as described in the indictment."

T. N. McClellan, Atty. Gen., for the State.

STONE, C. J. There is nothing in the objection that the defendant was tried on the 22d of February, a legal holiday. Holidays with us are not, on that account, non-judicial days. *Railroad Co. v. Smith*, 74 Ala. 206; *State v. Ricketts*, 74 N. C. 187; *Reid v. State*, 53 Ala. 402. The defendant was indicted for the larceny of a gold watch and watch-chain. The proof was that the case of the watch was composed of a metal 10 carats of gold and 14 of alloy, and that such watch was not considered a gold watch among jewelers, but that the people generally called such case a gold case. "The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended," etc. Code 1886, § 4368; *Chisolm v. State*, 45 Ala. 66; *Washington v. State*, 58 Ala. 355; *Lavender v. State*, 60 Ala. 60. We cannot affirm, as matter of law, that the description "one gold watch" would not enable a person of common understanding to know that the watch described by the witnesses was the watch intended to be described in the indictment. It was such watch as is generally called a gold watch by the public. The criminal court did not err in refusing to give the charge first asked by defendant. In the other rulings, the trial court fairly submitted the questions of inquiry to the jury, and there is no error in the record. Affirmed.

(34 Ala. 17)

*Ex parte BYRD.*

(Supreme Court of Alabama. May 31, 1888.)

## 1. CONSTITUTIONAL LAW—VALIDITY OF CITY ORDINANCES—ABRIDGING RIGHTS OF CITIZENS.

The provision in the Mobile city ordinance entitled an "ordinance to establish and regulate markets," prohibiting the sale of fresh meats at retail outside of certain markets established by the ordinance, is not violative of Const. U. S. art. 14, § 1, prohibiting laws which shall abridge the privileges or immunities of citizens, etc.<sup>1</sup>

## 2. SAME—VALIDITY OF CITY ORDINANCES—DEPRIVING PERSONS OF PROPERTY WITHOUT PROCESS OF LAW.

Such prohibition is not in violation of Const. Ala. art. 1, §§ 1, 7, providing that all men are free and independent, and entitled to liberty, etc., and that no one shall be deprived of property without due process of law, etc.

## 3. MUNICIPAL CORPORATIONS—POWER TO REGULATE MARKETS—VALIDITY OF ORDINANCES.

The clause in the Mobile city charter granting the power to "regulate and manage markets" impliedly authorizes the city council to adopt an ordinance prohibiting the sale of particular commodities at stores, stalls, and places outside of market-houses established for such purpose.

## Appeal from city court of Mobile.

Application by one Byrd for a writ of *habeas corpus*. The writ was denied, and the petitioner appeals. Const. U. S. art. 14, § 1, prohibits any state from making or enforcing any law which shall abridge the privileges or immunities of citizens; from depriving any person of life, liberty, or property without due process of law; and from denying to any person the equal protection of the laws. Const. Ala. art. 1, § 1, provides that all men are free and independent, and are entitled to life, liberty, etc. Section 7 provides for fairness in criminal prosecutions; and that no one shall be deprived of life, liberty, or property but by due process of law.

*L. H. Faith*, for petitioner. *Braxton Bragg*, for city of Mobile.

STONE, C. J. The petitioner was convicted by the mayor of Mobile for a violation of a municipal ordinance entitled an "ordinance to establish and regulate markets." Failing to pay the fine imposed, he was committed to prison, and thereupon he applied to the judge of the city court for a writ of *habeas corpus* on the ground of the invalidity of said ordinance. This application was denied, and he renews it here. The ordinance in question provides, among other things, for the establishment and regulation of markets at several points in the city of Mobile, and prohibits the sale of fresh meats at retail outside of these markets, except by tenants of the market stalls, who are permitted to hawk about the streets after "8 o'clock A. M. of the day." This ordinance was in effect on May 1, 1888. The petitioner was then, and had been for a number of years, a green grocer in Mobile, and as such was engaged in the business of selling fresh meats from his store, having regularly up to May 1, 1888, paid the municipal license tax imposed on that business, and having offered to continue the payment of this tax. It was admitted that the meats sold by petitioner were sound and wholesome, and that his store was fitted up for this business, and was and had always been clean and neat. Petitioner, on May 1, 1888, between 7 and 8 o'clock A. M., sold meat at his store in violation of this ordinance. For this he was convicted, and his conviction was assailed below, and its validity is attacked here, on the ground that said ordinance is void, because (1) it is violative of section 1, art. 14, of the constitution of the United States; (2) it is violative of sections 1 and 7 of article 1, and section 50 of article 4, of constitution of Alabama; and (3) that its enactment was not authorized by the charter of the city (or port) of Mobile. Upon the case, as thus presented, our conclusions are:

1. That it is clearly within the legislative power of the state, so far as any limitations resulting from the federal constitution are concerned, to authorize

<sup>1</sup>See *State v. Campbell*, (N. H.) 13 Atl. Rep. 535.

the passage by city councils of ordinances which prohibit the sale of certain commodities, either generally, or beyond specified limits, or within certain hours of the day. Indeed, the recent adjudications of the supreme court of the United States fully recognize the doctrine that the federal constitution cannot be successfully invoked in limitation of the state's absolute control, either directly or through its political instrumentalities, of its internal police affairs. Both the necessity for police regulation in a given instance, and the adaptation of a particular regulation to the specific end in view, are matters entirely of state cognizance and final determination. This ordinance, therefore, as applied to the agreed facts, is not violative of any provision of the national constitution. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; oleomargarine case, *Powell v. Com.*, 8 Sup. Ct. Rep. 992-1257.

2. The delegation to a municipal corporation of the power to establish public markets, and to confine the sale of commodities which, in consideration of public health, required police inspection and supervision, to such markets, is clearly within the competency of the general assembly, under the constitution of Alabama, and it is not conceived that any right secured by the organic law would be impaired by the exercise of this power, even if one of the results of its exercise should be the destruction of an existing and long-established business. Such ordinances, however, must not be inconsistent with general laws; they must be reasonable in their provisions, and referable to the performance of some recognized government function. Deferring, for the present, the inquiry whether the charter of Mobile confers power on the city government to prohibit the sale of meats at any store or stall outside of the market buildings, the question arises, has the petitioner shown that he is affected by any other provision in the ordinance? It is not shown that he has peddled, or desires to peddle, about the streets. An ordinance, like a statute, may be valid in some of its provisions and invalid as to others. *Vines v. State*, 67 Ala. 73; *Powell v. State*, 69 Ala. 10; *McCreary v. State*, 73 Ala. 480. It is not our purpose to inquire into the validity of the clause which discriminates, in the matter of peddling on the streets, between tenants of stalls and those who are not. If this does vitiate the ordinance to any extent, it is only to the extent of avoiding this exception, or giving to all persons the benefit of it, and allowing others as well as lessees of stalls the privilege of peddling about the streets.

3. This leaves but one inquiry for our consideration,—whether the charter power to “regulate and manage markets” authorized the city council of Mobile to adopt ordinances prohibiting the sale of commodities at stores, stalls, and places in the city outside of the market-houses. While the power “to regulate” does not authorize prohibition in a general sense, “for the very essence of regulation is the existence of something to be regulated,” yet the weight of authority is to the effect that this power confers the authority to confine the business referred to to certain hours of the day, to certain localities or buildings in a city, and to the manner of its prosecution within those hours, localities, and buildings. *Horr & B. Mun. Ord.* 32; *Cronin v. People*, 82 N. Y. 318; *State v. Livery Stables*, 16 Mo. App. 131; *In re Wilson*, 32 Minn. 145, 19 N. W. Rep. 723. The ordinance here brought in question is not a prohibition of petitioner's business. It does not deny his right to prosecute it. Its only effect upon that business is to confine it to the public markets, to limit its prosecution to certain hours of the day, and to prescribe rules for its conduct in conservation of public health.

The conviction of the petitioner was not void, his imprisonment thereunder is legal, and the writ of *habeas corpus* is denied.

(34 Ala. 517)

## THWEATT v. McCULLOUGH.

(Supreme Court of Alabama. June 11, 1888.)

## 1. GUARDIAN AND WARD—ACTION FOR MONEY WITHHELD FROM WARD'S MAINTENANCE—BURDEN OF PROOF.

In an action by a guardian for money shown to have been placed by him in defendant's hands for the tuition and maintenance of his ward, the burden is on defendant to show that he has applied the money to the purpose for which he received it.

2. SAME—ACTION FOR WARD'S PROPERTY—EVIDENCE—*RES INTER ALIOS ACTA*.

In such case, evidence that the guardian had been sued for the tuition of his ward is *res inter alios acta*, and inadmissible to prove defendant's alleged failure to apply the funds given him by the guardian in the manner required.

## 3. ESTOPPEL—IN PARS—TO DENY FRAUDULENT GIFT.

One who has permitted or procured a debt due her to be made payable to her minor daughter in order to place such fund beyond the reach of her creditors is estopped from assailing the validity of the transaction.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

This was an action brought by Thomas McCullough, as guardian of a minor, Gussie A. Baldwin, against Hiram Thweatt, for the recovery of money alleged to have been paid over to said Thweatt for the tuition and maintenance of the said minor, and which sum had never been so used by defendant. Judgment was rendered for plaintiff. Defendant appeals.

Lomax & Tyson, for appellant. Rice & Wiley, for appellee.

SOMERVILLE, J. The evidence tends to show that the plaintiff, McCullough, had from time to time placed funds in the hands of the defendant, Thweatt, to be specially applied by him to the uses of a certain minor, who was the ward of the plaintiff, and for whom he had been appointed guardian. This fact being satisfactorily proved, with the amount of the funds thus deposited with the defendant, the burden would be upon the defendant to show that he had applied the money as directed. Where money is delivered by one person to another, without any present valuable consideration, with direction to apply for the use of a third person, the order to apply may be countermanded by the depositor at any time before the receiver has appropriated it to the uses intended, or has, expressly or impliedly, entered into some arrangements with the other party by which he would be prejudiced by the revocation of the original order. *Coleman v. Hatcher*, 77 Ala. 217; 2 Greenl. Ev. § 119. The bringing of the present suit operated, in this case, to cast on the defendant the burden of proving that he had appropriated the funds received from the plaintiff to the uses designated, and the court, in effect, so ruled on the trial. The circuit court, however, improperly allowed the fact to be proved that the plaintiff had been sued for the tuition of his ward. This was, at most, merely a naked assertion by the plaintiff in that action that the tuition had never been paid by the defendant out of the funds deposited with him for that purpose, dignified, it may be, by a resort to a court of justice. As to the defendant, it was *res inter alios acta*, or mere hearsay evidence, and was inadmissible to prove that he had not paid the debt in question. For this error the judgment must be reversed.

We notice but one other point, which will be likely to arise again on another trial. This is the *status* of the fund accruing from the Huggins note. It is claimed by the defendant that this note was in fact the property of the defendant's wife, as a part of her statutory separate estate, although it was made payable to the plaintiff's ward, who was her daughter. The maker, Huggins, owned Mrs. Barclay, the mother of Mrs. Thweatt and the grandmother of the ward. Mrs. Barclay proposed to have the note made payable to Mrs. Thweatt by way of a gift to her. She, being then a widow, and financially embarrassed, permitted or procured the note to be made payable to her minor daughter, above alluded to as the plaintiff's ward, as the evidence tends

to show, in order to prevent her creditors from reaching it. If this be true, the note became the property of the daughter, and never belonged to the mother. By authorizing the note to be made payable to the daughter, she declined to become the donee of the debt due by Huggins; and, moreover, by procuring it to be made payable to another for the purpose of placing it beyond the reach of her creditors, she is in the attitude of a grantor who is not permitted to reclaim property that has been fraudulently aliened to a grantee or donee. The law punishes the grantor by estopping him from assailing the validity of her transfer, as the best and only practical mode of discouraging such covinous transactions, and promoting honesty and fair dealing between debtor and creditor. It is the policy of the law to make the fraudulent transaction as perilous as possible. Reversed and remanded.

(84 Ala. 519)

## SINGER MANUF'G CO. v. BELGART.

(Supreme Court of Alabama. June 11, 1888.)

## 1. CORPORATIONS—EXCHANGE OF CORPORATE PROPERTY BY AGENT—RATIFICATION BY COMPANY.

In an action by a corporation for the recovery of a certain mare that had been traded, without the company's authority, for another animal to defendant by the company's local agent, when the exchange was known to W., a general supervising agent of the company, who "had authority to check up and show the condition of the company's property in the hands of local agents," evidence to the effect that W. had stated to defendant "that he [defendant] had made a good trade in swapping the brown horse for the gray mare," is relevant, and admissible to show that the special attention of the company had been called to the fact of the exchange by reason of its agent's knowledge thereof.

## 2. SAME—ACTIONS—INSTRUCTIONS—RATIFICATION OF AGENT'S ACTS.

In such case, charges that, if the jury believe the title to the mare was really in the company at the time of the exchange, then the company is entitled to recover even though defendant is an innocent purchaser, and that if the jury believe that the corporation only leased the mare to the local agent, and that defendant obtained said mare from said local agent, and claimed under him, then the company is entitled to recover, are properly refused, in that they exclude from the jury all inquiry as to the alleged ratification of the exchange by plaintiff through its agent.

## 3. SAME—INSTRUCTIONS—AUTHORITY OF AGENT.

In such case, a charge "that W. is not shown to have been an agent of the company, with power to ratify an unauthorized trade of the horse," is properly refused, as being misleading in its tendency, and liable to be considered by the jury as an assertion of the non-existence of W.'s agency for any purpose affecting the question of ratification, as well as a denial of his authority to ratify.

Appeal from circuit court, Lowndes county; JAMES W. LAPSLEY, Judge.

This was an action of detinue, brought by the appellant, the Singer Manufacturing Company, against the appellee, L. Belgart, for the recovery of one gray mare, alleged in the complaint to be the property of the plaintiff. It was shown on the trial that the plaintiff owned the gray mare sued for in this action; that the plaintiff made a contract of employment with one L. D. Golson, and by written instrument leased and rented the horse sued for to the said Golson, for the purpose of enabling him to sell the machines of the company, which he had agreed to do in the contract of employment. In this written lease or rental contract, which is set out in full in the bill of exceptions, there was no authority given the said Golson to sell or otherwise dispose of the said gray mare, but he expressly covenanted to return the said mare at the expiration of the lease. It was further shown that the said Golson exchanged or swapped the said gray mare for one "brown bay horse" to the defendant, who was at the time of the commencement of the suit in possession of the said gray mare, and that the defendant made the exchange in good faith. The opinion states the tendency of the testimony to prove the agency of the said Wynn, and the ratification by the company, through their agent, Wynn, of the exchange of horses by the said Golson and the defendant. The defendant proved that the "said Wynn had stated to the defendant

that he (Belgart) had made a good trade in swapping the brown horse for the gray mare." The plaintiff objected to the admission of this declaration of Wynn, and excepted to the court's overruling their objection. The plaintiff asked the court to give the following charges, which were in writing, and duly excepted to the court's refusal to give them: (1) "The fact that L. D. Golson was in possession of the horse at the time of the exchange with the defendant is only *prima facie* evidence of title in said Golson, and cannot protect the defendant from a recovery by the true owner of the legal title; and if the jury believe that the Singer Manufacturing Company, at the time of the exchange of horses by said Golson and the defendant, held the legal title, then the said company is entitled to recover, even though the defendant is an innocent purchaser." (2) "If the jury believe from the evidence that the Singer Manufacturing Company only leased the horse to L. D. Golson, and that the defendant obtained said horse from said Golson, and claimed under said Golson, then the Singer Manufacturing Company is entitled to recover, even though the defendant be an innocent purchaser." (3) "That Wynn is not shown to have been an agent of the company with power to ratify an unauthorized trade of the horse." (4) "That, if the jury believe the evidence, the plaintiff is entitled to recover the horse sued for." The ruling of the court on the admission of the declaration of the agent, Wynn, as evidence, and the refusal by the court to give the charges asked by the plaintiff, are here assigned as error.

*Watts & Son*, for appellant. *R. M. Williamson*, for appellee.

SOMERVILLE, J. The written agreement between the plaintiff corporation and Golson, bearing date in June, 1885, was clearly a mere letting for hire or bailment of the horse in controversy, and nothing more. It conferred on the bailee no authority whatever to sell or exchange the animal, or otherwise dispose of it, even to a *bona fide* purchaser who was ignorant of his vendor's want of title. *Medlin v. Wilkerson*, 81 Ala. 147, 1 South. Rep. 37. If this had been the only controlling inquiry in the cause, the refusal of the first and second charges requested by the plaintiff would have been error. But these charges were erroneous, in excluding from the consideration of the jury all inquiry as to the alleged ratification by the plaintiff of the exchange of horses made by Golson. If there was no such ratification, made with a full knowledge by the plaintiff of all the material facts of the case, this qualifying fact would debar any recovery on plaintiff's part, and would be a waiver of Golson's original want of authority to make the trade in question.

The question of ratification was one which, under the facts of the case, should have been submitted to the jury. The evidence tends to show that the plaintiff corporation had in its employment one Wynn, who had authority, in the language of the bill of exceptions, "to check up and show the condition of the local agents, and to ascertain and report what property of the company such agents had in their possession." It is not disputed that Wynn knew that the animal here sued for (being the same let for hire to Golson) had been by him exchanged for a certain brown bay mare. It was certainly competent for the jury to decide, if it be not, indeed, an inference of law, that the plaintiff was charged with a knowledge of the *status* of this property by reason of the knowledge of their special agent on the subject. Corporations can act only through agents, and the knowledge of any fact imputed to such agent, within the scope of his authorized duties, is notice to the corporation as principal. Did the plaintiff ratify the exchange? The evidence tends to show that it did, by assuming dominion over the brown bay horse, and selling it for the alleged purpose of paying livery charges for keeping it. The jury were authorized to infer a ratification from this fact, coupled with the knowledge of the agent, Wynn, as to the *status* of the horse, which, we repeat, was the knowledge of the plaintiff, if the jury were satisfied as to the scope of the agency being such.

as to impute it. On this point the declaration made by Wynn to the defendant, that the latter had made a good trade, was relevant to show that the special attention of the declarant had been called to the fact that the exchange had been made. It tended to prove the principal's knowledge of this fact by proving the knowledge of the agent on the subject. The third charge was misleading in its tendency, and was properly refused. The jury were liable to construe it as asserting the non-existence of Wynn's agency for any purpose affecting the question of ratification, as well as a denial of his authority to ratify.

We discover no error in any of the rulings of the court, and the judgment must be affirmed.

(34 Ala. 405)

MORRISON v. STATE.

(*Supreme Court of Alabama.* June 11, 1888.)

1. HOMICIDE—SELF-DEFENSE.

One assailed by another must retreat unless retreat will endanger his safety, and must refrain from taking life, if there is any other reasonable mode of escape.<sup>1</sup>

2. SAME—EVIDENCE—MOTIVE.

On a trial for murder, it is not error to permit a witness to testify that he, as foreman for the deceased and his partner, discharged the defendant twice from their employ, and that the last discharge was about six weeks before the killing, in order to show a motive for the killing.

3. SAME—DRUNKENNESS AS A DEFENSE.

Upon a trial for murder, an instruction that if defendant was at the time of the killing intoxicated or under the influence of liquor, the jury might look to this fact in determining whether he struck the fatal blow in passion excited by provocation or from malice, is rightly refused, since a person may be under the influence of liquor or even be intoxicated and yet not be so drunk as to render him incapable of premeditation and deliberation.

4. SAME—TRIAL—DRAWING JURY.

Code Ala. 1886, § 4824, provides that on a trial for a capital offense, the names of the special jurors for the case and the regular jurors in attendance must be written on slips of paper, and all placed in the same box, and an officer designated by the court must draw them out, one by one, and if from these names a jury be not obtained, the court must direct the sheriff to summons other jurors. The officers who had charge of the drawing of a jury in a capital case failed to put all the names of those summoned as jurors in the box. All the names put in were drawn out, and a jury not obtained. The court ordered the other names to be put in the box, and the drawing proceeded. Defendant insisted that talesmen should be summoned, which the court refused, until all the jurors summoned had been drawn, when talesmen were summoned to complete the jury. *Held*, that the refusal to grant defendant's request was proper.

5. SAME.

An order to the sheriff to summon talesmen to complete the jury in a capital case may be made orally, and need not be entered of record.

Appeal from circuit court, Tuscaloosa county; S. H. SPROTT, Judge.

The appellant, James Morrison, was indicted by the grand jury of Tuscaloosa county for murder, was tried and convicted of manslaughter in the first degree, and sentenced to the penitentiary for nine years. On the trial, the state introduced one Jake Kale as a witness, who testified "that he had been foreman for the firm of Webb & Wildsmith, of which the deceased was a member, and which was engaged in the business of coal mining; that as such foreman he had twice discharged the defendant from the employment of said firm,—the last time about six weeks before the killing of the deceased." The defendant objected to the introduction of this evidence, and reserved an exception to the court overruling his objection. There was no evidence that the deceased knew anything of the discharge by Kale of the defendant, or that he sanctioned such discharge; nor was there any evidence of any hostility or ill feeling between the deceased and the defendant at any time before the kill-

<sup>1</sup>One assaulted in his own habitation is not obliged to retreat, but he is not justified in taking life unless it is necessary to protect himself and his home. *State v. Middleham*, (Iowa,) 17 N. W. Rep. 446; *Bledsoe v. Com.*, (Ky.) 7 S. W. Rep. 884.

ing. It was shown that at the time of the killing the defendant was under the influence of whisky, being intoxicated therefrom. At the request of the solicitor, the court gave the following charge, which was in writing: "If the deceased is the assailant, the party assailed must retreat unless retreat will endanger his safety, and must refrain from taking life, if there is any other reasonable mode of escape." To the giving of this charge the defendant excepted, and asked the court to give the following charge, which was in writing: "If the jury believe from the evidence that the defendant was struck by the deceased with the mallet before the fatal shot was fired, and that the defendant was at the time intoxicated or under the influence of liquor, the jury may look to this fact in determining whether he struck the fatal blow in the passion and heat of blood excited by the provocation of the blow, or from malice." The court refused to give this charge, and the defendant thereupon excepted. Code Ala. 1886, § 4324, provides that "on the trial of a person charged with a capital offense, the names of the jurors summoned for his trial, as well as the names of the regular jurors in attendance, must be written on slips of paper, folded or rolled up, placed in a box, or some substitute therefor, and shaken together, and such officer as may be designated by the court must, in his presence, draw out such slips, one by one, until the jury is completed. If all such slips are drawn, and the jury is not made up, the court must direct the sheriff to summon at least twice the number of jurors required to complete the jury, whose names are also to be written on slips of paper deposited and drawn as herein prescribed, and if such number is exhausted, the same proceeding must be had until the jury is complete."

*Hargrove & Vandegraaff* and *S. A. M. Wood*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

**STONE, C. J.** The circuit court of Tuscaloosa county sits two weeks, commencing on the sixth Mondays after the fourth Mondays in February and August of each year; and the criminal docket is taken up on the second Monday of each term. Code 1886, p. 225, subsec. 5, and note. The spring term, 1888, commenced on April 9th. On Friday of the first week (April 13th) the court made an order setting Wednesday (18th) for the trial of *James Morrison*, charged with murder, he having been arraigned at a former term, and pleaded not guilty. The court thereupon proceeded to draw from the jury-box the names of 30 persons to serve as special jurors in said cause, and ordered that said 30 special jurors, "together with the regular jurors drawn and summoned for the second week of this term of the court, shall constitute the venire for the trial of this cause." This order was a literal and strict compliance with the statute, when an order setting a day for the trial of a capital felony is made during one week, and the trial is to take place during another week. *Jury Law*, approved February 28, 1887; §§ 10 and 11; *Posey v. State*, 73 Ala. 490.

The officers charged with the duty of drawing names out from the box or hat, in organizing the jury, failed to place all the names in the hat in the first instance. This mistake was not discovered until those put in the hat were all drawn out,—35 in number. At that time only 7 jurors had been selected. The court directed the remaining names—those left out by mistake—to be placed in the hat, and for the drawing to proceed. "The defendant objected, on the ground that the slips contained in the hat, having all been drawn therefrom, and the jury not having been made up, the court should direct the sheriff to summon talesmen, under the provision of section 4324 of the Code of 1886, from whom to complete the jury." This objection was overruled, and an exception reserved. We might content ourselves with the statement that the ground of the contention was unsound. If the court had then ordered talesmen to complete the jury, it would have been a manifest error, unless, perhaps, the defendant's request would have precluded him from insisting on

it as a ground of reversal. We cannot hold that the court erred in refusing to do that at the defendant's request, which would have been error if done without his consent. If error had been committed, that was not the remedy. When all the panel had been drawn out and passed on,—those last put in as well as the first,—the jury was still incomplete, and talesmen had to be summoned. This demonstrates that the mistake did the defendant no injury. When the *venire* was exhausted, and the jury still incomplete, talesmen were summoned under the direction of the court, and the jury completed. It is objected for defendant that the court's order for summoning these talesmen ought to have been entered of record. *Posey v. State*, 78 Ala. 490; *Sylvester v. State*, 71 Ala. 17, and *Spicer v. State*, 69 Ala. 159, are relied on in support of this objection. What was said in *Posey's Case* had reference to the order to summon a special *venire* for the trial of a capital case. The language of the statute then under consideration is: "The court must make an order, commanding the sheriff to summon," etc. Code 1876, § 4874; Code 1886, § 4320. That order, we held, must be entered of record. The order to summon talesmen to complete the jury after the *venire* is exhausted is expressed in the following language: "The court shall order the sheriff to summon twice the number to complete the jury," etc. The uniform practice has been to give such orders orally, and we have no wish to declare a different rule. There is nothing in this objection. We think there was no error in admitting the evidence of the witness Kale. True, he was but the agent of Webb when he discharged the defendant from employment, and it is not shown that Webb either sanctioned or knew of the discharge. The discharge was permitted to stand, however, and neither Webb nor his partner undertook to annul it. Agents are under the control of their principals, and are presumed to consult their wishes. We think the discharge was a circumstance the jury might well consider, in determining whether or not there was a motive for the deed. *Kelsoe v. State*, 47 Ala. 593; *Hudson v. State*, 61 Ala. 333. The finding of the jury proves that they were not convinced that the killing was done with malice aforethought. The charge given at the instance of the solicitor is in exact conformity with many of our rulings, and is free from error. *Ex parte Brown*, 63 Ala. 187; *Biland v. State*, 52 Ala. 322; *Brown v. State*, 74 Ala. 478; *Storey v. State*, 71 Ala. 329; *Wills v. State*, 73 Ala. 362. The theory on which drunkenness may sometimes reduce a homicide from murder to manslaughter is that it may so cloud the mind, so obscure the reasoning powers, as to satisfy the jury that the perpetrator could not have formed the design to take life. This, it is said, repels the idea that there was a pre-conceived purpose to kill. The drunkenness, however, to produce this mitigating effect, must be such as to render the accused incapable of forming or entertaining a specific intention, of premeditation or deliberation. *Tidwell v. State*, 70 Ala. 33; *Ford v. State*, 71 Ala. 385. A person may be "under the influence of liquor"—may be even "intoxicated"—and yet not so drunk as to render him incapable of premeditation, of deliberation, of forming an intention. The charge asked by the defendant was rightly refused. Affirmed.

(34 Ala. 563)

## WARE v. DEWBERRY et al.

(Supreme Court of Alabama. June 12, 1883.)

## 1. VENDOR AND VENDEE—ESTOPPEL TO DENY VENDOR'S TITLE.

Where defendants in ejectment were in possession of land as heirs of one who had purchased of plaintiff, paid part of the purchase money, and taken possession, they are estopped to deny plaintiff's original title; and, to prevent recovery, they must show either a conveyance of some kind by plaintiff, or adverse possession as against him sufficient to bar a recovery.

## 2. EJECTMENT—DEFENSES—TITLE OF DEFENDANT.

Where it appears, in ejectment, that plaintiff had a prior actual possession of the land, with both color of title and claim of ownership, and that defendants derived

their title, apparently only an imperfect equitable one, from plaintiff, through their father, who had purchased the land of plaintiff, paying a part of the purchase money, and taking possession, plaintiff is entitled to recover.

Appeal from circuit court, Clay county; JAMES W. LAPSLEY, Judge.

Action by W. J. Ware against J. W. Dewberry and others to recover a certain tract of land. The court charged the jury, at the request of defendants, that if the jury believed the evidence they must find for the defendants. To this charge the plaintiff excepted, and now assigns the giving of the said charge as error.

*Lackey & Hood and Smith & Smith*, for appellant. *J. T. Heflin* and *A. S. Stockdale*, for appellees.

SOMERVILLE, J. The circuit court erred in giving the general affirmative charge instructing the jury to find for the defendants if they believed the evidence. The defendants came into possession of the land sued for as the heirs of one Aaron Dewberry, holding by privity of estate under him, as their deceased father and ancestor. He had purchased the land from the plaintiff, having paid a part of the purchase money, and gone into possession during his life-time. Under this state of facts the defendants were estopped from denying the original title of the plaintiff, from whom they claimed derivatively. *Railroad Co. v. Railway Co.*, 75 Ala. 516. They must show either a divestiture of the plaintiff's title by conveyance of some kind from him, or else an adverse possession for a sufficient length of time to bar the right of entry on his part. The plaintiff, moreover, is shown to have had a prior actual possession of the lands, accompanied, by both color of title and claim of ownership, which would be sufficient to authorize a recovery against an intruder or trespasser. *Crosby v. Pridgen*, 76 Ala. 385; *Wilson v. Glenn*, 68 Ala. 383. The defendants deriving possession, and, so far as the bill of exceptions shows, only an imperfect equitable title from the plaintiff, intermediately through their father, Aaron Dewberry, the court would have been justified, on request, in giving the general affirmative charge for the plaintiff. Reversed and remanded.

(84 Ala. 555)

LIGON *et al* v. LIGON *et. al*.

(*Supreme Court of Alabama*, June 12, 1883.)

1. EXECUTORS AND ADMINISTRATORS—DISCHARGE.

Where an administrator has made a final settlement, but it does not appear that he has been discharged from office, or that a decree of distribution has been made, he will be presumed, on appeal, to be still the legal representative of the estate within the meaning of Code Ala. 1886, § 2124, which requires an application for a conveyance of land sold at an administrator's sale to be made by the purchaser, his heirs, or person claiming under him, or the personal representative.

2. SAME—SALES UNDER ORDER OF COURT—NOTICE TO HEIRS.

When an administrator makes application to the probate court for an order for the conveyance of title to lands which he had sold to himself under an order of court, he acts only as purchaser, and cannot act as the personal representative of the estate, and the heirs must be notified that they may come in and elect whether they will treat the purchase money as paid, and charge the administrator, or, unpaid, and rely on the security of the land; and where such notice is not given, the order for conveyance is a nullity.

3. SAME.

In such a case, where the sale is made to another than the administrator, it is not necessary to give notice to the heirs.

Appeal from probate court, Cleburne county; BARTLETT OWEN, Judge.

David W. Ligon and others, heirs of David G. Ligon, deceased, entered a motion in the probate court to set aside an order for the conveyance of certain lands belonging to their ancestor's estate to Wilson M. Ligon and J. T. Smith. The motion was overruled, and appeal taken by the heirs.

*Kelley & Smith*, for appellants. *Aiken & Burton*, for appellees.

CLOPTON, J. On November 11, 1872, W. M. Ligon, as administrator, sold a portion of the lands of the estate of David G. Ligon under an order of the probate court, and himself became the purchaser. Under an amended order, he sold, October 15, 1874, other lands which were purchased by J. T. Smith. The sales were duly reported and confirmed. In February, 1877, Ligon made a final settlement of his administration. On February 8, 1888, he reported the payment of the purchase money, and made application for orders of conveyances of title. On the same day, without notice to the heirs of decedent, the court ascertained that the purchase money had been paid, and made an order that Ligon, as administrator, make a conveyance to Smith of the lands bought by him, and appointed T. J. Burton commissioner, and directed him to make conveyance to Ligon of the lands purchased by him. In April thereafter the appellants, who were heirs at law of the decedent, moved the court to vacate and annul the orders for the conveyances of title. From the judgment of the court refusing to grant this motion this appeal is taken.

The statute provides, generally, that after confirmation of the sale and payment of the purchase money, on application of the purchaser, his heirs, or some person claiming under him, or of the personal representative, the court must order a conveyance to be made to such purchaser, his heirs, or person claiming under him, by the personal representative, or such other person as the court may appoint. Code 1886, § 2124. It is insisted that application by the purchaser, his heirs, or person claiming under him, or by the personal representative, is a jurisdictional fact, and that Ligon was not the administrator at the time the application was made by reason of having made a final settlement, in 1877. As settled by our former decisions, a final settlement, though regularly made, does not necessarily discharge the administrator from further accounting, unless there is an order discharging him from his office, or unless decrees are rendered distributing the residue of the estate among those entitled, and they have been paid. *Simmons v. Price*, 18 Ala. 405; *Tarver v. Tankersley*, 51 Ala. 309. In the absence of proof that an order was made discharging the administrator, or that decrees of distribution were rendered, we should presume, in support of the judgment of the court, that his functions had not ceased. But, independent of this consideration, the application having been made by Ligon in his representative capacity, the order of the court, that Ligon, as administrator, make a conveyance to Smith of the lands purchased by him, was a judicial ascertainment that Ligon was the rightful administrator. Without the determination of this fact, which was necessarily involved, the court could not have made such order of conveyance. *Farley v. Dunklin*, 76 Ala. 530. Though the fact may have been erroneously determined, and the order reversible on appeal, it is conclusive so long as unreversed, and cannot be pronounced void. The next question is, are the orders, or either of them, void for want of jurisdiction of the parties? At this stage of the consideration the case diverges, the validity of the respective orders being governed by different principles. Proceedings to sell the real estate of a decedent are *in rem*, unless contested, when they become *inter partes*. When notice of the application for an order to sell is given to the heirs, they are considered as having notice of all the proceedings, which follow in the usual and regular course; and the power of the court is continuous from the institution of the proceedings to the order of conveyance of title, irrespective of the lapse of time. *Todd v. Flournoy*, 56 Ala. 99. When the application is made by the administrator for an order of conveyance of title to a purchaser other than himself, notice to the heirs is not essential to its validity. *May v. Marks*, 74 Ala. 249; *Farley v. Dunklin*, *supra*. The order that the administrator make a conveyance to Smith is valid, notwithstanding notice was not given to the heirs. But a different rule is applicable to the order for a conveyance of title to the administrator. In *Dugger v. Tayloe*, 60 Ala. 504, it was held that, when the application is by the purchaser,

notice to the personal representative is essential, and a decree rendered without it is void. The decision is rested on the ground that if the purchase money be paid, the administrator loses all right to maintain an action at law, or a suit in equity, for its recovery, and is chargeable with it in his representative capacity as assets, and the statute is silent as to notice: that it should not be construed so as to violate the established principle that notice of any judicial proceeding which is to deprive a party of rights, or impose a liability, is essential, is necessarily implied from the nature and effect of the proceedings. In *Anderson v. Bradley*, 66 Ala. 263, the same rule was applied, where the application was by a subpurchaser, and the office of the personal representative who made the sale had ceased; in which case it was held that notice to the heirs was essential. When the administrator becomes the purchaser of real estate sold by himself as such, he occupies antagonistic relations of purchaser claiming an adverse right, and of administrator, representing the heirs as to the collection and distribution of the purchase money. Having the right to receive payment as administrator, and being under obligation to pay as such purchaser, presumed payment arises when the purchase money matures so far as to render him chargeable therewith in the settlement of his administrator's accounts, but not for the purpose of entitling him to a conveyance of title. So long as he continues administrator, and the purchase money is unaccounted for, there is no payment, such as is required by the statute, to authorize the court to order a conveyance of title. When the purchase money becomes due, the heirs have the right to elect whether they will treat it as paid, and charge the administrator, or, as unpaid, and resort to the land to enforce its payment. The order that a conveyance be made to him, without notice to the heirs, and the execution of such conveyance, deprives them of this right of election, and divests them of the legal title, without an opportunity of being heard. The statute should not be construed as intending that the administrator may discharge the land from liability for the purchase money, and himself obtain title by an *ex parte* proceeding. In such case the same necessity exists for notice to the party whose rights are to be affected as for notice to the personal representative when the application is made by the purchaser; and, the same person being the administrator and the purchaser, *ex necessitate* notice must be given to the heirs. Where the administrator is the purchaser, at his own sale, the application for an order of conveyance of title, if made by him, should be properly regarded as made in his capacity of purchaser, and not of administrator. In such case notice to the heirs is essential to the validity of the order.

The judgment of the probate court is affirmed as respects the order of conveyance of title to Smith, but is reversed in all other respects, and judgment will be here rendered vacating and annulling the order directing conveyance to be made to the administrator, W. M. Ligon.

(84 Ala. 596)

LYON *et al.* v. DEES.

(Supreme Court of Alabama. June 12, 1888.)

**EQUITY—PLEADING—SUFFICIENCY OF PLEA.**

A bill in equity to set aside a sale of land and a mortgage alleged that the judgment under which the sale was made was assigned to defendant as security for money advanced to the judgment creditor at the request of complainant, to satisfy the judgment; that the mortgage was executed to defendant to secure the same debt and an additional sum, defendant agreeing to receive it in substitution for the judgment; and that the judgment was thereby satisfied. The judgment was afterwards revived by consent of complainant, and an execution issued and land sold thereunder. Defendant pleads the revival of the judgment in bar of the bill. *Held*, that such plea is insufficient, as not covering all the equities of the case, since, if the mortgage and judgment were to secure the same debt, both could not be enforced except sufficiently to satisfy such debt, and therefore proof of the facts might show other equities granting the revival of the judgment.

Appeal from chancery court, Choctaw county; JOHN A. FOSTER, Chancellor.

This was a bill filed by W. J. Dees against J. M. Lyon and Mary J. Lyon and Calvin Dees, and sought to set aside a sale of land which had been made under an execution issued upon a judgment which had been assigned to the defendant J. M. Lyon, and a mortgage which the complainant had made to the said J. M. Lyon. The defendants Lyon set up by plea the revival of the judgment under which the lands were sold by the defendant J. M. Lyon. The complainant demurs to the said plea. The court sustained the complainant's demurrer; and the ruling of the chancellor upon the demurrer is here assigned as error.

*Taylor & Elmore*, for appellants. *Glover & Camathan* and *T. N. McClellan*, for appellee.

CLOPTON, J. The assignment of error in reference to the omission of the chancellor to dismiss the bill after having sustained a demurrer thereto having been abandoned, the only question for consideration relates to the decree of the court overruling a plea which sets up in bar of the bill the revival of the judgment which Ward recovered April 29, 1880, against the complainant and Calvin Dees. The bill alleges that the judgment was assigned to J. M. Lyon, one of the appellants, in 1881, as security for the sum of \$200 paid by him to Ward at the request of complainant in settlement of the judgment, and that in March, 1882, a mortgage on real and personal property was executed to Lyon to secure the same debt, and also an additional sum then advanced to complainant, which he agreed to receive in substitution for the judgment, and that the judgment was thereby satisfied. The judgment was revived in October, 1884, by consent of complainant, and in January, 1885, real and personal property was levied on and sold under an execution, which Lyon procured to be issued on the revived judgment; and in June, 1885, the property conveyed by the mortgage was sold under a power of sale therein contained. The revived judgment is set up in bar of the bill. We shall regard, as the chancellor did, the demurrer to the plea as a mode adopted by the parties for setting the plea for hearing in vacation under the rule of chancery practice. On this appeal a discussion of the equities of the parties, further than may be necessary to determine the sufficiency of the plea, will be premature, and we forbear to enter upon such consideration. The effect of the plea is that the payment and satisfaction of the judgment at the time of its revival is *res adjudicata*, and that the revival precludes the complainant from asserting that it had been previously paid and satisfied. If this be conceded, the question still remains whether there is any matter of equity in the bill to which the plea does not set up a bar. While the bill alleges that cotton of the value of \$250 was paid on the mortgage debt in 1882, it does not allege that the judgment was thereby paid, but that it was discharged by the substitution of the mortgage in lieu thereof, as security for the money paid Ward. In what manner and to what extent would disproof of this last allegation affect the relief to which complainant would be entitled? Assuming as true that the debt, on account of the money paid Ward in settlement of the judgment, was included in the mortgage, complainants' case may be considered in two aspects: whether the mortgage displaced the judgment as a security, and thereby destroyed the right of Lyon to use it as such, or whether the mortgage was a cumulative and additional security for the debt,—the nature and extent of the relief being dependent on which aspect is sustained by the proof. The judgment having been assigned to Lyon as security for the sum advanced by him, it was his right to enforce its collection to the extent necessary to his reimbursement, but no further, unless this right is destroyed or modified or restricted by the subsequent transaction. If the mortgage was in fact a substituted security, intended to displace the judgment as such, its subsequent

enforcement was inequitable; and, if the mortgage was merely a cumulative security, Lyon could properly enforce either or both the judgment and mortgage for the payment of the amount advanced by him to Ward, but not both, so as to coerce a double payment of the same debt. The equity of the bill does not rest solely on the mortgage having been accepted as security in lieu of the judgment. Whether the sum advanced to Ward was included in the mortgage, and the mortgage was substituted in lieu of the judgment as security therefor, may become material as affecting the right of Lyon to have an execution issued and property sold thereunder, and as affecting the equity of complainant to have the execution sale set aside. But, if the judgment and mortgage were operative securities for the same debt, and the mortgage was paid in 1882, except a small balance, which was paid by the sale of the personal property under the execution, the sale of the land thereunder was unnecessary, excessive, and oppressive, which sale a court of equity would set aside on allegation and proof that the assignee of the judgment was really the purchaser of the land; and, if such is the case, the subsequent sale of the property conveyed by the mortgage would be an oppressive and illegal exercise of the power of sale, for the abuse of which Lyon would be responsible to complainant. If the order of the court reviving the judgment were introduced as evidence, and disproved the allegation that it was satisfied, the right of complainant to relief would not necessarily be defeated. It would only affect the nature and extent of the relief. On the case made by the bill, a plea setting up the same matter could have no other or greater effect. As the plea is in bar of the whole bill, and does not cover the whole case, by setting up a bar to all the matters of equity, it was properly set aside. *Piatt v. Oliver*, 1 McLean, 295; 1 Daniell, Ch. Pr. 648. Affirmed.

(84 Ala. 202)

BINGHAM v. JONES *et al.*

(Supreme Court of Alabama. June 12, 1888.)

## EXECUTORS AND ADMINISTRATORS—PETITION FOR SALE OF LAND—DESCRIPTION OF HEIRS.

Under Code Ala. 1886, § 2106, which provides that a petition to the probate court for the sale of land belonging to an estate, for the purpose of dividing the same, must state the names of the heirs or devisees, a petition which shows on its face that there are heirs whose names are not given, is fatally defective upon demurrer, although it states that the names of such heirs are unknown to the petitioner, and shows that he has used all reasonable diligence to ascertain them.

Appeal from probate court, Talledega county; G. K. MILLER, Judge.

Petition by Arthur Bingham, as administrator of the estate of Eliza E. Chase, deceased, for an order to sell land of the estate for distribution among the heirs, who were numerous, because an equitable division could not otherwise be made. C. S. Jones, one of the heirs, demurred to the petition. The demurrer was sustained, and petitioner appealed.

*Bishop & Whitson*, for appellant. *Know & Bowie* and *Heflin & Bulger*, for appellees.

STONE, C. J. The present proceeding is an application to the probate court, made by the administrator, for an order to sell the real estate of the intestate for distribution among the next of kin. The petition avers that the lands cannot be equitably divided among the heirs without a sale. Code 1886, § 2105 *et seq.* Intestate left no lineal descendants, but a very large number of collateral heirs, running through three or four generations, and very much scattered. The application was contested by one of the heirs, on a single ground to be after stated. In all other respects the petition is not objected to, nor does there appear to be any ground for objection; and we may add that the number and diversified interests of the numerous heirs make it absolutely certain that the land described in the petition as the entire real estate of in-

testate cannot be equitably divided without a sale. The petition and its several amendments make a strong showing of diligence on the part of the administrator to ascertain the names and residences of the numerous heirs at law. There is probably no ground of objection on the score of diligence. It sets forth, among other things, that one Charlotte Cowper, sister of intestate, had died before the death of intestate, leaving descendants. After setting out several of the descendants of Mrs. Cowper, the petition contains the following clause: "The children of Mary Little, deceased, who was also a daughter of the said Margaret [Charlotte?] Cowper, and a niece of the said Eliza E. Chase, (intestate,) decd., the names, residences, and ages of said children are unknown to petitioner, but they are supposed to reside near Columbus, in the state of Mississippi." In a later amendment petitioner states as follows: "Petitioner further represents that the distributees of said estate, described in his said amended petition as the children of Mary Little, deceased, whose names and residences and ages are unknown, \* \* \* is a full statement of all the knowledge petitioner has of such persons, or has been able to ascertain." This is all the petition contains in reference to the children of Mary Little. There was a demurrer to the petition, assigning as a ground that it failed to set forth the names, etc., of these heirs. The probate court sustained the demurrer. There is a statutory provision for making parties defendant to a bill in chancery, and for bringing them in for publication when their names are unknown to the plaintiff, and cannot be ascertained on diligent inquiry. Code 1886, § 3483. But this right is purely statutory, and, to bring a case within its influence, its substantial requirements must be conformed to. *City of Opelika v. Dantel*, 59 Ala. 219; *Bell v. Hall*, 76 Ala. 546. There is not enough in the petition to bring in these unknown heirs, if the suit had been in the chancery court. Proceedings in the probate court to obtain a sale of land for division are statutory, and the requirements of the statute must be complied with. It must give the names of the heirs or devisees, and must state which of them are under age, of unsound mind, or married women. Code 1886, § 2106. Neither of these assertions can be made, nor can they be negatived, without a knowledge, or, at least, information, showing who are the heirs or devisees. In the matter pointed out above, the petition is fatally defective, and the judgment of the probate court is free from error. *Noles v. Noles*, 40 Ala. 576; *Hoard v. Hoard*, 41 Ala. 590; *Ford v. Garner*, 49 Ala. 601; *Meadows v. Meadows*, 73 Ala. 856; *Whitman v. Reese*, 59 Ala. 532; *McCorkle v. Rhea*, 75 Ala. 213; *Whitlow v. Echols*, 78 Ala. 206; *Ballard v. Johns*, 80 Ala. 32; *Morgan v. Farned*, 83 Ala. 367, 3 South. Rep. 798; *Page v. Matthews*, 41 Ala. 719. This case comes before us directly. If it had been presented collaterally, rules somewhat different might possibly govern the case. *Lyons v. Hamner*, ante, 26.

If this case presents a hardship, the remedy is not with us. Affirmed.

(34 Ala. 368)

HINSON *et al.* v. BUSH, (two cases.)

(Supreme Court of Alabama. June 12, 1888.)

DOWER—HOW BARRED—DIVORCE A VINCULO.

In a controversy between a widow, regarding her right of dower and distributive interest in her deceased husband's estate, and a former wife who has been divorced for abandonment, and claims dower under the negative influence of Code Ala. § 2885, providing that a divorce for the adultery of the wife bars her of her dower, held, that the legislature intended that a wife who had been divorced *a vinculo* could under no circumstances claim dower at the death of her husband, and that the wife who filled that place at the time of her husband's death is alone entitled to dower and distribution. Overruling *Williams v. Hale*, 71 Ala. 83.

Appeal from chancery court, Butler county, and appeal from probate court, Butler county; JOHN A. FOSTER, Judge.

Application of Anna J. Bush to probate court for allotment of dower by

metes and bounds in the estate of her deceased husband; and bill in equity by Mary M. Bush, a divorced wife, for allotment of dower and distribution in the same estate.

*Gamble & Richardson*, for appellants. *R. E. Steiner*, for appellees.

STONE, C. J. Richard H. Bush was a widower with children, some adult and some minors. In December, 1880, he intermarried with Mary M. Johnson. There was no fruit of this marriage. They separated about a year after the marriage, and in 1884 the said Richard H. obtained a divorce from the said Mary M., *a vinculo matrimonii*, for her voluntary abandonment of his bed and board for two years next preceding the filing of the bill. Code 1886, § 2322. It is not shown that she either obtained or asked for maintenance or alimony. In her bill after noticed it is averred that she did not. In 1884, after the divorce was granted, the said Richard H. intermarried with Anna J. Harbin. One child, an infant of tender years, is the fruit of this marriage. In February, 1887, the said Richard H. died intestate, leaving several children, and some grandchildren, offspring of children who had died before his death. He owned a tract of land of more than a thousand acres, on which he resided with his family. His family consisted of the said Anna J., his wife, their infant child, a daughter by his first marriage, a minor, and some grandchildren, also minors. A homestead of 160 acres of land including the residence, and other exemptions, were allotted and set apart to the said Anna J., and the minor children living with her. Code 1886, §§ 2507, 2511, 2543, 2545, 2546, *et seq.* In July, 1887, the said Anna J. filed her petition in the probate court, praying an allotment of dower to her by metes and bounds, out of the lands of which the said Richard H. died seized. Code 1886, § 1900 *et seq.* Such proceedings were thereupon had as that, at the October term, 1887, said court made its decree, granting the prayer of the petition, and making the necessary orders for its allotment by metes and bounds. Code 1886, § 1906. No exception is taken to the mere form of these proceedings, and they appear to be regular. On the 17th day of September, 1887, the said Mary M., the divorced wife, filed her bill in chancery, claiming dower and distribution in the estate of the said Richard H. Bush, under the negative influence of section 2385, Code 1886; section 2698, Code 1876. The administrators and heirs of the said Richard H., as also the said Anna J., are made defendants to the bill, and the averments set forth the two marriages, the divorce, and the ground on which it was granted, and the other facts set forth above. The prayer is for dower, distributive interest, and homestead, and other exemptions in the estate of said Richard H.; the said Mary M. claiming that her right is paramount to that of the said Anna J. She also prayed that the allotment of the homestead and other exemptions made to the said Anna J. be vacated and annulled. There was a demurrer to the bill, setting forth as grounds the peculiar relations of the parties as set forth above. The chancellor overruled the demurrer, and decided that the bill contained equity. The administrator and other defendants have appealed in each of said cases, and they are now in our hands for joint consideration and decision. In the case of Anna J., the last of the wives, the decree of the probate court, granting her dower, is assigned as error. In the case of Mary M., the divorced wife, the decree of the chancellor, overruling the defendants' demurrer, is complained of. We are thus squarely confronted with the separate suits of two defendants, each claiming to be the surviving widow of one and the same, intestate, deceased husband, and each demanding the dower and distributive rights the law secures to a surviving widow. Is each one entitled? and if not, which one has the right to the exclusion of the other?

Our statute (Code 1886, § 2322) provides that divorces from the bonds of matrimony may be granted in favor of either party "for voluntary abandonment from bed and board for two years next preceding the filing of the bill."

Section 2335. "A divorce for the adultery of the wife bars her of her dower and of any distributive share in the personal estate of the husband." The case of *Williams v. Hale*, 71 Ala. 83, was an application by a wife, who had been divorced for abandonment, to have dower allotted in the lands of the husband. There had been no later marriage in that case, and consequently there was but one demandant of dower. Controlled by well-known canons of interpretation, we reluctantly affirmed that she was entitled to dower. We do not know how to answer the argument there made, on any known rules of interpretation. New York has had statutes on this subject from an early day, commencing, possibly, with the "act concerning dower," passed January 26, 1787, (2 Laws N. Y. 347-349, republished in 1886.) In *Wait v. Wait*, 4 N. Y. 95, decided in 1850, it was held, in part on reasoning very similar to that employed in *Williams v. Hale*, that a divorce *a vinculo* granted to the wife for the adultery of the husband does not bar the wife's dower. The court, among other things, said. "It is true that the decree is that the marriage be dissolved, and that each party be freed from the obligations thereof. This dissolution and release, however, is not absolute. The wife, when the husband is the guilty party, is still entitled to her support, and the obligations of marriage still rest upon the husband, so far as to render it unlawful for him again to marry." In the later and celebrated case of *Forrest v. Forrest*, 6 Duer, 102, the divorce, as in the former case, was granted to the wife, for the fault of the husband. The wife's right to dower, should she survive her husband, was made a factor in determining the extent of her alimony. The case before us makes it our duty to resurvey the grounds on which we determined the case of *Williams v. Hale*. It opens up a much wider field for contemplation than was then presented, and we must deal with stubborn facts, as well as many possibilities which the facts suggest. What, then, are some of the impregnable legal facts in this case? The divorce dissolved the bonds of matrimony, at least so far as the husband was concerned. He ceased to have any right to the wife's society, or to her services. He was, by the decree, also deprived of all right to control her separate estate, if she had such estate. Code 1876, § 2700. This would necessarily take from him all right to receive the income and profits of her estate, and would free her from the disability of selling and charging her estate without his concurrence. If it did not, then her property must remain tied up beyond all human power of disposition so long as the husband may live; and, save as provision may be made for her maintenance and alimony in the divorce proceedings, he would be absolved from all liabilities to and on account of his relations to her, during her life. How about the husband's rights? He can marry again, for the law expressly authorizes it. Does he thereby become the husband of two living wives? The law forbids that. The fact that he can and does marry again only makes emphatic that which the decree had declared, that the bonds of the former marriage are dissolved. And if dissolved, how can they exert any continuing, binding force? Dower is the resultant of marriage, seizin, and death. It is but the prolongation to the surviving wife of the interest in the husband's estate, conferred by the marriage. At common law, the surviving wife's right to dower had its correlation or recompense in the surviving husband's right of curtesy, sometimes called the husband's dower. Under our former system, known as the married woman's law of 1850, re-enacted in the Code of 1852, the surviving husband of an intestate wife was entitled to a life-estate in the lands of which she died seized, and to a half interest absolutely in her personal estate. This was the law for more than 30 years after the enactment of the statute under which the divorced wife claims dower in this case. Did this right remain in the husband of the said Mary M. after she was divorced from him by decree dissolving the matrimonial bonds? Dower is an estate for the life of the widow in certain defined classes of real estate of the husband "to which she has not relinquished her right during the

marriage." Code 1886, § 1892. Now, if the divorced wife is entitled to dower, the right extends to all lands owned by the husband during the marriage to which she has not relinquished her right; and the relinquishment, to be valid, must be made during the coverture or marriage. It is manifest, if she be dowable, that he cannot convey a good title to any lands he may own without her relinquishment. Was it intended, or expected, that he should be deprived of all right to dispose of his lands, except on the improbable if not impossible condition of his obtaining the relinquishment of a wife whom, it must be supposed, he had alienated by divorcing her? And is the marriage, which had been dissolved, to be considered so much in force as to enable her, even if willing to do so improbable an act, to comply with the statute, which requires that the relinquishment shall be made during the marriage? One of the causes justifying divorce from matrimonial bonds under our statute is incurable physical incapacity to enter into the marriage state. This includes what was known as canonical causes at the common law, one of which was incapacity to consummate the marriage. Marriages contracted by persons thus incapacitated were treated as a fraud perpetrated, and for that reason they were dissolved. *Benton v. Benton*, 1 Day, 111; 1 Bl. Comm. 540; 1 Bish. Mar. & Div. (6th Ed.) § 105. Yet, under our statute, divorces *a vinculo* granted on this ground are in the same category as to dower rights as all others, except those which are decreed for the proven adultery of the wife. If divorce for abandonment by the wife is no bar to her claim of dower, no argument can be predicated of our statutory provision which precludes her claim if her divorcement is the result of her incurable physical incapacity to consummate the marriage. Can we hold that such marriage confers dower rights on the author of the fraud? In this case there are two persons, each having filled the relation of wife to the same husband, and each claiming dower and distributive interest in one and the same decedent's estate. Are both entitled? A right to dower, as a rule, implies the precedent right to quarantine. Code 1886, § 1900. Is each entitled to this, and if not, which shall have it? In allotting dower, with certain exceptions not necessary to be noticed, "the entire house may be assigned to the widow." Code, § 1908. Which demandant is entitled to the dwelling-house?

An argument has been made before us, based on the conflicting claims of homestead and other exemptions, set up by the two surviving wives. The contention is that inasmuch as the exemption, particularly of the use of the homestead, to two separate claimants is a physical impossibility, this is an insuperable obstacle to the double relief claimed in the two applications. As a mere conflict in the claim of homestead, and other exemptions, it is not perceived that any difficulty is encountered. The statute, (Code, § 2385,) which it is supposed preserves the right of dower and distribution to the divorced wife for causes other than adultery, contains no such provision in reference to homestead or other exemptions. Manifestly these must go to the wife who fills that place at the death of the husband. She and she alone is entitled to them, to be enjoyed by her with the minor children, if there be any. But this fact furnishes an additional strong argument against the divorced wife's claim of dower. The homestead being set apart for the common enjoyment of the last wife and the minor children, it cannot be assigned to the divorced wife as part of her dower. Code, § 1908. In *Williams v. Hale*, 71 Ala. 83, we collected many authorities, holding that after divorce from matrimonial bonds dower cannot be successfully claimed. To them we may add the following, some of which present the argument in very strong light: *Dobson v. Butler*, 17 Mo. 87; *McCraney v. McCraney*, 5 Iowa, 232; *Starr v. Pease*, 8 Conn. 541; *Matlocks v. Stearns*, 9 Vt. 326. On the strength of these authorities, and on the argument we have employed above, we are convinced that the legislature never intended that two surviving widows of one and the same deceased husband shall each be entitled to dower and distribution in his

estate; and, contrary to a sound rule of interpretation, we hold that it was not intended that a wife who had been divorced *a vinculo* can under any circumstances claim dower at the death of the husband. *Williams v. Hale* is overruled. The judgment of the probate court in the case of Anna J. Bush, appellee, is affirmed. In the case of Mary M. Bush, appellee, the decree of the chancellor is reversed, and a decree here rendered sustaining the demurres to the bill.

(85 Ala. 152)

## MCCALL v. RICKARBY.

(Supreme Court of Alabama. June 14, 1888.)

## EXECUTION—IRREGULAR—LAPSE OF TIME.

Under Code Ala. 1886, § 2923, providing that "when execution has been issued on a judgment within a year after the rendition, and has not been returned satisfied, another execution may be issued at any time within ten years after the test of the last, without a revival of the judgment," an execution issued after a lapse of more than 11 years since the issuance of a former execution, during which time no attempt has been made to enforce the decree, is irregular, and is rightly quashed.

Appeal from probate court, Choctaw county; JAMES A. SLATER, Judge.

This proceeding is an attempt made in 1888, for the first time, to make the appellee, Rickarby, liable as surety for the default of a sheriff, acting as administrator by virtue of his office; said default having been judicially ascertained by the probate court of Choctaw county in 1869. The appellee petitioned the probate court issuing the execution, on the application of the administrator *de bonis non*, to supersede and quash the said execution, which has been lately levied on his property to satisfy the decree obtained in 1869. The court granted the petitioner the relief prayed for, and the administrator *de bonis non* appealed, and assigns the ruling of the probate court on the petition to quash the execution as error.

W. F. Glover, for appellant. Hamiltons & Gaillard, for appellee.

STONE, C. J. Giving to the record before us, and to the testimony appellant was able to produce, the interpretation most favorable to his wishes, they prove only the following state of facts: That in September, 1869, a decree of the probate court of Choctaw county was rendered in his favor, as administrator *de bonis non* of Alexander Lawson, deceased, and against J. D. Robinson, removed administrator in chief; that up to and including February, 1874, three executions were issued on said decree, the last one returned "No property found," April 23, 1874; that on March 9, 1876, another execution was issued, which was likewise returned "No property found," date not shown. There was then a lapse of more than 11 years, during which time no execution was issued, and no attempt made to enforce said decree. On October 18, 1887, another execution was issued on said decree, which was levied on the property of Rickarby, as one of the sureties of Robinson, when the present proceedings were instituted to supersede and quash said last execution. The probate court granted the motion. Several reasons are urged before us why the judgment of the probate court should be affirmed. We place our ruling on a single ground. Our statute (Code 1886) provides that "when execution has been issued on a judgment within a year after the rendition, and has not been returned satisfied, another execution may be issued at any time within ten years after the test of the last, without a revival of the judgment." Section 2923. If 10 years have elapsed from the rendition of the judgment without issue of the execution, or if 10 years have elapsed since the date of the last execution issued, the judgment must be presumed satisfied, and the burden of proving it not satisfied is cast on the plaintiff. The execution in this case was irregular, and, without noticing any other ground, it was rightly quashed. *Perkins v. Coal Co.*, 77 Ala. 408; *Elliott v. Holbrook*, 83 Ala. 659. Affirmed.

(24 Ala. 224)

GAGE *et al.* v. MOBILE & O. R. Co.

(Supreme Court of Alabama. June 12, 1883.)

## DEDICATION—PROOF OF—SUFFICIENCY OF EVIDENCE.

Evidence that plaintiff was interested in an ice-house, mill property, and a wharf adjacent to an alley, also in steamers landing at the wharf; that the alley was used by all who wished, and afforded access to the mill and ice-house business; that deeds to the property adjoining and including the alley made no reference to the existence of the alley; that one of them described the land constituting the alley as belonging to plaintiff; and that at one time the alley had been closed without apparent objection,—is sufficient to disprove dedication of the alley to the public, where the opposing evidence consisted only of several maps, only one of which tended to show a public alley; of the fact that the city erected a lamp-post at the entrance of the alley; and of certain ambiguous testimony as to statements by plaintiff as to his intentions.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Chancellor.

The bill in this case was filed by Gage & Co. to enjoin the appellee, the Mobile & Ohio Railroad Company, from closing up the space between the complainants' ice-house on the north, and a large brick building on the south, in Mobile, Ala., on the ground that it was a public alley-way. The public character of the said alley-way was attempted to be shown in two ways: by dedication, and by prescription. The defense set up is that the middle of the block in question, where the so-called alley runs, has at all times been private property. The bill was dismissed, and the complainants appeal.

W. S. Anderson, for appellants. P. J. & T. A. Anderson, for appellee.

SOMERVILLE, J. The facts of this case, in our opinion, bring it fully within the principles settled in *Steele v. Sullivan*, 70 Ala. 589, and we might well affirm the decree of the chancellor on the authority of that case. The testimony set out in the record fails to satisfactorily show either a dedication of the alley in controversy by the owner, or its acceptance by the municipal authorities of the city of Mobile. A dedication of property to public uses will not be established by the courts unless the intention of the owner to make such dedication unequivocally appears by clear and satisfactory evidence. *Forney v. Calhoun Co.*, ante, 153. And, however long the user of property may be continued, if it appears to be referable as well to an implied license of the owner as to any assertion of adverse claim by the public, the courts will attribute it to the former and not to the latter source of origin. The main reliance of the appellants to sustain the alleged dedication in this case is (1) certain oral declarations attributed to Charles P. Gage, who had been the owner of the property for over 30 years; and (2) a supposed adverse user by the public for over 20 years. The acceptance of the city is sought to be shown by certain maps made under the authority of the municipal officers, and by the erection of a gas-light, on Commerce street, near the entrance of the open space or alley. To a proper understanding of the case it is important to keep in mind that, during the period of Gage's alleged declarations, which in some cases are ambiguous in meaning, he was a half owner of the ice-house property belonging to C. P. Gage & Co., situated immediately north of the alley, and on the east side of Commerce street. He also owned the mill property on the south side of the supposed alley, and the wharf at the east end of the alley, and had an interest, for a time at least, in two steamers plying between Mobile and New Orleans, and landing at this wharf. The alley is shown to have been used by all who chose to pass through it, going to and from the wharf, and afforded access also to the mill and ice-house business. It is thus made probable, if not comparatively clear, that the alley was used by the public for the convenience of, and by the implied permission of, Gage himself, in connection with the ice, mill, and wharf business, and for the advancement of his own pecuniary interests. No inference can be drawn, therefore, that

such user was under any adverse claim in favor of the public, however long continued. "It is an important circumstance," says Mr. Washburn, "in determining whether the user of the right claimed is adverse or not, that it is contrary to the interest of the owner of the land." Washb. Easem. \*87. It has often been said that an enjoyment with the consent, or consistently with the rights and interests, of the true owner, has no tendency to prove a conveyance from him, or to establish an adverse right. *Arnold v. Stevens*, 24 Pick. 106; *Steele v. Sullivan*, 70 Ala. 589. A license by a business man to enter his premises, extended to the public to attract custom, and as an auxiliary to the promotion of such business, cannot be construed to be a dedication, however long continued. It is therefore revocable at his option. The deeds to the property adjoining and including the alleged alley repel the presumption of a dedication. In all the conveyances of this and adjacent property, running back from the commencement of this suit, in the year 1886, for over 60 years, there is nothing to indicate the recognition or existence of an alley anywhere in the entire square, within the compass of which the property in controversy is embraced. These deeds, being of a solemn and deliberate character, and placed upon the public records, must be taken as so many affirmative declarations by the owners of the alley property in denial of the public right. This is emphasized by a deed made by Charles P. Gage in 1885, in which he quitclaims to his partners in the ice-house business an undivided half interest in 30 feet of ground just north of the alleged alley; and, in describing the boundaries of this lot, he not only fails to mention the alley on the south side, but describes the land on the south side, which includes the alley, as his (the grantor's) property. As evidencing a further denial of the public right, it is stated by one witness in the record, and not satisfactorily refuted, that for one or two years after the war the open space in dispute was closed by a fence and gate on Commerce street, without apparent objection by the city authorities or the public; the inclosure being used as a private coal-yard during this interval. As said in *Steele v. Sullivan*, 70 Ala. 594: "Where the recorded deeds of the lands or lots adjacent to a street or alley contain recitals or words of conveyance which repel the idea of a dedication, this is always a very strong fact to rebut the presumption arising from the use of the public." And, again, it is said in the same case: "So the creation of a gate or other obstruction across the entrance rebuts the intention to dedicate an alley as a public highway." There are other minor facts in the record; but, taking all the testimony together, it falls very far short of proving a clear and unequivocal intention on the part of the owner of the soil to dedicate the supposed alley in controversy to the public use. The evidence of an acceptance by the public, also, is not satisfactorily proved. The maps of the city, which commence with the year 1837 and come down to 1887,—some half dozen in number,—seem to us rather to repel the idea of a recognition by the city authorities of the existence of a public alley at the place of the irregular opening in controversy. But one of these maps, prepared in 1868, seems clearly consistent with its existence. The others are repugnant to it. The erection of the gas-light post near the entrance, unexplained, is a circumstance of but little weight; no more, in fact, than the erection of a like one in front of a church or a private banking-house. The testimony in the case does not clearly show any act on the part of the city from which we can infer unequivocally an acceptance of the supposed dedication. These considerations vastly outweigh the alleged declarations of Gage that he intended the alley for public use. The testimony bearing on this point is not in itself free from ambiguity, and is quite as consistent with the idea that he intended the public to use the alley in connection with the wharf, mill, and ice business as with a purpose to abandon its use exclusively to the public. The whole proof in the case supports the counter-declarations of Gage that his design was to leave the passage-way in question open only for the promotion of his own private enterprises,

whether conducted by himself or his tenants. The bill is not framed with the view of claiming a private way of necessity in favor of complainants, which would entitle them to free access to and from their stable adjoining the alleyway. Nor is the right to such a way sustained by the testimony, based, as it here is, on convenience rather than necessity. A dedication proper can be made only to public and not to private uses. The objections to testimony are not considered, as the result would be unaffected by them. In our judgment, the decree of the chancellor dismissing the bill is free from error, and must be affirmed.

(84 Ala. 605)

ALEXANDER v. HOOKS *et al.*

(Supreme Court of Alabama. June 14, 1888.)

## 1. VENDOR AND VENDEE—VENDOR'S LIEN.

A bond for the conveyance of land, reciting a consideration for the land, but containing a statement that certain personal property is embraced in the sale, shows a sale of both real and personal property for a consideration in gross, from which no vendor's lien arises, and the burden of proving a separate consideration for sale of the land is upon the plaintiff seeking to enforce a vendor's lien.

## 2. SAME—EVIDENCE.

In a suit to enforce a vendor's lien, the contract reciting a sale of both real and personal property for a consideration in gross, evidence of oral admissions of a deceased party to the contract made 18 years previous to the bringing of the suit is insufficient to prove that the sale of the personal property was without consideration, when such admissions are only proved by the testimony of a brother of the opposite party, who has made mistakes in other parts of his testimony, showing that his recollection of the matters in controversy was defective.

## 3. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Under Code Ala. 1886, § 2765, providing that, in a civil suit, "neither party shall be allowed to testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit," the testimony of the complainant in a bill to enforce a vendor's lien as to admissions of the deceased vendee is inadmissible.

Appeal from chancery court, Colbert county; THOMAS COBBS, Chancellor. Bill in equity to enforce vendor's lien on land. Code Ala. 1886, § 2765, is as follows: "In civil suits and proceedings there must be no exclusion of any witness because he is a party or interested in the issue tried, except that neither party shall be allowed to testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit."

*John B. Moore*, for appellant. *L. B. Cooper and Brickell, Semple & Gunter*, for appellees.

SOMERVILLE, J. It is now a statutory rule, imposed upon this court by the adoption of the new Code, that, "in deciding appeals from the chancery court, no weight shall be given the decision of the chancellor upon the facts, but the supreme court shall weigh the evidence, and give judgment as they deem just." Code 1886, § 675. This statute was manifestly designed to abrogate the rule heretofore established that the decree of the chancellor upon the facts would not be reversed or disturbed by the appellate court unless we were clearly convinced that it was wrong, or, as was often said in equivalent language, unless there was a decided preponderance of evidence against the conclusion attained in the decree; and, in the consideration of this case, we shall regard the new rule as superseding the old one, and be governed by it accordingly. The present bill, filed by the appellant, Alexander, is one for the enforcement of an alleged vendor's lien. The defense set up, and mainly relied on, is that the note which is sought to be fastened as a vendor's lien on the land described in the bill was based on a mingled consideration of land and personal property; and the evidence failing, as is insisted, to satisfactorily show that the price of the land was ascertained and distinguished from

that of the personality, no lien can be allowed for the aggregate or gross sum. If the evidence sustains this contention,—that is, if it satisfactorily appears that the sale made by the complainant Alexander to William Hooks, deceased, embraced both real and personal property, and the complainant fails to show, by reasonably convincing testimony, that a particular price was agreed on for the land as distinct from the aggregate amount allowed for both the land and the personality,—we must, under our decisions, regard the vendor's lien as waived and abandoned, and hold the bill to have been properly dismissed by the chancellor. *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala. 367, 3 South. Rep. 4; *Betts v. Sykes*, 82 Ala. 378, 2 South. Rep. 643. The sale was made on October 14, 1878; the complainant on that day executing to the vendee, Hooks, his bond for title, and the latter executing his several promissory notes for the purchase money, one of which—the foundation of this suit—seems to have been renewed in January, 1878. The notes all recite the consideration to be land. The title-bond obligates the complainant to make a good and lawful deed to a described tract of land, and, after reciting the notes of the vendee as the consideration of the sale, the following *addendum* is written at the foot of the title-bond, and bearing the same date: "I also embrace in sale my interest in four mules, and the corn made on the place this year, and all the tools and wagons and all other stock on said place, this the 14th day of October, 1878." Here follows the signature of the vendor, with those of the two subscribing witnesses to the instrument, each in its appropriate place. It is thus obvious that the written contract between the parties unquestionably shows on its face a sale of both real and personal property at a gross or aggregate price, and *prima facie* no vendor's lien arises or can be implied from the transaction. It is attempted to prove that the entire purchase money was due for the land exclusively, and that the personal property was "thrown in" without charge in the trade,—an assertion the *onus* of which is cast on the complainant. The chancellor properly ruled that the entire testimony of the complainant was inadmissible; he being incompetent to testify as to any statement by or transaction with the deceased vendee, William Hooks. Code 1886, § 2765. We shall accordingly discard the testimony of this witness as not proper to exercise any influence on our decision. The only remaining evidence bearing on the question is found in the testimony of J. F. Alexander and J. W. Alexander, both of whom are the brothers of the complainant. They are not supposed to be free from that natural and instinctive prejudice which finds its origin, spontaneously and often honorably, in the fact that "a brother is born for adversity." Each of these witnesses undertakes to state occurrences and conversations that transpired some 13 years previously. The latter is an attesting witness to the agreement. The interrogatories, which seek to elicit the answers of this witness bearing on the question in dispute, are offensively leading, in almost putting the desired answers in the mouth of the witness. These he answers "as well," he observed, "as he could recollect," by asserting that "the personal property was thrown in as an inducement to buy the land after the bond was signed." This, by necessary implication, was before the delivery of the bond, which was the completion of the trade. The frailty of this witness' memory is shown by his statement that his brother J. F. Alexander was the other attesting witness to the paper, whereas it was his nephew J. F. Alexander, Jr., who was then dead. We cannot say that he remembers accurately what was said and done 13 years previous. The other witness, J. F. Alexander, testifies to an oral admission alleged to have been made by Hooks, on the day after the sale, to the effect that the personal property was "thrown in." The settled rule with respect to verbal admissions of this nature, especially when, as here, they are inconsistent with a written memorial made many years ago, by the contracting parties, is that they ought to be received with great caution. "This evidence," as said by Mr. Greenleaf, "consisting as it does in the mere

repetition of oral statements, is subject to much imperfection and mistake: the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also," he adds, "that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." 1 Greenl. Ev. (14th Ed.) § 200. This principle has received the indorsement of this court, with an approval also of Mr. Greenleaf's concluding suggestion, that, where an admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory character. *Wittick v. Ketffer*, 81 Ala. 199; *Garrett v. Garrett*, 29 Ala. 489. But the value and weight of such evidence depends greatly also upon its consistency with other evidence not subject to like infirmities. *Lehman v. McQueen*, 65 Ala. 570. In this case, we are not willing that verbal admissions, alleged to have been made about 13 years prior to the bringing of the present suit, and by one whose lips are now sealed by death, so that he cannot be heard to explain or contradict, shall, under the circumstances, be permitted to outweigh the written recitals of the contract as to the real consideration on which it purported to be based. We accordingly hold that the contract of sale was of real and personal property, without attaching any particular price to the land, and for a consideration in gross; and, for this reason, no vendor's lien can be implied as having been retained. The chancellor so held, and his decree is affirmed.

(84 Ala. 454)

## SHIFF v. STATE.

(Supreme Court of Alabama. June 14, 1888.)

## 1. INDICTMENT—AMENDMENT—MISNOMER.

Under Code Ala. 1886, § 4389, providing that an indictment may be amended, "with the consent of the defendant, when the name of the defendant is incorrectly stated," it is reversible error to allow an indictment to be amended so as to correct a misnomer set up by the defendant's plea in abatement, where the record does not show affirmatively that defendant consented to the amendment.

## 2. HAWKERS AND PEDDLERS—SELLING WITHOUT LICENSE—EVIDENCE.

On the trial of an indictment for carrying on, without a license, the business of a transient or itinerant dealer of goods, evidence of sales made in other counties than that named in the indictment is admissible for the purpose of showing the itinerant nature of the business.

## Appeal from circuit court, Cherokee county.

The appellant was indicted for engaging in or carrying on the business of a transient or itinerant dealer in goods, wares, or merchandise without a license. The indictment was found against "Mike" Shiff. The appellant pleaded in abatement a misnomer; his name being "Ike" Shiff, instead of "Mike" Shiff, as contained in the indictment. The solicitor confessed the plea, and, "by leave of the court," amended the indictment accordingly. The defense relied on by the appellant in the court below is shown in the opinion. On the trial there was evidence, as shown by the bill of exceptions, tending to show that the defendant had proclaimed his goods on the street in the town of Centre, Cherokee county, but had not sold them to the highest bidder,—not asking for a highest bidder, but selling them at a fixed price; that he had sold his goods, under similar license, in the counties of De Kalb, Etowah, and Talladega, but that he had sold his goods nowhere else in the county of Cherokee than in the town of Centre.

*Matthews & Daniels*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

**SOMERVILLE, J.** The statute permits an indictment to be amended, "with the consent of the defendant, when the name of the defendant is incorrectly stated, or when any person, property, or matter therein stated is incorrectly

described." Code 1886, § 4389. It is the obvious meaning of this statute that an indictment shall not be amended, even in an immaterial matter, without the consent of the defendant, as is the rule of the common law." *Gregory v. State*, 46 Ala. 151; *Johnson v. State*, Id. 212. The present indictment was amended by the solicitor so as to correct a misnomer set up by plea in abatement on the part of the defendant. The judgment entry recites that it was done "by leave of the court." It nowhere appears from the record that the consent of the defendant was obtained, unless such consent can be implied by his failure to dissent. It is our opinion that the record should show affirmatively that the consent of the defendant was given to the amendment. Mere silence, or failure to object, ought not to operate as a forfeiture of the defendant's right to be tried on the indictment in the form it has been framed by the grand jury. It would be an unsafe rule to infer consent from mere silence on the part of the defendant in such cases, and such a practice would not be in harmony with our past rulings on other questions of an analogous character. *Flanagan v. State*, 19 Ala. 546; *Spicer v. State*, 69 Ala. 159; *Sylvester v. State*, 71 Ala. 17. For this error the judgment must be reversed.

The defendant in this case was convicted of the offense of engaging in or carrying on, without a license and contrary to law, the business of a transient or itinerant dealer in goods, wares, or merchandise, other than that of a licensed peddler, or traveling agent of a wholesale dealer in said articles, making sales thereof by sample. Code 1886, § 629, subd. 34. He justified under a peddler's license, which was introduced in evidence, and conferred on the partnership of Ike Shiff & Co., of which he was a member, full authority to engage in the business of peddling on foot in the county of Cherokee, where the license was taken out and the indictment was found. Code 1886, § 629, subd. 31. If the facts in evidence showed that the defendant was a peddler on foot, in the popular signification of that term,—that he walked from house to house, or from place to place, carrying his goods with him, and selling them by retail,—then his peddler's license, issued to the partnership of which he was a member, would be a full protection to him. Code 1886, §§ 631, 632; *Thompson v. State*, 37 Ala. 151; *Long v. State*, 27 Ala. 82. But if he was not a peddler, but a transient or itinerant dealer in goods, other than a licensed peddler, or traveling agent of a wholesale dealer, selling by sample, and if he engaged in or carried on the business of such transient or itinerant dealer in the county of Cherokee, without a license therefor, as required by subdivision 34 of section 629 of the present Code, (1886,) and within 12 months before the finding of the indictment, he would be guilty as charged, and be subject to a fine of three times the amount of the state license, which, in this case, is \$50. Code 1886, § 3892; Id. § 629, subd. 34; *Randolph v. Yellow Stone Kit*, 83 Ala. 471.<sup>1</sup> In the latter aspect of the case it would be competent to prove that the defendant had in person made sales in other counties, and had gone from one county to another, in this state, dealing in goods, wares, and merchandise. This would be relevant for the purpose of showing that he was a transient or itinerant dealer; that he traveled from place to place while engaged in his business of selling. It would, in other words, show the itinerant nature of such business, and that his motive in pursuing it was for a profit, or as a means of livelihood, which is a necessary element of engaging in any business, occupation, or profession. *Harris v. State*, 50 Ala. 127; *Will v. State*, 52 Ala. 19. Of this offense the defendant could be convicted without proving that he had sold goods in other places in the county of Cherokee other than at Centre, the county-seat, where was located his place for making sales, if we correctly understand the bill of exceptions. There could be no lawful conviction, however, unless he engaged in or car-

<sup>1</sup> 18 South. Rep. 708.

ried on the business; by some act done in the prosecution of it, in the county of Cherokee.

The judgment is reversed for the error above pointed out, and the cause is remanded for a new trial.

(84 Ala. 535)

ROONEY *et al.* v. MICHAEL *et al.*

(Supreme Court of Alabama. June 13, 1898.)

1. HUSBAND AND WIFE—CONTRACTS CONCERNING WIFE'S SEPARATE ESTATE—ACTIONS TO ENFORCE—JURISDICTION.

A decree in chancery, under the statute authorizing the same, relieving a married woman of the disabilities of coverture as to her separate estate, "so far as to invest her with the right to buy, sell, convey, and mortgage real and personal property, and to sue and be sued as a *feme sole*," does not deprive equity of jurisdiction of an action to subject her separate estate to the payment of a debt contracted by her after the rendition of the decree, and confer it upon a court of law.

2. SAME—ALIENATION OF WIFE'S SEPARATE ESTATE—JOINDER OF HUSBAND IN DEED.

A married woman signed and acknowledged a deed of part of her separate estate two days before the filing of a bill to subject her separate estate to the payment of a debt contracted by her. The deed was not signed by her husband, or delivered until after the bill was filed. *Held*, that under Code Ala. § 2343, providing that a married woman whose husband is of sound mind and has not abandoned her, is a resident of the state and not imprisoned for a period exceeding two years, cannot alienate her lands, or any interest therein, unless her husband join her in executing the conveyance, there was no alienation of the land until after the bill was filed and the suit begun.

3. SAME—ACTION TO CHARGE WIFE'S SEPARATE ESTATE—CONVEYANCE PENDENTE LITE.

Where a married woman acquires property by a conveyance to her in her own name, creating an equitable separate estate, the equitable and legal title are merged in her, and service of process upon her, in an action to subject her separate estate to the payment of a debt, begins the suit, and a conveyance of the property made after such service is a conveyance made *pendente lite*.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge.

This was a bill filed by Michael & Lyons and others against Mary C. Rooney and another, seeking to have a conveyance from one Mrs. Untreiner to Mrs. McMahon, and from Mrs. McMahon to Mrs. Rooney, set aside as invalid, on the ground that the said conveyances were made *pendente lite*. Judgment for plaintiffs, and defendants appealed. Code Ala. § 2348, provides that the wife, if the husband be of sound mind, and has not abandoned her, or be not a non-resident of the state, or be not imprisoned under a conviction for crime for a period exceeding two years, cannot alienate her lands, or any interest therein, without the assent and concurrence of the husband, the assent and concurrence of the husband to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land.

*Pillans, Torrey & Hanaw*, for appellants. *G. S. & H. T. Smith*, for appellees.

CLOPTON, J. Mrs. Untreiner acquired, in March, 1885, by conveyance, which created an equitable separate estate, the real estate which appellees seek by the bill to charge with debts contracted by her. In May, 1880, by decree of the chancellor, she was relieved of the disabilities of coverture as to her separate estate "so far as to invest her with the right to buy, sell, convey, and mortgage real and personal property, and to sue and be sued as a *feme sole*." The debts due complainants were contracted after the rendition of the decree, which is specially pleaded in defense of the suit. The ground of defense is that the effect and operation of the decree is to convert the equitable separate estate into a legal estate discharged of the trusteeship of the husband; and that complainants dealt with her, not as a *feme covert*, but as a *feme sole*, having credit by reason of her personal liability, and of possessing a legal estate, and that their remedy is by action at law, and not in equity. The statute which authorized chancellors to relieve married women of the

disabilities of coverture, and decrees rendered thereunder, have been considered and construed in several cases. The result of these decisions is that the statute did not operate to remove the husband from the trusteeship of the wife's separate estate, or to deprive him of any right conferred, or to relieve him of any duties imposed, by the pre-existing statutes; and the wife was relieved of the disabilities of coverture only as to her separate estate, and as to this only so far as the statute provides. In the execution of the specified powers she was discharged from any restraint or control of her husband, and was vested with power to make contracts touching and concerning property which may create a personal liability on which a personal judgment could be rendered, but had no general power to contract. *Cook v. Meyer*, 73 Ala. 580; *Parker v. Roswald*, 78 Ala. 526. By the statute and the decree the character and status of the separate estate of Mrs. Untreiner were not changed, but remained the same as prior to the rendition of the decree, except that her capacity to buy, sell, convey, and mortgage real and personal property was enlarged. That the chancery court had original jurisdiction to subject the equitable separate estate of a married woman to the payment of any debt contracted by her with the intention to charge it, is undoubted. It is a well-settled and general principle that a statutory enactment is essential to take from a court of equity its original jurisdiction of any subject-matter. Mere affirmative words, conferring or enlarging the jurisdiction of courts of equity, do not oust or abridge the pre-existing jurisdiction. "The rule is well settled that unless the statute contains negative words, or other language expressly taking away the pre-existing jurisdiction, or unless the whole scope of the statute, by its reasonable construction and its operation, shows a clear, legislative intent to abolish that jurisdiction, the former jurisdiction of equity to grant its relief, under the circumstances, continues unabridged." *Lee v. Lee*, 55 Ala. 590; 1 Pom. Eq. Jur. §§ 276-279. The statute authorizing chancellors to remove the disabilities of coverture confers upon a married woman the right to sue, and imposes liability to be sued as a *feme sole* in respect to any transactions or contracts made in the execution of the special and limited powers with which she is invested. In respect to such matters her coverture opposes no obstacle to the assertion of rights and liabilities for or against her. As to these matters jurisdiction is conferred on courts of law by affirmative words, in cases in which such courts would have jurisdiction if she were *sui juris*. But the statute contains no words, negative or other, which take away the former jurisdiction of the courts of equity in regard to the equitable separate estate of married women, nor any terms from which such legislative intent can be implied. The former jurisdiction remains unimpaired and unabridged. *Mitchell v. Otey*, 23 Miss. 286. The debts due complainants having been contracted prior to the passage of the act of February 28, 1887, which comprises sections 2341-2351, Code 1886, the case does not come, in reference to this question, within the operation of those sections, and we intimate no opinion as to their effect. As to contracts made prior to the repeal of the statute we have been considering, the rights and remedies in existence when the contract was made are not abolished. *Jordan v. Smith*, 83 Ala. 299, 3 South. Rep. 708.

The bill does not seek to set aside the conveyances made by Mrs. Untreiner and her husband to Mrs. McMahon, and by the latter and her husband to Mrs. Rooney, as fraudulent, but on the ground that they are purchasers *pendente lite*. The admitted facts are that prior to the filing of the bill, Mrs. Untreiner had agreed to sell the property to Mrs. McMahon at a stipulated price, and caused a deed to be prepared, which was signed and acknowledged by her March 25, 1887, two days before the bill was filed. The deed was signed by her husband on the day succeeding the filing of the bill, and was delivered to the grantee three or four days thereafter. On the day of its delivery Mrs. McMahon and her husband made a deed to Mrs. Rooney. Process was served

on Mrs. Untreiner before the deed was signed by her husband, but not on the husband until after the delivery of the deeds to the grantees. The defendants contend that the rule of *lis pendens* does not apply by reason of having acquired an interest in the property before the commencement of the suit. It will be conceded that the doctrine of *lis pendens* does not apply to persons who have acquired a subsisting equitable right or interest in the subject-matter of the suit before it was commenced, and who could and should have been made parties. Having an equity, and not having been made parties, such persons may, for their protection, procure the legal title, and their rights will not be affected by the pendency of the suit. They have a right to be heard, and are not regarded as intruders in the pending litigation. In order that the right or interest thus acquired may be effectual against the application of the rule it must be substantial and enforceable; if by contract, a contract obligatory on the parties, which could have been enforced. *Gibler v. Trimble*, 14 Ohio, 323; *Clarkson v. Morgan*, 6 B. Mon. 441. Mrs. Untreiner, having been relieved of the disabilities of coverture, which, under the statute, invested her with capacity to sell and convey the property, without her husband joining in the execution of the conveyance, it may be, could have made a binding contract of sale. *Robinson v. Walker*, 81 Ala. 404, 1 South. Rep. 347. Had the statute been in force when the agreement to sell was made, there would have been some basis for the contention of defendants. But the act of February 28, 1887, which is comprised in article 3, c. 1, tit. 5, Code 1886, repeals the pre-existing statutes creating and regulating the separate estate of married women, including the statute under which the decree was rendered, and establishes an entirely new system of laws. Section 2351 provides: "All property of the wife, whether acquired by descent or inheritance, or gift, devise, or bequest, or by contract, or conveyance, or by gift from a contract with the husband, is the separate property of the wife within the meaning, and is subject to all the provisions, of this article, saving and excepting only such property as may be conveyed to an active trustee for her benefit." The distinction, which had heretofore prevailed, and been preserved between equitable and statutory separate estates is abrogated except in cases where the property is conveyed to an active trustee, a trustee having some duties to perform in reference to the property. With this single exception equitable separate estates are now statutory. The right or power of the wife to bind or charge as a *feme sole* her equitable separate estate, created by conveyance directly to her, is taken away. She has full capacity to contract concerning such separate estates only in writing, and with the assent or concurrence of her husband expressed in writing. Section 2346. She is incapacitated to alienate her lands, or any interest therein, without the consent or concurrence of the husband, manifested by his joining in the alienation in the mode prescribed by the law, when he is of sound mind, and has not abandoned her, or is not a non-resident of the state, or is not imprisoned under a conviction for crime exceeding two years. Section 2348. The provisions of the act of February 28, 1887, though not retroactive as to contracts and transactions prior to its passage, apply and govern as to contracts and transactions made after it took effect, the capacity of a married woman to charge, alien, and dispose of, or contract in reference to, property conveyed directly to her, which, under the former system of laws, constituted an equitable separate estate. She cannot bind or charge it by any promise or act of her own. Her mere agreement to sell her real estate, without the consent or concurrence of her husband expressed in writing, is void under the statutes, and a court of equity will not enforce it against her; and her conveyance, without the consent or concurrence of the husband shown in the mode prescribed, will not operate as a contract to convey. *Blythe v. Dargin*, 68 Ala. 370. Wherefore, the agreement to sell prior to the commencement of the suit was not a valid and enforceable contract, and passed no right or interest to the purchaser. There

was no alienation of the lands, or of any interest therein, until the deed was signed by the husband of Mrs. Untreiner, and delivered to the grantee. This was after the filing of the bill and service of process upon Mrs. Untreiner.

Defendants further contend that the doctrine of *lis pendens* does not apply, because process was not served upon the husband of Mrs. Untreiner until after the delivery of the conveyances. This contention is founded on the settled rule that a holder of the legal title must have been impleaded at the time of the purchase to affect a purchaser, who comes in under him, with constructive notice of the equity claimed in the bill, and that the suit will not be regarded as commenced until actual service of the process, so as to constitute *lis pendens*. Such is undoubtedly the rule where it is sought to charge a person, who has acquired the legal title, with constructive notice of a latent outstanding equity. But it may well be doubted whether it applies to a case like the present, where the legal title is not vested in the trustee by express grant or conveyance. Be this as it may, service of process upon the husband of Mrs. Untreiner was not requisite, under the circumstances of this case, to affect the grantees with constructive notice of the claim of complainants. Whatever right or title he had in the real estate, conveyed directly to the wife for her sole and separate use, arose from his trusteeship by operation of law, and as an incident to his relation of husband. By the statutes the land, with the rents, incomes, and profits, is declared to be the separate property of his wife. His trusteeship was abolished, and all his right and title was thereby terminated. The equitable and legal title was merged in Mrs. Untreiner. He had no rights in the property growing out of his relation of husband; and the incidents thereto fell with the abrogation of such relation as to the property, except that his assent or concurrence is necessary to a valid alienation, which is provided not for the purpose of passing any interest or title from him, but as a salutary restraint upon the wife's power of alienation. This is manifest from the provision in the same section that the wife may alienate her lands as if she were a *feme sole*, if her husband be a *non compos mentis*, or has abandoned her, or is a non-resident of the state, or is imprisoned under a conviction for crime for a period exceeding two years. In this case the *lis pendens* began from the service of process upon Mrs. Untreiner. It is insisted that the doctrine of *lis pendens*, on account of its harshness, should be confined within narrow limits. Its harshness has been frequently acknowledged by learned jurists, and that it does operate harshly in particular cases must be admitted, which fact disposes the courts to give the purchaser the benefit of all technical objections to the regularity of the proceedings in the suit. But the doctrine has been long established in equity jurisprudence, as founded on public necessity, and firmly adhered to as essential to the due administration of justice, and to give effect to the decrees of the courts. Considerations of harshness in individual cases do not require that it shall be confined within such narrow limits as to constitute a purchase completed *pendente lite*, the acquisition of an interest before the commencement of the suit by relation to a void contract, a baseless claim without color of right or interest. Affirmed.

(84 Ala. 460)

*Ex parte* BUCKALEW.

(*Supreme Court of Alabama.* June 14, 1888.)

1. CONVICTS—Hiring to CONTRACTOR—PRESUMPTION AS TO VALIDITY OF CONTRACT.

On an application for *habeas corpus*, where it appears that a prisoner escaped from the custody of a contractor to whom he was let for hire in pursuance of an order of the court, and was rearrested, and turned over to another contractor, in the absence of averments and proof to the contrary, it will be presumed that a proper contract was executed, and that the prisoner was confined and worked in the manner required by the statute relating to convict labor, and that his escape was unjustifiable, and he will not be discharged from the custody of the second contractor.

## 2. SAME—ESCAPE FROM CUSTODY—EXPIRATION OF TERM.

A prisoner sentenced to hard labor, who escapes and is rearrested, is not entitled to a discharge because the term of his sentence has expired, when, by reason of his escape, he has been at hard labor for a less term than he was sentenced.

Appeal from circuit court, Chambers county.

Application of L. L. Buckalew for *habeas corpus*. Code Ala. 1886, § 4597, provides that "every contract for the hire of county convicts must express the kind of labor, and the place at which it is to be performed; and such convict must be restricted to such place and labor, which must not be changed except upon the recommendation of the court of county commissioners; and county convicts can only be sublet or rehired in the same manner." Section 4658. "It is unlawful to work together, or to confine in the same room or apartment, any convict or convicts who have been sentenced to hard labor for the commission of a misdemeanor not involving moral turpitude, with any convict or convicts sentenced for the commission of a felony."

T. N. McClellan, Atty. Gen., for the State.

CLOFTON, J. The right to a discharge is founded on the following facts: The petitioner, Buckalew, having been convicted, in July, 1887, of assault and battery, and sentenced to hard labor for the county for a definite number of days, was turned over to Trammell, who had made a contract with the court of county commissioners for the hire of county convicts, in pursuance of an order of the court made in December, 1885, which is as follows: "It is ordered that the county convicts, for a term of three years from the 1st of January, 1886, be let to R. J. Trammell at the rate of nine dollars each per month, and that J. J. Robinson, judge of probate, be authorized to have a proper contract executed for them." In August succeeding his conviction, the petitioner escaped from the custody of the contractor, was rearrested in March, 1888, and then turned over to Pace, who had made, in November, 1887, a contract with the court of county commissioners for the hire of convicts sentenced for the commission of misdemeanors not involving moral turpitude, under another and different order of that date. The validity of the order of November, 1887, and of the contract with Pace, made in pursuance thereof, is not assailed; but it is insisted that the confinement of the petitioner by Trammell was illegal, from which he had a right to escape, on the ground that the order, in pursuance of which his contract was made, was void, and, having rightly escaped, that the petitioner could not be rearrested, and compelled to labor for the term of his sentence.

By statute, hard labor for the county includes labor on the public roads, public bridges, and other public works in the county, and authorizes the court of county commissioners to let the convicts to hire to some other person or corporation, to labor anywhere within the state. When the court establishes a system of hard labor which provides that the convicts shall labor on the public works in the county, the court is required to determine in what manner and on what particular works the labor shall be performed. Such determination is not requisite when they are let to hire. In such case, general terms are sufficient. Code 1876, §§ 4465, 4466; *Ex parte Crews*, 78 Ala. 457. When the system of letting to hire is adopted, the requirement of the act of February 17, 1885, (Code 1886, § 4658,) that convicts sentenced for the commission of misdemeanors not involving moral turpitude, and convicts sentenced for the commission of felonies, shall not be worked together, nor confined in the same room or apartment, is not jurisdictional. It operates on the contract, and on the manner of its execution by the contractor. The order authorizing letting to hire may be general in its terms, and silent in this respect; and there may be but one contractor for both classes of convicts, and one contract, if it substantially conforms to the statutory regulations. *Ex parte White*, 81 Ala. 80, 1 South. Rep. 700. The statute provides that any con-

tract for the hire of county convicts must express the kind of labor, and the place at which it is to be performed; and such convict must be restricted to such place and labor unless changed upon the recommendation of the court of county commissioners. The contract with Trammell is not produced, and it is neither alleged nor shown that it did not conform to the statutory requirements, nor that the petitioner was worked together with convict felons. In the absence of such averments and proof, we must presume, on this application, that a proper and lawful contract was executed, as provided by the court of county commissioners, and that the petitioner was confined and worked in the manner required by the statute. The order cannot be pronounced void in this mode of attack, and neither the contract, nor the manner in which the petitioner was worked or confined, being shown to be illegal, we cannot declare that his punishment was unlawful, or that his escape was justifiable.

It is not controverted that the court of county commissioners, in November, 1887, having determined that the interest of the county required that persons convicted of misdemeanors be hired outside of the county, made a proper and valid order to let the county convicts to hire, to work as agricultural laborers on a farm, and that, in pursuance of this order, a sufficient contract was made with the respondent, Pace, who has the petitioner in custody, for the hire of all convicts sentenced for misdemeanors not involving moral turpitude. If it were conceded that the petitioner escaped from an unlawful imprisonment, it does not follow that he is entitled to a discharge from his present custody. In *Ex parte Crews, supra*, the petitioner, who had been sentenced to hard labor for the county, was imprisoned in the county jail, and was discharged because no system of hard labor adapted to his offense had been established at the time of his discharge. Had such system been provided, he would have been discharged from the unlawful imprisonment, but remanded to the proper custodian. The petitioner did not resort to his legal remedy, and was not lawfully discharged. He took the matter into his own hands, determined for himself the illegality of his punishment, and voluntarily escaped. A system of hard labor adapted to his offense having been established prior to, and being in operation at the time of, his rearrest, he could be lawfully required to perform hard labor for the time prescribed by the sentence. It is, however, further insisted that the petitioner should be discharged on the ground that the term for which he was sentenced has expired by lapse of time, though by reason of his escape he has been at hard labor for less time than he was sentenced. When one is sentenced to the punishment of death, and it is not executed on the day fixed by the sentence, the judgment continues in force, and the court may fix another day. *Aaron v. State*, 40 Ala. 307. Also, where a convict who has been sentenced to imprisonment escapes, and is rearrested, he may be imprisoned for the full term of his sentence, deducting the time of his absence. *Dolan's Case*, 101 Mass. 219; *Cleak v. Com.* 21 Grat. 777; 1 Bish. Crim. Proc. §§ 1382-1385. The substance of the sentence is that the petitioner shall be put to hard labor for the actual number of days prescribed, and no time is fixed as to when the term shall begin. The sentence of the court does not expire until the prisoner has been at hard labor for the full period adjudged against him. Application denied.

34 Ala. 508)

#### LIDDELL v. CHIDESTER.

(*Supreme Court of Alabama. June 14, 1888.*)

##### JUDGMENT—RES ADJUDICATA—MASTER AND SERVANT.

In *assumpsit* for wages, where the agreement between the parties shows on its face a single contract for a year for an entire sum, the recovery of the *pro rata* amount that would be due from the date of plaintiff's discharge to the end of that month, were the wages payable monthly, estops defendant from denying that the agreement was to pay in monthly installments, or that he discharged plaintiff without just cause.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. This was an action brought by the appellee, Thomas H. Chidester, against the appellant, Forbes Liddell, for the recovery of a balance alleged to be due the plaintiff from the defendant for services rendered, and by contract entered into by plaintiff and defendant. The defendant pleaded the general issue, payment, and *res adjudicata*. The plaintiff demurred to the defendant's plea of *res adjudicata*. The court overruled the demurrer. There was then a replication, and the pleadings were very full. The court charged the jury, at the written request of the plaintiff, as follows: (1) "If the jury believe all the evidence, they must find a verdict for the plaintiff." (2) "If the jury believe the evidence, the plaintiff would be entitled to recover the balance due under said contract for each month, or part of a month thereof, from the 1st day of August, 1885, at the contract price, until the end of the contract year, which was February 26, 1886, with interest thereon from this last date." The defendant objected to the giving of each of these charges by the court, and duly excepted to the court's overruling his objection. The rulings of the court on the demurrer, and the giving of the first and second charges requested by the plaintiff, were here assigned as error.

*Arrington & Graham*, for appellant. *Troy, Tompkins & London*, for appellee.

STONE, C. J. The most important inquiry in this case, alike of law and of fact, was whether Chidester was employed by Liddell to perform a year's service for \$1,000, to be paid in gross, or to be paid in monthly installments. If the former, then the recovery and enforcement of the judgment for a part of the demand in June, 1886, is a complete defense and bar to this action, and nothing should be recovered. This, under the well-known principle that a plaintiff cannot split up a single cause of action into two or more suits; and if he does so, and recovers a part of his demand, this is a waiver of and a bar to the residue of his claim, be it much or little. *Oliver v. Holt*, 11 Ala. 574; *O'Neal v. Brown*, 21 Ala. 482; *Railroad Co. v. Henlein*, 56 Ala. 368; *Wharton v. King*, 69 Ala. 365. If, on the other hand, the wages were due and demandable at the end of each month, then the recovery of one installment, unreversed, is a complete answer to and preclusion of all defenses to the merits which were or could be pleaded to such second suit. *Rake v. Pope*, 7 Ala. 161; 3 Brick. Dig. p. 580, § 75 *et seq.*; 1 Whart. Ev. § 758; *Gardner v. Buckler*, 3 Cow. 120. The contract in this case was by telegraphic correspondence. Liddell's offer was: "If one thousand dollars a year is an inducement, come immediately. Answer." Chidester's acceptance was: "Will accept one thousand dollars a year." These communications, unexplained, show a single contract for a year; the wages to be \$1,000 in gross. There was testimony that, up to the time of Chidester's discharge, his wages were paid to him monthly; but the testimony on this subject was somewhat in conflict. *Partridge v. Forsyth*, 29 Ala. 200; *Insurance Co. v. Insurance Co.*, 81 Ala. 320. It is contended for the appellee that the verdict and judgment in the former suit—that which was tried in 1886—are conclusive that Chidester's wages were due and payable in monthly installments, and that without such finding the jury could not have rendered a verdict in his favor. The elements necessary to constitute a judgment in one suit a bar to a second suit are "(1) that the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein; (2) that the former judgment was upon the merits." *Freem. Judgm.* § 256. "It is only of those matters which, as promises, enter into and uphold the judgment, (the judgment being the conclusion of the syllogism,) and connected, qualifying matters, which, if produced, would change or impair the legal force and effect of the cause of action itself on which the judgment was rendered, that the judgment pronounced becomes conclusive."

*Haas v. Taylor*, 80 Ala. 459, 2 South. Rep. 633. To be a bar it must appear that the fact claimed to have been established "was essential to the finding of the former verdict." 1 Greenl. Ev. § 534; *Chamberlain v. Gatlard*, 26 Ala. 504; *Gilbreath v. Jones*, 66 Ala. 129; *McCall v. Jones*, 72 Ala. 368; *Hanchey v. Coskrey*, 81 Ala. 149, 1 South. Rep. 259. In the first suit, instituted before a justice of the peace, the cause of action was described as follows: "The plaintiff claims of defendant \$41.50, due by  $\frac{1}{100}$  on 26th July, 1885, for salary due and for services rendered by plff. to the deff." When the case reached the circuit court by appeal, a new complaint was filed with three counts, two common and one special. The first count was "for work and labor done by the plaintiff for the defendant, and at his request, during the month of July, 1885." The second count was for the "sum of fifty dollars due by account stated between the plaintiff and the defendant on, to-wit, the 1st day of August, 1885." The third count was a special count. It averred that there was a contract for a year, the wages to be paid in monthly installments of \$83.33; that plaintiff, Chidester, was serving, and ready to serve, when on July 15, 1885, without fault on his part, Liddell discharged him, paying him on that month's wages \$30, leaving the balance, \$41.50, unpaid. For that balance, with interest, this count claimed judgment. The recovery was for that sum, with interest, which was acquiesced in and paid. It is settled in this state, by many decisions, that, when Chidester was discharged, he had the option of one of three remedies if the discharge was wrongful: (1) He could have elected to treat the contract as rescinded, and sue on a *quantum meruit* for any labor he may have performed; (2) he could have sued at once for an entire breach of the contract by the defendant, in which event he would have been entitled to recover all damages he suffered up to the trial, not exceeding the entire wages he could have earned under the contract, or (3) he could have waited until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. Each of these alternate rights, as we have seen, was dependent on his fixing on Liddell the fault of his discharge. *Strauss v. Meertief*, 64 Ala. 299; *Davis v. Ayres*, 9 Ala. 292; *Ramey v. Holcombe*, 21 Ala. 567; *Fowler v. Armour*, 24 Ala. 194; *Holloway v. Talbot*, 70 Ala. 389; *Wilkinson v. Black*, 80 Ala. 329; 3 Wait, Act. & Def. 606. And, when wages are payable in installments, suits may be brought on the several installments as they mature. *Davis v. Preston*, 6 Ala. 83. It is manifest that the former suit was not brought on the first of the alternate grounds stated above. There is nothing to show that it relied on the rescission or abandonment of the contract; and, if it had, there were no past services actually rendered, and unpaid for, on which to found a recovery. The suit was for that part of the salary for July which had not been paid. Nor was the suit brought on the second of the grounds,—an entire breach of the contract. On the contrary, it treated the contract as continuing through the month of July, and sued for the wages alleged to have been constructively earned in July, after the discharge. The former suit was, then, brought on the third of the grounds, treating the contract as still binding on Liddell, and claiming wages according to its terms. It was brought July 27, 1885, the first day after the completion of one of the months of the wage year. If the contract was for the payment of \$1,000 in gross at the end of the year, February 26, 1886, that suit was prematurely brought, and there could have been no recovery. It was indispensable to plaintiff's right of recovery to show that, by the terms of the contract, his wages were due in monthly installments, one installment of which had matured. This was "essential to the finding of the former verdict." The foregoing facts are placed beyond dispute in the record before us. They estop Liddell from denying that, by the terms of his contract with Chidester, he was to pay him wages in monthly installments, and that he discharged plaintiff without cause; and the same inevitable result would follow; no matter what proof he might offer that the contract was for the payment of

Chidester's salary in gross, and that he had good grounds for discharging him. We have not deemed it necessary to consider the rulings on demurrer. Whether right or wrong, they could not have affected the defendant injuriously. There was no error in the charges of the court. Affirmed.

(65 Miss. 468)

**LEWIS et al. v. STATE, to Use of NOXUBEE COUNTY.**

(*Supreme Court of Mississippi*, May 21, 1888.)

1. **BONDS—BREACH OF—WHAT IS—ISSUING FALSE WITNESS CERTIFICATES BY CLERK.**  
In an action on the official bond of a clerk of the court, conditioned for the faithful discharge of his duties, under Code Miss. § 2757, providing that if the clerk of any court shall willfully neglect or refuse to perform any of the duties required of him by law, or shall violate his duty in any respect, it shall be the duty of the president of the board of county supervisors to cause suit to be brought on his official bond for the recovery of such damages as the county may have sustained thereby, it appeared that such clerk had issued and put in circulation false and fraudulent witness certificates, which were accepted as genuine, and paid by the county. *Held*, that such act was a violation of the condition of the bond for which the sureties were liable.
2. **SAME—ACTIONS ON OFFICIAL BONDS—NON-JOINDER OF SURETIES.**  
Under Code Miss. § 1184, providing that "in any action founded on any joint, or joint and several, bond, \* \* \* it shall be lawful to sue any one or more of the parties liable on such bond," etc., the non-joinder of one of the sureties, in an action on an official bond, is not error.
3. **SAME—PLEA IN ABATEMENT—NON-JOINDER OF SURETIES.**  
In an action on an official bond in which the non-joinder of one of the sureties appeared on the face of the declaration, defendants, after pleading in bar, by leave of court, but without withdrawing their plea in bar, pleaded such non-joinder in abatement. *Held*, that such plea of non-joinder was out of time, and required no response, as the objection should have been taken by demurrer, and was waived by plea in bar.
4. **COUNTIES—OFFICERS—INDEMNITY FOR ISSUE OF FALSE WITNESS CERTIFICATES.**  
A county is not precluded from resorting for indemnity to the bond of a clerk of the court who has issued and put in circulation false and fraudulent witness certificates, which were accepted as genuine, and paid by the county, by the fact that it may indemnify itself by suit against the sheriff and tax collector, county treasurer, or other persons.

Appeal from circuit court, Noxubee county; W. M. ROGERS, Judge.

Code Miss. § 1184, provides that "in any action founded on any joint, or joint and several, bond, \* \* \* it shall be lawful to sue any one or more of the parties liable on such bond," etc.

*J. E. Madison*, for appellants. *Bogle & Bogle*, for appellee.

ARNOLD, C. J. Suit was brought in this cause in the name of the state, for the use of Noxubee county, against W. B. Bracey, circuit clerk of the county, and the sureties on his bond as such clerk, to recover damages sustained by the county on account of certain acts committed by Bracey during his term of office. J. L. Griggs, one of the original sureties on the bond, is not sued, for the reason, as stated in the declaration, that before the commission of the acts complained of he had been lawfully released from the bond by the board of supervisors of the county. The principal breach of the bond assigned in the declaration is that Bracey did not faithfully perform the duties of his office, but, on the contrary, while acting as such clerk, and under color and by virtue of his office, he issued at various times specified divers and sundry false and fraudulent witness certificates, and put them into circulation, and the same were afterwards accepted as genuine, and paid by the county. There was a demurrer to the declaration, and several special causes of demurrer were assigned, but the one mainly relied on was, in effect, that the sureties were not liable for the alleged acts of the clerk, because they were outside of his prescribed duties, and were individual, and not official, acts. The demurrer was overruled, and the defendants excepted. The sureties then pleaded *non est factum* and a general denial of the breaches of the bond al-

leged in the declaration. After this, by leave of court, but without withdrawing their pleas in bar, they pleaded the non-joinder of Griggs, one of the original sureties on the bond. No issue was made or taken on this plea, but it was shown on the trial that Griggs had been released as stated in the declaration, or that an effort had been made by the board of supervisors, under sections 412 and 413 of the Code, on his petition, to release him from the bond. On the trial the defendants offered testimony to show that the sheriff and tax collector received the false and fraudulent certificates from responsible taxpayers, in payment of county taxes, and asked the court to instruct the jury to the effect that the sheriff and tax collector and treasurer, who received the certificates as valid claims against the county, were responsible to the county therefor, and that the defendants were not. The court sustained objection to this testimony, and refused to instruct the jury as requested. The allegations of the declaration were sustained by the proof, and there was verdict and judgment for the plaintiff below, and the defendants appealed.

The declaration was not subject to demurrer. On the facts therein alleged the principal and sureties on the bond were liable. Section 2757 of the Code provides, among other things, that if the clerk of any court, or other county officer, shall willfully neglect or refuse to perform any of the duties required of him by law, or shall violate his duty in any respect, in addition to his being prosecuted criminally therefor it shall be the duty of the president of the board of county supervisors, where such delinquent officer has given bond for the faithful performance of his duties, to cause suit to be brought thereon, for the recovery of such damages as the county may have sustained thereby. The condition of the bond in suit was that Bracey should faithfully perform the duties of his office. Construed according to its manifest scope and legal import, and with reference to the subject-matter to which it relates, the bond was a contract by which Bracey and his sureties covenanted and agreed, in effect, not only that he would faithfully perform the duties enjoined by law, but that he would not, by virtue and under color of his office, commit any illegal act, to the injury of the county or others. Indemnity to this extent is within the terms of the bond, and the contemplation of the law which required it to be given. It was among the powers and duties of Bracey, as circuit clerk, to issue, under certain conditions, certificates to witnesses to be paid by the county; and if, in exercising this power, or performing this duty, he acted wrongfully, or violated his duty in any respect, so that the county, whose servant and agent he was in the matter, was thereby defrauded, it was a breach of his bond. There is much refinement and quibbling in the books in behalf of sureties on official bonds, who are sought to be held responsible for the misconduct of their principal, as to whether the act of the officer was done *colore officii* or *virtute officii*, or whether it constitutes a misfeasance, a malfeasance, or a non-feasance. While the liability of sureties is not to be extended beyond the terms of their engagement, the public is entitled to some consideration as well as the voluntary sponsors of unfaithful public officers; and it must be true that if an officer, under bond to faithfully discharge the duties of his office, does an act as such officer, injurious to the county or to others, in regard to a subject over which he has jurisdiction and control, his sureties cannot escape responsibility for the act, no matter by what technical name it may be called. Brandt, Sur. § 452; Murfree, Off. Bonds, § 211; *People v. Treadway*, 17 Mich. 480; *Armington v. State*, 45 Ind. 10; *Mahaska Co. v. Ruan*, 45 Iowa, 328; *Kane v. Railroad*, 5 Neb. 105; *Fox v. Meacham*, 6 Neb. 530. A public officer, charged, as Bracey was, with the function of issuing claims against his county in certain cases, who willfully lends his official seal and signature to false and fraudulent claims against the county, by which it is defrauded, cannot be said to have faithfully discharged the duties of his office. Such conduct is as clearly a breach of the security given for faithful service as if it were expressly "nominated in the bond" that he should

not cheat and defraud the county. Surprise was expressed in *Furlong v. State*, 58 Miss. 717, at its being insisted that such an official bond is not a security against the abuse and misuse of official power and authority. In *People v. Treadway*, 17 Mich. 480, where a county clerk and the sureties on his bond were held liable to the county, on his bond, for the act of the clerk in fraudulently countersigning and filling up a warrant on the county treasury, and drawing the money thereon, the supreme court of Michigan, speaking through a judge whose opinions are always sound and instructive, expressed the true doctrine on the subject, in these words: "It is very plain that this money was obtained by a misuse of his official authority to sign warrants, and that wrongful act was an official act. If such an officer is to be regarded as acting unofficially, whenever he violates his duty, it is not easy to see what object there can be in requiring official bonds. They are not meant to be mere formalities, and they can only be made to secure against the consequences of some sort of misdoings. Their object is to obtain indemnity against the use of an official position for wrong purposes, and that which is done under color of office, and which would obtain no credit, except from its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it." *Whyte v. Mills*, 64 Miss. 158, relied on by appellants, cannot affect the case at bar. That was not a suit in which the county was complaining of a violation of official duty by one of its officers; but the plaintiff was a party who had purchased false and fraudulent county warrants after they had been issued and put into circulation by a deputy chancery clerk, and it was sought to hold the chancery clerk liable for the willful and unauthorized act of his deputy. The question of the liability of the clerk and the sureties on his official bond, for the violation of official duty resulting in injury to the county, was not involved in the case. There is but little to be said in regard to the other errors assigned. The non-joinder of Griggs, even if it be admitted that he had not been lawfully released from the bond, afforded no cause for appellants to complain. Under section 1134 of the Code it was lawful to sue any one or more of the obligors on the bond. Besides, pleading in bar was a waiver of matters in abatement, and the non-joinder appearing on the face of the declaration, it should have been objected to by demurrer, and not by plea in abatement. *Halsey v. Norton*, 45 Miss. 703; 1 Chit. Pl. 552, 553. The plea of the non-joinder of Griggs was out of time, and a nullity, and required no response or notice. The fact that the county may have been indemnified by suit against the sheriff and tax collector, or county treasurer, or other persons, did not preclude it from resorting to the bond of Bracey for satisfaction. The errors, negligence, or omissions of other officers constituted no defense for his breach of duty. *Marlar v. State*, 62 Miss. 677; *Duncan v. State*, 7 La. Ann. 377; *State v. Powell*, 4 South. Rep. 46. Affirmed.

(65 Miss. 474)

HAMBLET *et al.* v. STEEN.

(Supreme Court of Mississippi. May 21, 1883.)

## HUSBAND AND WIFE—MANAGEMENT OF WIFE'S BUSINESS BY HUSBAND—LIABILITY OF ASSETS TO HUSBAND'S DEBTS.

The lease of a stable building, the bill of sale of the personal property, and the license for conducting the business were taken in the name of a wife, who was the actual owner, and the books were kept and accounts against customers made out in her name. H., her husband, conducted the business, personally superintending it, and was shown to have given two orders for the payment of dues to the stable proprietor, signing his own name to them. The stable was advertised in the village newspaper as "Carr Stable," managed by H. The only sign on the building was "Carr Stable." H. spoke of the business and property as his, a number of persons believing him to be the owner, while others were aware of the facts as to ownership. Held, that under Code Miss. § 1800, providing that "if any person shall transact business as a trader, or otherwise, with the addition of the words 'agent,' 'factor,' 'and company' or 'and Co.' or like words, and fail to disclose the name of his

principal or partner by a sign, in letters easy to be read, placed conspicuously at the house where such business is transacted, \* \* \* all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts," etc., such sign was insufficient to save the rights of the wife, and that the property was liable for the debts of the husband. *ARNOLD, C. J.*, dissenting.

Appeal from chancery court, Yalobusha county; *B. T. KIMBROUGH*, Chancellor.

Code, § 1300, reads as follows: "If any person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or 'and Co.,' or like words, and fail to disclose the name of his principal or partner, by a sign, in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or accrued in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated, in favor of his creditors, as his property.

*A. H. Whitfield*, for appellants. *Blount & Golladay*, for appellee.

*CAMPBELL, J.* This case involves the consideration of section 1300 of the Code as applicable to a case different from any we have heretofore decided. In *Schoolfield v. Wilkings*, 60 Miss. 238, it was admitted that "Mrs. W. was doing business as a merchant with her own means and in her own name," and her husband was her agent and clerk, and it was held that, in this state of case, a sign was not required. In *Cato v. Hardie*, No. 4,797, not reported, the facts are that Cato went to St. Louis, and purchased a car-load of mules, and shipped them in his own name to Hazlehurst, where they were put in a livery stable, and exhibited and offered for sale by him, and on the next day after their arrival they were seized under execution against Cato. The wife of Cato, and Harris, claimed the mules, but they were decided to be liable to execution as the property of Cato, by virtue of section 1300. The case now before us is distinguished from all that have preceded it by the fact that the business was transacted partly in the name of Mrs. Hamblet, who owned the property. The lease of the stable building was in her name, and the bill of sale of personal property was, and she obtained licenses, and books were kept in her name, and accounts were made out against customers in her name. Mr. Hamblet conducted the business, and was usually at the stable personally superintending it and managing it, and he is shown to have given two orders for the payment of dues to the stable proprietor, and signed his name to them. There was an advertisement in the village newspaper of the stable as "Carr Stable," managed by Mr. Hamblet. The only sign at the building was "Carr Stable." The license was posted up in the office of the stable. Hamblet spoke of the business and property as his, and acted as proprietor to all appearances. A number of persons were aware of the fact that the stable and property belonged to Mrs. Hamblet. Some were led to conclude, from what they saw, that Mr. Hamblet was proprietor. It is thus seen that, while the esoteric circumstances of the business were in the name of Mrs. Hamblet, the exoteric pointed to Mr. Hamblet as owner; and the question is, does section 1300 subject the property to liability for the debts of Mr. Hamblet? The object of section 1300 is to prevent fraud. The means it adopts to accomplish that is to require the conspicuous display, at the place of business, of a sign which shall plainly disclose the name of the true owner; otherwise the property used or acquired in the business shall be liable to the creditors of him who appears to the world to be owner, by dealing with it as owners usually do. This law has regard to the external *indicia* of ownership, and by these stamps ownership on the property, to the extent of liability to the creditors of him who appears to be owner. A sign which shall proclaim the real owner is required where one owns and another conducts the business, so that the public may be

informed how matters are. In this case there was no sign except the old one, as stated above. The advertisement in the newspaper was a mere circumstance in the conduct of the business, but it proclaimed that the business was managed (transacted) by Mr. Hamblet. The license posted in the office was not such a sign as the law requires. The external and visible acts connected with the transaction of the business were performed by Mr. H., and pointed to him as owner. It would have been easy to save the rights of Mrs. H. Only a plain sign, placed conspicuously at the stable, disclosing that she was principal, was necessary. In the absence of that, the question is, who transacted the business? It will not do to say that Hamblet was not transacting the business in his own name, and therefore the case is not within the statute. The words of the statute, "or if any person shall transact business in his own name, without any such addition," etc., do not have the effect to permit one to do business in a fictitious name or in that of some one not the owner of the property, and thus escape its consequences. That is the very evil which it was made to extirpate. The words "in his own name, without any such addition," are designed to meet the case of one who transacts business without any such addition as is mentioned for illustration, and not in the name of some person other than himself, who is the real owner. Whoever transacts business without doing it in the name of another does it in his own name and character, necessarily. The statute does not mean that it shall be defeated by the easy disguise of a fictitious name, or a real name of one not the owner, or evaded by the artful dodge of not using any name at all. It proceeds on the assumption that, if one transacts business without doing it in the name of another, he does it in his own name, and it applies wherever one transacts business, not in the name of another, who is the true owner of the property employed. The chancellor found that Mr. Hamblet transacted the business, in the meaning of the statute, and we concur in that view. Affirmed.

ARNOLD, C. J., (*dissenting*.) I do not concur in the opinion of the majority of the court. I vote to reverse the judgment of the court below. On the facts of record, the judgment should be for appellants. If it be conceded that the business as it was carried on, was within the meaning of the statute, the question for decision then is, was the business transacted in the name of Mrs. Hamblet or of her husband? It was certainly transacted in the name of one or the other, or both, and not in a fictitious name. I am unable to deduce from the evidence that it was transacted by the husband in his own name. It seems to me that the most important parts of it were transacted publicly, in the name of the wife, and that the husband was no more than a common clerk or employe in the matter. A statute which produces forfeiture of estate, or which is so harsh and penal in its consequences as to arbitrarily condemn the property of one person to pay the debts of another, when no fraud or wrong is suggested, intended, or accomplished, as to others, by the use which is being made of the property by its owner, ought not, in my judgment, to be applied in a doubtful case. It should be construed strictly, and its application limited to cases that are brought fully and clearly, in every respect, within its letter.

After judgment of affirmance was entered, appellants filed a petition for re-argument, which was denied.

(40 La. Ann. 322)

BOARD OF ADM'RS OF CHARITY HOSPITAL v. NEW ORLEANS  
GAS-LIGHT CO.

(*Supreme Court of Louisiana*. February 13, 1888.)

1. CORPORATIONS—CONSOLIDATION—EFFECT—ACT LA. 1874, No. 157.

The legal effect of the consolidation of two corporations, under the provision of act No. 157 of 1874, is a perfect amalgamation, which terminates the existence of the  
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consolidating companies as separate autonomies, and operates the creation of a new one, thus concentrating in one corporation the members, the property, and the capital stock of both.

3. **SAME.**

The consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but it will be held on the very identical liabilities and obligations incurred by either of the former companies.

3. **SAME.**

Hence, under the amalgamation effected between the New Orleans Gas-Light Company and the Crescent City Gas-Light Company, the obligation imposed by the legislature, on the former company, to furnish gas, free of charge, to the Charity Hospital, adheres to the new or consolidated company, without reference to the term or duration of the charter of said company as previously composed. *FANNER, J., dissenting.*

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; W. T. Houston, Judge.

The question involved in this case is whether the New Orleans Gas-Light Company, defendant, is bound to furnish to the Charity Hospital, a public institution in the state of Louisiana, located in the city of New Orleans, gas-light free of charge. There was judgment below against the plaintiff, who prosecutes this appeal.

*Farrar & Kruttschnitt and S. S. Carlisle, for appellant. Braughn, Buck, Dinkelpiel & Hart, and John A. Campbell, for appellee.*

**POCHÉ, J.** The issue involved in this case is the alleged obligation of the defendant company to furnish gas, free of expense, to the Charity Hospital. Plaintiffs rest their demand on the provisions of act 100 of 1845, which amended the charter of the New Orleans Gas-Light Company, as then composed, and by which the company was required to furnish the hospital all the "gas and fixtures necessary for lighting the same free of charge." Hence they aver that the legislative requirement followed the company in the act of consolidation and amalgamation between it and the Crescent City Gas-Light Company, on the 29th of March, 1875, effected under the authority of act 157 of 1874, authorizing the consolidation of corporations in this state, by means of which the defendant company, as at present organized, came into legal existence. Its resistance is predicated on the fact that, under the effect of the legislation of 1845, the charter of the previous New Orleans Gas-Light Company expired on the 1st of April, 1875, and that with it was extinguished the obligation of the present company to furnish gas, free of charge, to the Charity Hospital. Plaintiffs prosecute this appeal from an adverse judgment.

It appears that, after the act of consolidation, until January, 1886, the consolidated company continued the free supply of gas to the hospital; but, on the 19th January of that year, it was resolved by the board of directors that in the future the Charity Hospital would be charged regular price for the gas consumed by it. Hence this suit, which was begun by an injunction for the purpose of restraining the defendant from cutting off the free gas supply. The controversy hinges upon a proper construction of the legal effect of the act of consolidation between the two previously existing companies. As bearing on the issues to be discussed, must be noted the incorporation of the Crescent City Gas-Light Company, by an act of the legislature, No. 97 of 1870, as amended by act 106 of 1873, by means of which legislation the company thereby created was granted the sole and exclusive privilege of making and vending gas-light in the city of New Orleans, for a term of 50 years after the date of the expiration of the charter of the New Orleans Gas-Light Company as then existing, and which under its charter was in the exercise of the exclusive privilege to supply gas to the people and city of New Orleans. But, in the mean time, the legislature, by act No. 66 of 1860, had extended the charter of the New Orleans Gas-Light Company to the 1st of April, 1895; and its provisions clashed with the legislation of 1870 and 1873 in favor of the Crescent

City Gas-Light Company. Hence arose litigation between the two companies, in which a decision was rendered by this court, declaring that the act No. 66 of 1860 was unconstitutional. While a writ of error, taken from that decision, was pending in the supreme court of the United States, the two companies entered into a compromise, resulting in the dismissal of the writ, and culminating in the consolidation of the 29th of March, 1875, hereinabove referred to. The act No. 157 of 1874, under which the consolidation was effected, reads as follows: "Any two business and manufacturing corporations or companies now existing under general or special law, whose business and objects are in general of the same nature, may amalgamate, unite, and consolidate said corporations or companies, and form one consolidated company, holding and enjoying all the rights, privileges, powers, franchises, and property belonging to each, and under such corporate name as they may adopt or agree upon. Such consolidation shall be made by agreement, in writing, by or under authority of the board of directors, and with the assent of the owners of at least three-fifths of the capital stock of each of said corporations or companies, and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the secretary of state; provided, that no such consolidation shall in any manner affect or impair the right of any creditors of either of said companies. In the agreement of consolidation the number of directors of the consolidated company shall be specified, and the capital stock may be in amount agreed upon by the companies or corporations, and set forth in the articles of consolidation."

It is not disputed by the defendant company that, as a legal result of the amalgamation, the obligation theretofore resting on the New Orleans Gas-Light Company to supply gas, free of charge, to the Charity Hospital, adhered to the consolidated company, but the contention is that the obligation was only co-equal with the duration of the charter of the company which was burdened with that duty, and that, therefore, the obligation became extinct on the 1st of April, 1875, at which time the charter of that company is alleged to have expired. That conclusion is predicated on the proposition that the consolidation of the two previous companies operated merely a merger of one of the corporations into the other, and that the measure of the rights, privileges, and franchises or vitality infused in the consolidated company, by each of the consolidating corporations, was the respective terms of duration of the charters of each. But that argument finds no support either in the facts of the case, or in well-settled jurisprudence on the question of the effects of an amalgamation of two distinct and co-existing corporations. In dealing with the question of the legal effects of the consolidation of the identical companies now under discussion, this court said: "The articles of consolidation, and the legislation act, by authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights, and liabilities of each old company to the new one." *Fee v. Gas Co.*, 35 La. Ann. 416. That opinion was sanctioned both by reason and by the nature of the act by which the consolidation had been authorized, as well as by the highest judicial authority in the land. The principle had been announced by the supreme court of the United States on several occasions, and was in one of the adjudications couched in the following language: "The effect of the consolidation was a dissolution of the three corporations, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those passing out of existence." *Clearwater v. Meredith*, 1 Wall. 40. These views were repeatedly reaffirmed by that exalted tribunal. *Shields v. Ohio*, 95 U. S. 823; *Railroad Co. v. Maine*, 96 U. S. 510; *Railroad Co. v. Georgia*, 98 U. S. 362. It may not be amiss to add that our views on this

question in the *Fee Case*, 35 La. Ann. 416, were quoted with approval, and made the basis of its reasoning, by the supreme court of the United States in the case of *Gas Co. v. Manufacturing Co.*, 115 U. S. 697, 6 Sup. Ct. Rep. 272. On the same subject, Taylor, on the Law of Corporations, § 425, uses the following language: "On the other hand, the consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but, as a general rule, will be held on the very identical liabilities and obligations incurred by either of the former companies." The same principle is dealt with by Field on Corporations, § 435, as follows: "And the general rule is that the rights of creditors against the old companies revive against the new one created by the consolidation, as we have just noticed, and that it becomes substitute for the former. Provision is made, perhaps generally made, by statute or by articles of agreement as provided by law, for the payment of the creditors and the satisfaction of the old obligations of the consolidating companies; but even where no such provision is made, but the same consolidation is consummated lawfully, the new company has been held liable to all obligations of the former ones, to the very necessity of the case, and to prevent the failure of justice." Our reading of the act of 1874, authorizing the consolidation of corporations, and of the articles of agreement adopted under its authority by the two original companies which were consolidated on the 29th of March, 1875, has satisfied us that both were conceived, draughted and adopted under the guidance of the very expositions of the principle to which we have herein referred to, and that, therefore, the same legal effects must flow from the amalgamation out of which the present defendant sprang into legal existence. Hence we cannot adopt the reasoning which would measure the consolidated powers, privileges, or obligations of the present company by reference to the term of duration of the charters of the former companies. And we hold now, as we did in the *Fee Case*, 35 La. Ann. 416, that the charters of the two former companies terminated their existence on the 29th of March, 1875, and that all the powers, rights, liabilities and vitality which both possessed at that very moment were infused and incorporated into the new company which was then born of the amalgamation. The very legal existence of the defendant company hangs upon the vivifying breath of that legal creation. It seems quite natural for the defendant, in its present attitude, to continue to draw the breath of life from the new being created out of the union of its parents who ceased to exist at its birth, while it unnaturally repudiates the essential conditions legally imposed on its creation.

Under the articles of agreement, and as a result of the amalgamation, the consolidated company became the owner, and went into possession, of all the gas-works, machinery, main-pipes, service-pipes, meters, lamps, and all other property then in use for the business of gas manufacture and distribution, including all real estate (with one exception) then belonging to the former New Orleans Gas-Light Company, and it is yet the undisputed owner of all that property. Should any one—for instance, some dissatisfied stockholder of that former company—seek to disturb its possession and enjoyment of that property, he would be triumphantly met by a reference to the act of amalgamation. But, in defendant's opinion, the same rule does not apply when it is called on to comply with an obligation which then attached as an essential legal condition of the very existence of one of the authors of its being under the law. To such a demand the answer is that the obligation was canceled by the expiration of the charter of the former company. The law cannot and will not tolerate such a course. Through the same channel which led the defendant company to the right of ownership of all the property and rights of the former New Orleans Gas-Light Company, it must be led and coerced to the discharge of the obligations which had been imposed on its author by the law which had created it, and which authorized the organization of the new company. That position cannot be successfully assailed by a consideration of the opinion of

this court in the twenty-seventh of Annuals, which declared the unconstitutionality of the act of 1860, which purported to extend the charter of the former New Orleans Gas-Light Company to 1895. That decision was rendered in February, 1875, and the amalgamation was effected in March following, and the measure was adopted as a compromise of the possible effects of the decision. By that compromise all advantages resulting from that decision in favor of the Crescent City Company were in fact, if not formally, waived. Under the effect of the writ of error taken from this to the supreme court of the United States the decree in the case was not yet final between the parties when they agreed to abate the litigation. On this point the record contains the following statement: "It is further agreed that from the judgment rendered by the supreme court of the state in the case of *Gas-Light Co. v. Gas-Light Co.*, 27 La. Ann. 138, a writ of error was prosecuted by the New Orleans Gas-Light Company to the supreme court of the United States; that said writ of error, in consequence of the agreement of consolidation between the two companies, was dismissed by consent of parties." It is thus made clear that the judgment was not final when the consolidation was effected, and the conclusion is warranted that *quoad* the amalgamation the judgment thus rendered and suspended must have been entirely ignored, and cannot now be considered. That conclusion is removed beyond the possibility of a doubt by many features which were embodied in the articles of agreement or amalgamation. Among others we note the following: The capital stock of the consolidated company was fixed at \$10,000,000, of which \$3,750,000, or 37,500 shares of \$100 each, were considered as paid up. Now, out of those, 25,000 shares were distributed *pro rata* to the holders of 19,800 shares of \$100 each, which represented all the stock previously issued by the New Orleans Gas-Light Company; and the remainder, only 12,500 shares, was allotted to the holders *pro rata* of 30,000 shares of \$100 each issued to that date by the Crescent City Gas-Light Company. It was also stipulated that the holders of the 19,800 shares of the New Orleans Gas-Light Company were to receive a dividend of 60 per cent. on July 1, 1875, while no dividend was to be paid to the stockholders of the Crescent City Company before the 1st of January, 1876. Again, the whole force of employees, including the president and board of directors, of the New Orleans Gas-Light Company, were retained to manage and control the new company until the 2d Monday of July, 1875. Would the Crescent City Gas-Light Company, holding a charter good for fifty years, have made such concessions and granted such other similar advantages, in a contract of amalgamation, to a company whose legal existence was, to the knowledge and belief of both of the contracting parties, to have terminated within three days? The judicial mind cannot be strained to the extent of believing a condition of things so much at variance with all springs of human action. We therefore conclude and we hold that the obligation to furnish gas, free of charge, to the Charity Hospital, adheres to the consolidated company.

The views thus reached leave but one question open to discussion, and that is to determine the length of time during which the obligation will continue. The considerations which led us to the conclusion that the duty in question adhered to the new company after the first of April, 1875, even under defendant's contention to the contrary, logically lead to the conclusion that it will exist as long as the consolidated corporation will continue to operate under the authority of the amalgamation of the law which sanctioned it. Its effect, as we said in *Fee's Case*, was "to terminate the separate existence of the former corporations, and to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights, and liabilities of each old company to the new one." Nothing suggests a difference between the results of a perfect amalgamation in law and those produced by an amalgamation in physical science. As is the case in the latter, in an amalgamation in law all the parts of the component matters or things to be

subjected to amalgamation must enter in the formation of the new being or matter to be thus produced. And the amalgamation, in order to be and remain complete as intended, must continue to combine all the parts or elements from which the new being had been formed. The subsequent withdrawal from the amalgamation of any of its component parts would destroy, or at least alter, its autonomy. Thus, in the instant case, the property, rights, and liabilities of the former New Orleans Gas-Light Company must continue as component parts of the amalgamated company, or otherwise the latter's autonomy would be changed into a new or different corporation. After the 1st of April, 1895, the property and franchises of the old New Orleans Gas-Light Company will remain in the consolidated company just as they existed and were transferred on the day of the amalgamation. As a component part of the new corporation, the old company is estopped from averring a limit to a transfer, which was not stipulated in the contract, and its original stockholders are forever debarred from setting up any claim in their original capacity to any of the property or rights which were thus vested in the new company. Treating of the legal effect of a similar amalgamation, the supreme court of the United States used the following language, which is quite in point on the present discussion: "Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and lieu of the two companies previously existing, and that whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result." *Railroad Co. v. Georgia*, 98 U. S. 363. In our opinion, there is no possible escape for the defendant from the relief claimed by plaintiffs.

The judgment appealed from is therefore reversed, and it is ordered and decreed that the preliminary writ of injunction issued herein be perpetuated; that the New Orleans Gas-Light Company, defendant herein, is obliged to furnish gas, free of charge, to the Charity Hospital of New Orleans, as long as said company shall continue to operate under its present organization; and that said defendant pay all costs in both courts. Rehearing refused, April 16, 1888.

FENNER, J., (*concurring in part.*) The act No. 157 of 1874 undoubtedly authorized the consolidation of the Crescent City and the New Orleans Gas-Light Companies; and the effect of that consolidation, as we held in *Fee's Case*, 85 La. Ann. 413, was "to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights, and liabilities of each old company to the new one." The rights and obligations of each old company passed to the new company just as they stood; the consolidation created no new rights and no new obligations, nor did it enlarge or diminish, restrict or extend, existing rights or obligations. If the legislature had granted to one of the old companies any peculiar franchise which had not been granted to the other, obviously the duration of such franchise would be limited by the term for which it had been granted, *i. e.*, by the duration of the charter of the company possessing it. The right held by this company would be the right to exercise the franchise during the term for which it was granted by the legislature, that is, during the term of its charter; and it could not, by consolidation, confer upon the new company a greater right, or one extending over a longer term, it being borne in mind that the act authorizing this consolidation has no reference to these particular corporations, but is a

general law applicable to all business and manufacturing corporations. Otherwise, any corporation possessing a valuable franchise, limited as to its term by the length of its charter, might prolong it indefinitely by waiting until it was about to expire, and then consolidating with some other company having longer life, whose "objects and business were of the same general nature," but which did not possess this particular franchise or right. The statement of such a proposition is sufficient to refute it. The same rule must necessarily apply to obligations resting exclusively on legislative imposition, such as the one here involved. The obligation to furnish free light to the Charity Hospital has no basis except in the legislative will and power, accepted by the New Orleans Gas-Light Company under and according to the terms imposed, which expressly limited the obligation, as to time, by the words, "during the continuance of the charter of said gas-light company." Therefore, at the moment of the consolidation, the old New Orleans Gas-Light Company was subject to no obligation to furnish free gas to the hospital, except for a term limited by the term of its charter. This obligation, and no other, was transmitted to the consolidated corporation under the letter and spirit of the law. While the consolidation terminated the existence of both old corporations, yet this destroyed neither the rights nor obligations of either, which were held by the new company precisely as they were held by each of the old ones. Hence the new company received the obligation precisely as the old company held it, and would have continued to hold it but for the consolidation, to-wit, during the term for which its charter had been granted, and I dissent from the contrary views expressed in the majority opinion.

I concur, however, in the view that this term extended to April 1, 1895, under the effect of act 66 of 1860. The judgment of this court declaring that act unconstitutional never became *res judicata*, by reason of the writ of error from the supreme court of the United States, and by reason of the compromise or transaction between the parties resulting in the consolidation, which settled the whole controversy between the parties to that suit, and withdrew it from further litigation by the dismissal of the writ of error, which dismissal was expressly bottomed on said settlement. It does not lie in the mouth of the defendant corporation, representing, as it does, the old New Orleans Gas-Light Company, which accepted and acted under said act and enjoyed the extended privileges granted thereby, to raise anew the question of its constitutionality. On these grounds, I concur in that part of the decree only which dissolves the injunction.

(40 La. Ann. 426)

SARPY *et al.* v. HYMEL *et al.*

(Supreme Court of Louisiana. March 5, 1898.)

1. DRAINAGE—STATUTORY ESTABLISHMENT—PRESCRIPTION.

Prescription does not run against the exercise of a servitude of drainage established by a police jury, in pursuance of section 6 of the act of 25th February, 1813, on Bonnet Carre point and adjacent lands, in favor of one of the proprietors of an estate included in the system ordained, who participated in its establishment, and afterwards resisted and prevented its repair and improvement.

2. SAME—POWERS OF POLICE JURY.

A servitude having been established under the police power conferred by that statute, its control continues to reside in the police jury; neither party to it can prevent or oppose its repair or improvement; no individual can go, at his pleasure, on the premises or estate of another, and make repairs on or improvements of such servitude he may deem necessary; and such repair and improvement can be made in pursuance of the authorities and ordinances of the police jury only.

ON REHEARING.

3. APPEAL—REVIEW—OBJECTION WAIVED.

An appellee who has not filed a timely motion or prayer for an amendment of the judgment appealed from can obtain no relief on appeal.

(Syllabus by the Court.)

Appeal from district court, parish of St. John the Baptist; EMILE ROST, Judge.

Controversy between George Sarpy and others and Adele Hymel and others. Plaintiffs claim a right of drain over defendants' lands, which right, they contend, arises from the natural situation of the respective estates and from prescription. Defendants deny the existence of the right, and aver that, if it ever existed, it became prescribed by non-usage for 10 years, and was abandoned and renounced by plaintiffs and their authors. From a judgment recognizing the right of plaintiff to the full enjoyment of the servitude in question, and prohibiting defendants from interfering in all matters relating thereto, said defendants prosecute this appeal.

*T. J. Semmes & Legendre*, for appellants. *Henry Denis*, for appellees.

WATKINS, J. Plaintiffs are the widow and heir of Delord Sarpy and the owners of the Glendale plantation, having derived title from Norbert Rancon; and the defendant is the owner of the Gold Mine plantation, having derived title from Thomas May. These plantations are contiguous estates, and situated in close proximity to Bonnet Carre point on the Mississippi river; and this controversy involves their mode of drainage. The plaintiffs' contention is that the police jury, in pursuance of a special statute, established a plan or system of drainage for said plantations, and others on Bonnet Carre point, and that defendant's author accepted same, and bound her to it. They seek the recognition and maintenance of the servitude thus established, and, in support of it, plead, *acquiescenda causa*, the prescription of 10, 20, and 30 years. The defendant denies the establishment of a servitude, legal, conventional, or otherwise, on her property, in favor of the plaintiffs' property, and also denies the construction and ownership of a ditch in common between the two estates. She avers that the ditch described in the plaintiffs' petition was constructed to drain lands other than those of plaintiffs, and that said ditch was never completed. In the alternative, she avers that, in case the servitude claimed is found to have existed, same has been lost by non-usage for 10 years, and by the renunciation and remission thereof on the part of the plaintiffs and their authors. In reconvention, she claims that plaintiffs' lands are lower than hers, and are subject to a natural servitude in favor of hers, and are bound to receive the waters that flow naturally from her lands; that, contrary to law, plaintiffs have erected dams and embankments at the boundary line of respondent's estate which obstruct the natural flow of the waters from her lands, and thus interferes with the servitude due by plaintiffs' estate to her own. The record discloses the following salient facts, viz.: That the Gold Mine plantation has a front on the Mississippi river, which, at that place, flows due east, to the extreme point of Bonnet Carre; and that, from that point, it flows due south, passing in front of Glendale plantation. That Glendale extends back from the river in a due west course to a point at which it intersects the rear line of Gold Mine, which extends back from the river in a due south course; the boundary line between them being a diagonal one, extending from north-east to south-west. The two plantations are situated at right angles with each other, and constitute the west and south boundaries of Bonnet Carre point, while the river constitutes its north and east boundaries. This intervening space is subdivided into quite a number of plantations, which are owned by a number of different proprietors, all of which are separated from the swamp in the rear. The natural course of their drainage is in a south-westerly direction; and that results, in part, from the fact that they are more elevated, and in part from the formation of a *crevasse* on the upper side of Bonnet Carre point. In consequence thereof, both the rain and river waters, at high tide, were precipitated upon Glendale, to its great injury and damage. Originally, the course of Bayou Tone, and that of some small *coules*, was from the river above, in a southerly direction, across the central por-

tion of Glendale; and that of Bayou Rousse, from the river above, in a south-westerly direction, diagonally across the rear portion of Gold Mine. From the latter there was an outlet which passed through the rear portion of Glendale. In pursuance of section 6 of the act of March 25, 1818, the police jury undertook the adjustment of the drainage of these different estates; and on the 3d of June, 1850, adopted an ordinance in which provision was made for the appointment of a committee having authority to examine "the locality of Bonnet Carre point and adjacent lands," and with full authority "to open and clean out Bayou Tone and Bayou Rousse, situated on said point, down to the lower limits of the parish." It was therein "resolved that the opening and cleaning of said bayou shall be at the common expense of the proprietors of the land forming the Bonnet Carre point." At a subsequent meeting of the police jury this committee made a report in which they recommended the dredging and cleaning of Bayou Tone; the cutting of a new ditch or canal from Bayou Tone to Bayou Rousse; the digging out and cleaning of the latter as far as its junction with the Rancon canal, behind the Gold Mine plantation, at that time owned by May, and thence continued until it reached the swamp and Bayou Pin, in the rear. On the 1st of April, 1852, the committee entered into a contract with Pat Phelan "to have the Bonnet Carre point and adjacent lands drained, and to make the canals and drains necessary for the same." He completed the construction of the canals from Bayou Tone to Bayou Rousse, dredged and deepened the latter, and completed the canal beyond Bayou Rousse to its intersection of Rancon canal; but he failed to complete about 9 or 10 arpents of the canal, at the lower or outer end, which was necessary to make it reach Bayou Pin. Phelan brought suit against the police jury for a balance due him, and it resulted in a compromise whereby Phelan realized the full amount of his contract of \$4,000, less \$650. It remains in that condition to this day. This canal was denominated "Company Canal." It was begun at a point on the upper or northern boundary line of Glendale, a little east of where Bayou Tone intersects it; thence extended west on that line to its intersection of the eastern boundary of Gold Mine; and thence, across Gold Mine, until it intersected Bayou Rousse, and made connection therewith. Through this canal the waters of Bayou Tone, and the drainage water from the plantations on Bonnet Carre point, were passed into Bayou Rousse, and thence into the swamp into the rear of Gold Mine and Glendale; and by this means Glendale was relieved from distress and overflow during high water. It appears that, at present, and during the last several years, that portion of Bayou Rousse that intersects Gold Mine plantation, and unites with Company canal, has become obstructed with decayed vegetable matter, weeds, and willow trees, and has become partially filled with dirt, by means of the cultivation of its banks for a series of years; so that the flow of water into it from Company canal is retarded, and the water backed up, and thrown upon the plantations on Bonnet Carre point, and Glendale, whereby the latter is frequently overflowed. It thus appears that if Bayou Rousse was open, and the water permitted to flow through it from Company canal, Glendale would be entirely relieved, and Gold Mine would suffer little, if any, injury. Because of the obstructions in Bayou Rousse, and the defendant's objection to its being cleaned and deepened, the plaintiffs have brought this suit for the recognition and re-establishment of Company canal, and the deepening of Bayou Rousse.

It is a fact—one evidenced by this statement—that Glendale is now, and has been for many years, exclusively drained by means of Rancon canal, which extends from the river west, on its southern boundary, to the swamp in the rear. There is but little difference in the altitude and inclination of Glendale or Gold Mine; and there is but a small portion of the latter so situated as to naturally receive drainage from the former. But, as an additional protection, one of plaintiffs' authors caused to be constructed in 1828 a

line of levee along the northern boundary of Glendale, and also upon the boundary line between it and Gold Mine, and the same has been since maintained. Company canal was constructed parallel with it on its northern boundary. During the stress occasioned by high water, and threatened overflows, plaintiffs and their authors have frequently felt constrained to open small culverts in these levees, so as to pass a portion of the water through, and thus obtain partial relief. With Bayou Rousse thus obstructed, Bonnet Carre point and Glendale suffer from annual overflows, while Gold Mine has no serious interruption of her drainage. Bayou Rousse has been constantly treated as a part of Company canal by the proprietors of plantations on Bonnet Carre point, and also by the plaintiffs and their authors; and they have frequently exercised the right to clean it of grass and weeds, without objection on the part of the proprietors of Gold Mine. But the defendant has steadily refused to permit it to be dredged or deepened. This question of drainage has been a mooted one between the proprietors of Glendale and Gold Mine plantations for a great many years; and in 1850, prior to the establishment of Company canal by the police jury, there was litigation between Thomas May and Norbert Rancon, the object of which, on the part of the former, was to coerce the drainage of Bonnet Carre point and Gold Mine, over Glendale, and to compel Rancon to demolish and remove the levees and embankments that had been established 15 or 20 years before. To this pretension, Rancon made resistance on the identical grounds on which the plaintiff predicates his present suit. Hence it is necessary to examine the report of that case, and see what bearing it has upon the present controversy. *Vide May v. Ransom*, 5 La. Ann. 424. The defendant, among others, made the following defenses, viz.: "That the natural flow of the water along the line of the levee complained of was in a direction parallel with it; that the levees or dams complained of have existed for more than fifteen years, without any opposition from the plaintiff or his vendors, and that he has waived, by his silence, any rights he might have; that the said levees were not constructed with the intention of arresting the natural flow of the waters on plaintiffs' land, but for the purpose of counteracting the effect of two wide draining canals now existing on his estate, which accumulate the water in large quantities, raise it above its level, and force it with great rapidity through his land; that those canals extend far beyond the cultivated lands of the plaintiff; that they change the natural course of the waters, and should not be permitted to continue open; that the *coulées*, through which some of the water that falls on the plaintiff's land and finds its way on defendant's estate, are the result of *crevasses*, and cannot be considered natural drains." That paragraph clearly shows that the issues in this case are identical, except in so far as the condition of things has been changed since the construction of Company canal. That suit was tried by jury, who found for the defendant, and the plaintiff appealed. On the hearing in this court the discovery was made that there had been improperly admitted, over the defendant's objection and exception, certain incompetent evidence, and consequently the verdict and judgment was set aside, and the cause remanded. As a means of solving the difficulty presented, the court took occasion to recommend the parties to seek relief under the provisions of section 6 of the act of March 25, 1813. The pertinent provision of that act reads as follows, viz.: "When a point of land on the Mississippi or other water-course shall be divided among several proprietors, [and] it shall be found necessary to dig one or more common draining ditches, the said [police] juries shall have the power to ordain that said ditches be dug at the expense of said lots, and that the expense be borne by a contribution among said owners, to be levied in such manner as the said juries shall, respectively, prescribe." The court then proceeded to say: "Those powers are ample to meet the present case, and to remove all the difficulties which are shown to exist in relation to draining the point of Bonnet Carre. We therefore earn-

estly recommend the parties to this suit to avail themselves of the provision of this law, and not to force us to make a decision which may be injurious to both. The police jury have the right to determine how lands situated as these are shall be drained, without regard to their relative position; and, if any rational system of drainage be ordained by them, it shall be respected and enforced by us." That decision was rendered in May, 1850, and it was in pursuance of this recommendation by the court that the police jury ordained and established Company canal, as above described. The decision, as well as the ordinances themselves, leave no doubt in our minds of the fact that both Glendale and Gold Mine plantations were specifically included in this plan or system of artificial drainage,—not, possibly, as a part of Bonnet Carre point, but as "adjacent lands," in like situation. In so deciding, the court only followed the precedent established in the case of *Martin v. Jett*, 12 La. 502, and to which special reference is made as authority for their decision. It has been followed by the case of *Walsh v. Arnous*, 6 La. Ann. 97, in which the same recommendation was made by the court. In *Avery v. Police Jury*, 12 La. Ann. 554, the court upheld the constitutionality of the act of 1813. Neither the law, nor the authority of the police jury, has been questioned since, and it is manifest that the defendant and her authors acquiesced in the construction of Company canal. Indeed, it is in proof that May paid at least one-half of the assessment made against Gold Mine by the police jury, for the purpose of constructing it. There was a clause in the act of March 8, 1814, which is explanatory of section 6 of the act of 1813, "saving to individuals or persons aggrieved the right of complaining for the working, making, or opening of such natural or artificial drainings, when \* \* \* hurtful to them, before any court of competent jurisdiction, as in case of a common civil action."

Under the evidence in the record the defendant is estopped from gainsaying or disputing the existence of Company canal, or that Bayou Rousee forms a part of it. Her author bears quite as much of the responsibility for it, if not more, than any one else, because it was his suit against the former proprietor of Glendale that brought it into existence. There is no sufficient evidence in the record to show any relinquishment or abandonment of this canal on the part of plaintiffs or their authors. On the contrary, the proof is that the rain and overflow water from Bonnet Carre point pass through the upper portion of Company canal, but that same is partially obstructed in its flow through Bayou Rousee in its course to that portion of the canal below Gold Mine. Hence the provisions of the Code relied upon by the defendant are not applicable. Rev. Civil Code, art. 815 *et seq.* For like reason, the servitude has not been extinguished by non-usage, and is not prescribed. Rev. Civil Code, arts. 789, 790. Indeed, prescription could not run against the exercise of a right of servitude when the person pleading prescription has resisted and prevented its exercise, as defendant has done in this instance. Rev. Civil Code, art. 792. The judge *a quo* held "that, the servitude having been established under the police power of the parish authorities, the control of the common canal or ditch known as the 'Company Canal' still remains in the police jury; that neither can the defendant prevent nor oppose the digging or cleaning of any portion of the canal through which the servitude has been established; nor can the plaintiffs, or other individuals, go at their pleasure on defendant's land, without her consent, for the purpose of digging or improving the condition of the drainage canal; and that such improvements must be done by order of the police jury, on such terms and in such manner as they may think proper." These observations are eminently wise and correct, and should be enforced. We are of the opinion that the system of artificial drainage which was established by the police jury was for the mutual benefit and advantage of the proprietors of estates on Bonnet Carre point, and others adjacent thereto, including Glendale and Gold Mine, and that they are entitled to its full and

complete exercise and enjoyment; but only through the parish authorities, as herein intimated. But the record discloses that Company canal has never been so extended as to form a connection with Bayou Pin, in the rear, as originally ordained by the police jury. We are of the opinion that it is but justice and equity to the defendant that it should be completed, and that the judgment should be amended in this respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to require the police jury, in case they determine to enforce this decree, to cause, at the same time, the Company canal to be extended so as to form a connection with Bayou Pin; and that, as thus amended, said judgment be affirmed. It is further ordered that the costs of the appeal be taxed against the plaintiffs and appellees.

ON APPLICATION FOR REHEARING.

(April 16, 1888.)

POCHE, J. Plaintiffs charge two serious errors, to their detriment, in our decree:

1. They urge that having found the law and the facts in their favor, as declared in their pleadings, we should have granted them the relief which they had prayed for; and that, therefore, we should have absolutely recognized their rights to enter on defendant's lands for the purpose of cleaning and deepening the Bonnet Carre Company canal, or, in the alternative, the defendant should have been condemned to make those improvements herself. Such was the purport of the prayer of their petition. But the part of our decree complained of in this regard was simply in affirmance of the judgment rendered by the district court, which subordinated the recognized right of plaintiffs to clean and deepen the canal to the action and control of the parish authorities. Now, plaintiffs are appellees from that judgment, and they have not made a motion or prayer for an amendment of the same. It is elementary, under the rules of our jurisprudence, that we are powerless to amend the judgment in their favor. Hence that feature of the decree must remain undisturbed.

2. They next complain of that part of our decree which amends the judgment appealed from so as to "require the police jury, in case they determine to enforce this decree, to cause, at the same time, the Company canal to be extended so far as to form a connection with Bayou Pin." A second examination of the whole case has led us to the conclusion that we had committed an error on that point, superinduced by an allegation in defendant's answer to the effect that said Company canal or "ditch was never completed or finished." Our second consideration of the pleadings and of the evidence has satisfied us that that allegation formed no issue in the case. No prayer was predicated thereon, and no contestation on the trial grew out therefrom. The record does show that the canal contracted for by the police jury was contemplated to have been extended to Bayou Pin, and that this has never been done. But, in point of fact, the only issues which were tendered by the pleadings, and which were tried and disposed of in the district court, were the contested right of plaintiffs to claim any legal title to, or protection and advantage from, the Company canal as dug and made under the authority of the police jury, and the reconventional demand of defendant to exercise her alleged right of natural servitude of drainage over plaintiffs' lands. It appears to our satisfaction from the evidence that a proper dredging and cleaning of the Company canal, including that portion of the same known as "Bayou Rousse," throughout its entire length, as made under the contract with the police jury, would afford all the relief which plaintiffs claim and contemplate, without injurious effects to defendant's lands and drainage. Hence we conclude that the judgment appealed from was as favorable to her as the nature of the case could admit of, and that she was entitled to no relief at our hands. We therefore deem it our duty to reopen the case with the sole view of setting aside that portion of

our decree which amended the judgment in favor of appellant. To that end we shall recast our decree in full.

It is therefore ordered that our previous decree herein be annulled and set aside, and it is now ordered that the judgment of the district court be affirmed, at appellant's costs. Rehearing refused.

(40 La. Ann. 281)

DAVIS v. GREEN, Tax Collector, *et al.*

(*Supreme Court of Louisiana. March 5, 1888.*)

1. CONSTITUTIONAL LAW—TAXATION—TAX FOR LEEVE PURPOSES.

Article 214 of the constitution of the state of Louisiana is self-acting, in so far as it confers directly upon the levee commissioners authority to levy a tax of five mills for levee purposes in their respective districts.

2. SAME—CONSTRUCTION—LEEVE DISTRICTS—LEGISLATIVE ACTION REQUIRED.

The only legislative action contemplated under article 214 of the constitution is the division of the state into levee districts, and to provide for the appointment or election of levee commissioners.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; S. CHARLES YOUNG, Judge.

Action by A. V. Davis against T. K. Green, sheriff and tax collector for the parish of Concordia, and the board of levee commissioners of the Fifth Louisiana levee district. Plaintiff enjoins the defendants from collecting the five-mill tax levied by said board, averring that said tax is illegal and unconstitutional. Plaintiff appeals from a judgment dissolving his injunction.

J. N. Luce, for appellant. Steele, Garrett & Dagg, for appellees.

TODD, J. The issue in this case is the legality and constitutionality of the five-mill district levee tax for the year 1887, amounting to \$294.75, levied for said year on the property of plaintiff, situated in the parish of Concordia. The collection and enforcement of said five-mill tax by the tax collector of Concordia were enjoined as being illegal and unconstitutional. Two alleged levies of said five-mill tax for the year 1887 were made: One by the general assembly, under section 8 of act No. 44 of 1886, and one by the board of levee commissioners for the Fifth Louisiana levee district, in August, 1887. The grounds of objection to the levy made by the legislature are that the legislature, under articles 213 and 214, could not levy such tax itself, and that such a levy by the legislature violated article 203 of the constitution. The objections to the levy made by the levee board are that there was no legislative act and grant authorizing and empowering the levee commissioners to assess such tax; and that act 44 of 1886 not only conferred no such authority, not only repealed all that part of act 33 of 1879 which did confer such authority, but in letter and effect restrained and prohibited such a levy by the levee commissioners. The sheriff and levee board answered, putting plaintiff's petition at issue, prayed that demand of plaintiff be rejected, and for dissolution of the injunction. The district judge decided the tax levied by the levee commissioners to be valid and constitutional, and dissolved plaintiff's injunction. Plaintiff prosecutes this appeal.

Waiving the consideration of the charge of the illegality of the tax levied by the general assembly and the unconstitutionality of the act referred to, under or by which the tax was levied, if the ground upon which the attack is made against the tax levied by the levee commissioners should prove untenable, there would be no reason to disturb the conclusion reached by the judge of the first instance. It is sufficient if the tax imposed by either authority be found legal and constitutional. Article 214 of the constitution reads: "The general assembly may divide the state into levee districts, and provide for the appointment or election of levee commissioners in said districts, who shall in the method and manner to be provided by law have supervision of the erec-

tion, repair, and maintenance of levees in said districts. To that effect it may levy a tax not to exceed five mills on the taxable property situated within the alluvial portions of said districts subject to overflow." It has been judicially determined that the power to levy the tax mentioned in this article is directly conferred on the levee commissioners. *Steam-Ship Co. v. Cage*, 34 La. Ann. 506. The sole question for determination is whether a legislative grant or authority is necessary to the exercise of that power by the levee commissioners. It seems to us that this question was virtually solved by the same decision referred to. This court in that case, where the sole issue was the constitutionality or legality of a levee tax imposed by the levee commissioners, after deciding that such a tax could not constitutionally be levied by the general assembly, proceeds to say, (quoting:) "But such a tax could be levied by the levee commissioners, and would be equal and uniform throughout their territorial limits." The same decision (after quoting from article 214 the words, "to that effect it may levy a tax not to exceed five mills on taxable property within the alluvial portions of said districts subject to overflow") again proceeds: "Now to which of the two powers enumerated in the first portion of the article do the words 'to that effect' apply? Evidently not to the power of the legislature to divide the state into levee districts, but, on the contrary, they must refer to the power of the levee commissioners to build, repair, and maintain levees. Hence we conclude that, while the pronoun 'it' is inartistically used in the language granting the taxing power, the convention undoubtedly intended to confer the taxing power under article 214 directly to the levee commissioners." It is true that in the case of the tax involved in that decision, there was a legislative act (83 of 1879) authorizing the levy by the commissioners, and the act 44 of 1886, referred to in the pleadings, contains no such provision; but the court, in the same decision, in treating of the act of 1879 and article 214, declared substantially that the article was framed with special reference to the act, and with the undoubted intention of giving it constitutional effect and vitality, and securing its efficacy to the people to be affected thereby. In the face of such expressions and judicial construction, we attach no significance to the repeal of the act of 1879 and the silence of the act of 1886, touching the authority of the commissioners to levy the tax. The constitutional grant was all-sufficient and self-operative, and no expression of the legislative will or permission was needed. If the power to impose this tax was conferred by the constitution on the levee commissioners, it was their right, and doubtless their duty, to exercise it; and there is therefore no force in the contention that the legislature, in levying the tax directly by statutory enactment, virtually prohibited the exercise of such authority by the commissioners. One of the subjects of paramount importance before the convention that framed the constitution was that of levees, and the necessity of protection from overflow of the alluvial lands of the state. The efficacy of any system of protection that could be devised would essentially depend upon a prompt and speedy raising of adequate means for the construction and maintenance of the required works. Doubtless it was concluded that it was safer and wiser to confer the power to provide the funds on small bodies from the endangered districts that could seasonably realize the exigency, and by prompt action and speedy levies meet it, than to jeopardize the entire system of levee protection by depending exclusively on the precarious and dilatory action of the legislature, which meets once only in two years, for the required means.

For these reasons the judgment of the lower court is affirmed, at the costs of the plaintiff in both courts.

(40 La. Ann. 241)

STATE v. POWELL *et al.*

(Supreme Court of Louisiana. March 26, 1888.)

1. **TRIAL—REOPENING CASE AFTER EVIDENCE IS CLOSED—DISCRETION OF TRIAL COURT.**  
When, after the evidence in a case is closed and the argument begun, one of the parties discovers new evidence, the effect of which is to furnish a new ground of defense, and presents an affidavit of its new discovery and of due diligence, and when it is apparent that it would furnish ground for a new trial, the discretion of the judge in opening the case, and permitting a supplemental answer, and offering of the evidence under it, will not be interfered with.<sup>1</sup>
2. **OFFICE AND OFFICER—APPOINTMENT DURING RECESS OF SENATE—LENGTH OF TERM.**  
Under article 69 of the constitution, the term of an officer appointed by the governor during the recess of the senate cannot extend beyond the end of the next ensuing session of the legislature; and where the same name is subsequently sent to the senate and confirmed, and a new commission is issued, the latter is a distinct appointment, and requires a new bond.
3. **SAME—LIABILITY OF SURETIES—EXPIRATION OF TERM OF OFFICE.**  
Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished.
4. **SAME.**  
Provisions of law authorizing officers to hold over until their successors are appointed and qualified, can only extend the liabilities of the sureties for such reasonable time as, with due diligence, would enable the successor to be appointed and qualified.

(Syllabus by the Court.)

Appeal from district court, parish of East Carroll; E. J. DELONEY, Judge.

Prosecution by the state of Louisiana against M. S. Powell, and the sureties on his official bond, for the recovery of certain sums of money peculated by defendant as state tax collector. From a judgment rejecting its demand the state appeals. See *ante*, 46.

J. E. Ransdell, Dist. Atty., C. S. Wyly, and W. G. Wyly, for appellant. J. W. Montgomery, J. M. Kennedy, and F. F. Montgomery, for appellees.

FENNER, J. The action is against the principal and sureties on an official bond of M. S. Powell as tax collector for the state and parish, executed on May 26, 1880. Powell having died shortly after the bringing of the suit, his succession was made a party. By a written consent which fully reserved all the rights and defenses of the sureties, the case went to separate trial against the succession of Powell, resulting in a judgment in favor of the plaintiff. The sureties filed general and various special defenses, upon which trial was begun. After the evidence had been closed, and in course of the argument, the defendant sureties applied to the court for leave to file a supplemental answer, setting forth that M. S. Powell was appointed sheriff and *ex officio* tax collector, during a recess of the senate, to fill a vacancy, and was commissioned thereunder; that, under the terms of the constitution of the state, said appointment and commission could not extend beyond the end of the ensuing session of the general assembly; that the bond sued on was executed under said appointment and commission; that subsequently, at said ensuing session, the governor nominated said Powell as such officer for the full unexpired term, and sent said nomination to the senate, by which body it was duly confirmed; and that thereafter, on the 19th day of December, 1881, a new commission was issued to said M. S. Powell, under which he qualified by tak-

<sup>1</sup>As to when a new trial will be granted on the ground of newly-discovered evidence, see *Boot v. Brewster*, (Iowa,) 36 N. W. Rep. 649, and note; *Railway Co. v. Wood*, (Tex.) 7 S. W. Rep. 372; *McCormick v. Railroad Co.*, (Colo.) 17 Pac. Rep. 542; *Petafish v. Watkins*, (Ill.) 16 N. E. Rep. 248; *Pemberton v. Johnson*, (Ind.) 15 N. E. Rep. 801; *Achorn v. Andrews*, (Mo.) 12 Atl. Rep. 793; *Insurance Co. v. Harvey*, (Va.) 5 S. E. Rep. 553; *Railway Co. v. Walker*, (Tex.) 7 S. W. Rep. 791; *Gassaway v. White*, (Tex.) 8 S. W. Rep. 117; *Lee v. Birmingham*, (Kan.) 18 Pac. Rep. 219; *Heathcote v. Haskins*, (Iowa,) 38 N. W. Rep. 417; *Norris v. Hix*, (Iowa,) 38 N. W. Rep. 895.

ing the oath. The said commission and oath of office were annexed. The application further set forth that said facts had been discovered on that morning, and were not before known to defendants, notwithstanding due diligence; that they did not make the application for delay, but only to obtain justice. The judge permitted the answer to be filed, and the commission and oath to be received in evidence, over the objection of plaintiff's counsel, who reserved exception to the ruling.

That exception is vehemently pressed in this court; but we think it has no substantial merit. It was obvious that if the newly-discovered evidence, and the defense based thereon, had merit, it would be ground for a new trial. What advantage could result to either party from proceeding with a vain trial, which, if terminating adversely to defendants, would certainly have to be reopened in order to let in the newly-discovered evidence? The diligence and good faith of defendants are not questioned, nor is the truth of the facts presented by them disputed. On the contrary, we find in the record the following admission: "It is admitted that M. S. Powell was first appointed and commissioned sheriff (*ex officio* tax collector) to fill a vacancy, during the recess of the senate, and that the bond sued on in this case was given under said commission." If plaintiff were surprised by this new issue and evidence, and desired opportunity to furnish any countervailing proof, he would have been undoubtedly entitled to a continuance; but he applied for none, nor is it pretended that any benefit would have been derived from one. We are not disposed to encourage loose practice; but, under the circumstances of this case, we do not feel authorized to interfere with the large discretion vested in inferior courts in such matters, the exercise of which, in the present instance, seems to us to have been wise, and promotive of the ends of justice, and of a speedy termination of the controversy between the parties. For reasons which will be more fully presented in another case, (No. 10,141, *ante*, 46, decided this day,) we consider that the original defenses of the defendants have no merit, and the defense above referred to is the only one now requiring examination. Article 69 of the constitution provides: "The governor shall have power to fill vacancies that may happen during the recess of the senate, in cases not otherwise provided for in this constitution, by granting commissions which shall expire at the end of the next session; but no person who has been nominated for office, and rejected, shall be appointed to the same office during the recess of the senate. The failure of the governor to send into the senate the name of any person appointed for office, as herein provided, shall be equivalent to rejection." Under this article the governor appointed and commissioned Powell, and the bond sued on was furnished. That commission could not possibly extend beyond the end of the next session of the general assembly; but, having been subsequently nominated and confirmed by the senate, Powell received a new commission, and took a new oath, under which he continued to exercise the duties of the office until June 16, 1884, but without furnishing a new bond. The suit in this case is for taxes collected, and not accounted for, between the date of the bond, May 20, 1880, and June 16, 1884. The question is whether defendants are liable except for moneys collected during the term of the commission under which the bond was furnished, which was limited to the end of the ensuing session of the legislature, to-wit, December 24, 1881.

The question is by no means new. From the time of Lord HALE, it has been presented to courts in every variety of aspect, and it has been held uniformly that sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished; and this is not affected by the fact that the terms of the bond are not so restricted, or that the officer continues in office as his own successor without furnishing a new bond. The first and leading case was that of *Arlington v. Merricks*, 2 Saund. 408, where one had

been appointed as deputy-postmaster for the term of six months, and furnished a bond with the broadest possible condition that he should faithfully perform "for and during all the time" that he should continue as deputy. He continued to hold beyond the six months, and effort was made to hold him for subsequent defaults; but Lord HALE rejected the claim, holding that the sureties only intended to bind themselves for the original term of his appointment, and that otherwise they might be held accountable during the whole life of the principal. A case strikingly similar to the instant one came before the supreme court of the United States. Under a provision of the United States statutes almost identical with article 69 of our constitution, the president was authorized, in the recess of the senate, to make appointments by granting commissions to expire at the end of the next session. The president so appointed Samuel Reed, who qualified and furnished bond. At the ensuing session the president sent his name to the senate, and after his confirmation issued a new commission, after which he continued in office, but without furnishing a new bond. It was claimed that this was one continuing appointment; the second commission operating only as a continuation of the first. But the court, through Mr. Justice STORY, held otherwise, and that the obligatory force of the bond was confined to acts done while the first commission had a legal continuance, and could not go beyond it. *U. S. v. Kirkpatrick*, 9 Wheat. 720. We have carefully considered the cases of *Shepherd v. Haralson*, 16 La. Ann. 194, and *Kelly v. Gilly*, 5 La. Ann. 534, but do not find them in conflict with the foregoing. In the first-mentioned case it is expressly stated: "The 48th article of the constitution of 1852, [corresponding to article 69 of our present constitution,] on the subject of vacancies, has no application to the case at bar. There was no vacancy in the office at the date of Haralson's recess appointment." This clearly indicates that the decision was not intended to apply to cases arising under that article. In the 5 La. Ann. case, the article 51 of the constitution of 1845 was not referred to, and the decision was confined to the peculiar case of notaries. The decision was that, under the laws regulating that office, "every person appointed a notary is entitled to hold office for four years from the date of his appointment," without reference to the question of vacancies, or to the length of the unexpired term of his predecessor. It would require a very unequivocal precedent to justify us in holding that an appointment and commission which the constitution positively says "shall expire at the end of the next session" could be held as continuing for a longer term. The argument in the *Kirkpatrick Case* is applicable and unanswerable. It has been further frequently held that the liability of the surety is not extended by provisions of law to the effect that the officer continues in office until his successor is qualified. It is the duty of the state to appoint his successor, and to require him to qualify, and, in case he fails, to appoint some one who will. It cannot, by neglecting these duties, and suffering an incumbent to hold on, prolong the liability of the sureties beyond the term contemplated in their bond. *Mayor v. Crowell*, 40 N. J. Law, 207; *Mayor v. Horn*, 2 Har. (Del.) 190; *Commissioners v. Greenwood*, 1 Desaus. Eq. 450; *Chelmsford v. Demarest*, 7 Gray, 1; *Leadly v. Evans*, 2 Bing. 32; *Liverpool Co. v. Harpley*, 6 East, 507; *Peppin v. Cooper*, 2 Barn. & Ald. 481; *Bigelow v. Bridge*, 8 Mass. 275. The four cases first above cited, from New Jersey, Delaware, South Carolina, and Massachusetts, examine these questions very closely, and dispose of every point made by plaintiff. Possibly, as held in 40 N. J., the liability under the bond might be held to extend to such reasonable period beyond the term of office as would enable a successor, in the exercise of due diligence, to be appointed and qualified. But in this case there was no diligence, and no effort whatever to require proper qualification by the furnishing of a new bond. We therefore hold that defendants are only responsible for taxes collected and not accounted for between the dates of May 20, 1880, and December 24, 1881.

The evidence in the case does not enable us to ascertain with certainty the amount so due, and we shall remand the case on that ground.

A special ground of defense is presented by Mrs. Bettie Jenckins, administratrix of the succession of D. C. Jenckins, one of the sureties. The suit was undoubtedly against the succession of Jenckins, but it was alleged that Mrs. Jenckins "was administering the succession as natural tutrix of his minor child," and citation was served on her. She appeared with all the other sureties, and joined in the answer. On the trial, she offered evidence showing that she had been duly appointed and qualified as administratrix, and was not administering as natural tutrix. We think the point has no merit. The suit was against the succession; she was alleged to be administering it; she was actually its administratrix; and, having been cited and having answered, we think she made the succession a party, with full authority to represent it, and cannot avail herself of a mere misdescription of the title under which she administered, which was not excepted to.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the case be remanded to the lower court to be there proceeded with according to law, and to the views herein expressed; appellees to pay costs of appeal.

(40 La. Ann. 307)

HOWE v. POWELL *et al.*

(Supreme Court of Louisiana. March 26, 1888.)

1. MORTGAGES—WHAT CONSTITUTES—SALE À RÉMÉRÉ.

An act, purporting on its face to be a sale à *rémeré*, is not translatif of the ownership of the real estate to the purchaser, when it is shown that the parties did not intend that it should thus operate.

2. SAME.

Such sales, made for an inadequate consideration, and unaccompanied by delivery, will be treated, without sufficient evidence to the reverse, as contracts, by which the thing nominally sold stands as security and nothing else.

3. SAME.

The vileness of the price and the retention of possession establish that the contract was designed solely to subject the property as a security.

4. VENDOR AND VENDEE—BONA FIDE SALE—INADEQUACY OF CONSIDERATION.

Property admitted to be worth more than \$2,500 cannot be claimed to have been sold, even à *rémeré*, when the price stipulated is \$400, or even \$1,000, and possession was not delivered.

5. EQUITY—JURISDICTION—PROCEEDINGS TO DECLARE A DEED A MORTGAGE.

Such an innominate agreement is in the nature of a pignorative contract, by which a *quasi* hypothecary right is conferred. It is recognized by the jurisprudence of the state as a contract of security, and may be enforced, on a proper proceeding and showing, for specific performance.

6. SAME.

This cannot be done in a suit which is strictly a pure and simple petitory action, involving nothing but rights of ownership.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge; J. W. BURGESS, Judge.

This is a petitory action brought by Charles L. Howe, as testimony executor of Thomas A. Gaff, against Joseph H. Powell, the tenant of a certain piece of real estate in the city of Baton Rouge, both parties claiming possession. From a judgment rejecting his demand, and decreeing defendants to be the original owners of the property, plaintiff prosecutes this appeal.

L. D. Beal and Henry C. Miller, for appellant. Kernan & Laycock, for appellees.

BERMUDEZ, C. J. This is a petitory action. It is brought against the tenant or occupant of the property, but the parties claiming adverse title have joined issue. The plaintiff claims that the real estate, which is situated in

Baton Rouge, was sold by Kleinert to Gaff, whose executor he is, the former having acquired it from Cochran in 1877. The defense is that the property belongs to the respondents, by purchase from the same Cochran in 1878; that the original act by the latter to Kleinert was not designed to be a sale, but merely a mortgage, to secure a debt; that the price was wholly inadequate, and possession was never given to Kleinert, but was retained by him, and passed with the ownership from him to the respondents, who still have it; that the act from Kleinert to Gaff, on which plaintiff relies, was a mere transfer of his rights against Cochran; that the act was never properly recorded; that the debt and mortgage are prescribed, etc. From a judgment for the defendants the plaintiff appeals.

It appears that the act between Cochran and Kleinert was executed in Ohio. It has all the characteristics of a sale, but contains the pact of redemption within a specified delay. The property is admitted to be worth more than \$2,500, and the price of sale is stated to be \$460. It was recorded in the mortgage book and in that of notarial records in 1877, previous to the sale to the defendants. The transcript does not show that the "notarial records" are the "conveyance book" in which sales and other transfers of real estate are required by law to be recorded, to affect their persons. It is shown by a letter of Gaff that he considered the property as having been mortgaged by Cochran to Kleinert, and he directed his agent to acquire the mortgage for him. Objection was made to the admission of this letter, but it was properly overruled, as it was written evidence opposable to the party in whose name the property is claimed. Conceding, however, that the act in question was properly recorded, and that no evidence was received to show the intention of the parties, Cochran and Kleinert, the only question which seriously arises in the controversy is whether that act did actually transfer title of ownership to Kleinert. The act is evidently a sale with the faculty of redeeming, "*vente à réméré*." The text of the law and the jurisprudence upon it are to the effect that, by such sale, the ownership passes to the purchaser, who most of the time is a mere money lender; but that, on payment to him of the amount mentioned in the act, he is divested of that ownership, which passes to the original vendor. In two late cases we had occasion to consider that matter to some extent. *Lawler v. Cosgrove*, 39 La. Ann. 488, 2 South. Rep. 34; *Davis v. Bank*, 39 La. Ann. 523, 2 South. Rep. 401. See, also, *Jackson v. Lemle*, 35 La. Ann. 855. But the law and the jurisprudence only thus say where the transaction is really a sale *à réméré*; that is, where, among other requirements, the price paid was adequate, *i. e.*, in reasonable proportion to the true value of the property. *Stewart v. Buard*, 23 La. Ann. 201. Hence it is that, when the price is inadequate and possession has not been delivered to the purchaser, but was retained by the vendor, it has uniformly been considered and held that the transaction was not a sale, but a mere security, indeed, a sort of pignorative contract, upon which the law looks with suspicion, for the protection of the embarrassed and unfortunate debtor against the rapacity of his ravenous creditor. Indeed, the settled doctrine of this court on this subject is that "redeemable sales," unaccompanied by delivery of the thing sold of which the considerations are inadequate, will be treated by courts, without sufficient evidence to the contrary, as contracts for which the thing nominally sold stands as security and nothing else. *Le Blanc v. Bouchereau*, 16 La. Ann. 11; *Colins v. Pellerin*, 5 La. Ann. 99; *Miller v. Shotwell*, 38 La. Ann. 891. See *Ware v. Morris*, 23 La. Ann. 665; *Stewart v. Buard*, *Id.* 201. Also, *Merlin*, Vo. Pignorative Contract, 284; *Troplong*, Vente, No. 695, p. 191; 3 *Baudry*, *Lacantinerie*, No. 1045, p. 606; 28 *Laurent*, No. 544, p. 531.

The record shows that the price of sale was \$460; that possession never was delivered to Kleinert, but continued in Cochran, and, since 1878, has been in the defendants; and the admission is that the value of the property exceeds \$2,500. The price is about one-sixth of the value. It is a vile price. Had

the sale been a real one in the intention of the parties, the vendors would have had the right to demand its rescission for lesion beyond moiety. Rev. Civil Code, art. 2589. The detained possession by the vendor is a presumption of simulation, for whosoever sells must deliver possession to the purchaser, unless it be expressly stipulated otherwise for a stated period. Id. arts. 2479, 2480. It is true that the plaintiff says that, besides the \$460, there was another consideration for the sale. The record does not establish this averment of the petition; but even if it did, that supplemental consideration, in the very terms of the petition, would consist of a mortgage debt originally for \$2,000, but reduced by partial payment to \$500. The act does not mention the assumption of that mortgage debt as a part of the price; but, even if it did, the sum at which it was reduced, \$500, added to the \$460, would not make that price to be \$1,000, and that amount would still be inadequate as the price of property admitted to be worth more than \$2,500. It is manifest that Cochran never intended to sell to Kleinert, and Kleinert did not propose to buy; that even if they so designed, the transaction would be a nullity as a conveyance, owing at least to the vileness of the price, and the absence of delivery of possession; and that, by merely putting the property in the name of Kleinert, Cochran has simply given, and Kleinert has only received, a security for the payment of the sum due him. In the case of *Ware v. Morris*, already alluded to, page 665, which is analogous to the present one, the plaintiff claimed to be recognized as owner of the property which the court found had been given as a security for the payment of the debt, and asked no other relief. The then court affirmed the judgment appealed from, which had rejected plaintiff's demand, because by the act the ownership had not been divested and had not passed to the plaintiffs. In the course of the opinion the court took occasion, however, to say: "Here an hypothecary right is given under the false appearance of a contract of sale, possession being retained by the ostensible vendor." What was then said may be repeated here. The plaintiff has brought a purely petitory action, and has prayed to be recognized and put in possession as owner of the property, which he avers was sold to the deceased, whom he represents. On the other hand, the defendants resist the claim for ownership, alleging that the title resides in them, and they admit that the contract was intended as a mortgage, or, which is nearly the same by implication, as one conveying *quasi* hypothecary rights, and pray that the suit be dismissed, and that they be recognized as the owners. We merely decide here, that even if the act in this case was designed to be a sale *à réméré*, the title did not move from the one to the other. We do not undertake to name the contract, but we recognize it as a valid agreement under the jurisprudence of this state, which is susceptible of enforcement, on a proper proceeding and showing for specific performance. Such a case is not presently before this court. When such a claim will be presented,—the fact and the law warranting,—the contract will be entitled to be given, as against the world, the effect which the parties designed it should have, and of which all others had due notice. The ruling in *Stewart v. Buard*, 23 La. Ann. 201, was made in a controversy in which the contract presented the features of a sale *à réméré*, and effect was given to it, because it proved to be a valid sale of that class. In the present instance, the contract in appearance is a similar one, but no effect is given to it, because, on scrutiny, it is found not only that the parties did not propose that it should operate as a transfer of ownership, but also that, even if they intended otherwise, it does not combine essential elements to make it translatable of the fee, which therefore never was divested. As the plaintiff does not ask specific performance, and there is no issue on that point, we are powerless to grant relief, even if the circumstances justified. These views dispense us from passing upon the existence of the debt and of the mortgage against which defendants have, out of caution, pleaded prescription and pre-emption. Judgment affirmed,

(40 La. Ann. 351)

SEIXAS v. GONSOULIN *et al.*

(Supreme Court of Louisiana. March 26, 1888.)

## 1. SUBROGATION—PAYMENT OF NOTE BY INDORSER.

Payment of a note by an indorser actually bound, produces the legal effect of subrogating him to the rights of the last holder.

## 2. NEGOTIABLE INSTRUMENTS—PAYMENT—BY WHOM MADE—INDORSER AND DRAWER.

Money borrowed for account of the borrower, and applied to the payment of a note, at the request of the drawer, cannot be claimed by the indorser as being his money, though he subsequently issued his check to the original lender, in the absence of proof that the money was lent to him, the indorser.

## 3. SAME—EVIDENCE.

The unimpeached and positive testimony of the lender that he lent to the borrower, and that he had no previous communication with any one else on the subject, outbalances altogether that of another witness, however respectable, who practically testifies from hearsay.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; W. T. HOUSTON, Judge. Suit by J. M. Seixas, syndic of the firm of A. Carriere & Sons, against Alfred Gonsoulin and others, in which plaintiff seeks to participate in the proceeds of certain real estate. This appeal is prosecuted from a judgment sustaining his action.

Henry C. Miller, for appellant. Bayne, Denégre & Bayne, for appellees.

BERMUDEZ, C. J. The plaintiff sues as syndic of Carriere & Sons, to participate in the proceeds of certain real estate judicially sold. He alleges that the note on which he declares, and two other similar notes, held by the Citizens' Bank and the Louisiana National Bank, were originally secured by vendor's privilege and special mortgage on the property in question; that the note was, before its maturity, owned by the last-named bank; that, as indorsers thereon, A. Carriere & Sons took it up. He then contends that, as they became thereby subrogated to all the rights of the last owner, the proceeds of the real estate judicially sold must be distributed *pro rata* among the creditors of A. Carriere & Sons and the two banks. The defense is that the note was paid at its maturity, by L. Brulatour, the drawer thereof, and not by A. Carriere & Sons; that it was marked, "Paid," at the time of payment, and handed over in that condition. There is no dispute that, if A. Carriere & Sons paid the note, they are entitled to the relief sought. The note was drawn by L. Brulatour, to his own order, and was by him indorsed. A. Carriere & Sons were subsequent indorsers. The suit is brought against the purchaser of the property who had retained the proceeds, but the banks are the real defendants at stake. From a judgment in plaintiff's favor, this appeal is taken. It appears that on the day of maturity, May 19, 1884, of the note in question, (which was for \$5,000,) the drawer, finding himself unable to honor it, requested the firm of P. E. Brulatour & Co. to make provision for it; that they, not being in funds, applied to Bertus & Durel, brokers in this city, to loan them the amount required; that these did so, by their check, to the order of P. E. Brulatour & Co., who deposited it in bank to their credit; that P. E. Brulatour & Co. then drew their check against the deposit to the order of the Louisiana National Bank; that, on presentation of this check, the note was marked, "Paid," and delivered to the person who brought the check. It is also shown that A. Carriere & Sons, on the same day, issued a check of \$5,000, which went to Bertus & Durel; that they sent to the bank in which the note had been deposited for collection, to ask that it be not marked, "Paid," as is usually done, but that the request came after the note had been paid, thus marked, and delivered.

In order to determine the question as to who paid the note, it is necessary to ascertain whose money was used for the purpose. If Bertus & Durel loaned the money for which they issued their check to A. Carriere & Sons, owing to

some previous understanding with them, there can be no doubt that although the check was made to the order of P. E. Brulatour & Co., was deposited by them, and the proceeds used to take up the note, A. Carriere & Sons must be considered as having paid the note, with money which became theirs, by the loan to them, by Bertus & Durel, through P. E. Brulatour & Co. The plaintiff relies to establish this material fact on the testimony of Nores, a member of the firm of P. E. Brulatour & Co., who says quite distinctly that the brokers' check was furnished at the instance of E. L. Carriere, a member of the firm of A. Carriere & Sons. On the other hand, Bertus, of the firm of Bertus & Durel, heard as a witness, unequivocally says that on the 19th of May, 1884, Thomas Brulatour, of P. E. Brulatour & Co., came to them, and asked them to loan them a check of \$5,000, which they would return during the day, which they did; and that within an hour or two afterwards, before 3 P. M., P. E. Brulatour & Co. returned them a check of A. Carriere & Sons, for a like amount. He adds that they had no communications with A. Carriere & Sons about the check; that the check was furnished Brulatour at the instance of Thomas Brulatour, and no one else. This clear and positive testimony in itself suffices to out-balance that of Nores, (however respectable this witness be,) which, on cross-examination, proved to be vague and indefinite, to lack substance and solidity, and, after all, nothing but hearsay. It is unquestionable that had not Brulatour & Co. paid their debt with Carriere & Sons' check to Bertus & Durel, these could have sued them, and would have had no right of action against A. Carriere & Sons. We are satisfied that the evidence given by Bertus, and corroborated by the surrounding circumstances, decidedly preponderates and justifies judgment in favor of the banks.

It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now adjudged that plaintiffs' demand be rejected, with judgment in favor of the defendants, with costs in both courts.

Rehearing refused, May 7, 1888.

(40 La. Ann. 336)

**ANDERSON v. BENHAM et al.**

(*Supreme Court of Louisiana. March 26, 1888.*)

**1. TRUSTS—EVIDENCE.**

Parol evidence is inadmissible between the contracting parties to an act of sale of an immovable to prove its simulation. This can only be done by a counter-letter, or writing equivalent thereto. To constitute a counter-letter, it is not necessary that it should be contemporaneous with the act attacked. It is sufficient to set aside the act if the writing offered against it, of whatever date, contains an admission that the alleged sale was a simulation.

**2. SAME—ESTOPPEL.**

Nor is the plaintiff in such action debarred by any stipulation in the act, or by the warranty contained therein, from proving the falsity of the act.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Carroll; E. J. DELONEY, Judge.

Action by R. K. Anderson against George C. Benham and Mrs. Carrie T. Benham. The principal question involved is the proper construction to be placed on a certain contract of retrocession or annulment of a deed. There was judgment below in favor of the plaintiff against the succession of Benham, annulling the conveyance to him, and in favor of Mrs. Benham, rejecting the plaintiff's demands as to one-half of the property claimed by her in her own right. From this judgment the plaintiff and one of the defendants appeal.

J. W. Montgomery and J. M. Kennedy, for Anderson, appellant. W. G. Wyly, for George C. Benham, appellant, and Carrie T. Benham, appellee.

TODD, J. The plaintiff, on the 22d of November, 1870, made a conveyance, by act under private signature, to the defendant, to Mrs. Benham, of one undivided half of the plantation described in the pleadings. On the 22d of May, 1871, he executed another act, by which he purports to have conveyed

the entire plantation to George C. Benham, the husband of Mrs. Benham. On the 5th of February, 1886, he instituted this suit. In his petition he declares, substantially, that in making said conveyances it was not his purpose or intention thereby to sell the property referred to, or to pass title thereto to the defendants, or either of them, but that the acts were executed for the sole purpose of investing said parties with the ostensible omission of the property, in order that they might mortgage the same for his benefit, and thereby raise money for him to cultivate the plantation; that such was the understanding of all the parties at the time, and was so acknowledged to be by the defendants in a counter-letter subsequently executed; that the acts, as sales, were pure simulations; and he seeks by this action to have them so declared. The defendants' answer contains the general issue; claims possession of the property in defendants; alleges the disturbance of their possession and slander of their title by the plaintiff; and, further, prescription and estoppel resulting from the stipulations of the acts of conveyance, and the express warranty therein contained. During the pendency of the litigation in the lower court, Benham died, and Mrs. Benham qualified as administratrix of his succession, and filed an appearance as his legal representative. There was judgment in favor of the plaintiff against the succession of Benham, annulling the conveyance to him, and in favor of Mrs. Benham, rejecting the plaintiff's demands as to one-half of the property claimed by her in her own right. From the judgment the plaintiff and Mrs. Benham, as administratrix, appealed.

On the trial of the cause, a document was offered in evidence by the plaintiff, and received and filed. It was termed a counter-letter by the plaintiff, but its character as such was denied, and its admission objected to on grounds that will be noticed hereafter. It was signed by the plaintiff and both the defendants. To show the character of the document, and the intent and meaning of the parties thereto, we extract from it the following clauses: "I, Geo. C. Benham, hereby acknowledge that R. K. Anderson is the owner of the undivided half interest of the Robertdale plantation held by me under deed dated the 22d of May, 1871, situated in \* \* \* East Carroll parish. \* \* \* And I do hold and respect said Anderson as the owner of the before-described land, and all the revenues arising therefrom, and improvements and appurtenances thereunto belonging, notwithstanding any deed or act of sale of aforesaid date of May 22, 1871; and I hereby obligate myself \* \* \* not to interrupt or disturb him in the quiet and peaceable possession of said undivided half of the said plantation which he now holds and enjoys. \* \* \* The document signed by Geo. C. Benham and his wife, Carrie T. Benham, and R. K. Anderson, dated May 22, 1871, is hereby declared null and void." This document is essentially a counter-letter. To constitute a counter-letter, it was not necessary that it should have been contemporaneous with the deed to which it referred and purported to control and explain; and, if properly admitted, must be held conclusive upon the question of sale or no sale. Most of the objections made to the admission of the document related to the character of the instrument, and therefore went to the effect of it. It appears that it was executed in duplicate, one copy being delivered to the plaintiff, and one retained by Benham. The copy of the plaintiff was first offered, and was objected to on the grounds, mainly, that it was mutilated,—that is, that several dates appearing therein had been altered,—and that plaintiff was bound by the stipulations of the deed, and estopped from attempting to show by any kind of evidence that the act was false or simulated. If the act offered was signed by the parties, and that is not questioned, the alterations made in the dates mentioned, if they were such, were not a sufficient ground for the entire exclusion of the document; it only went to the effect of it.

As to the other objection, and the question of estoppel, if the act of 22d of May, 1871, purporting to sell the property to Benham, was a real act, then of course the objection was a good one; but if the act was a simulation, as

charged, and which it was the purpose of the suit to establish, and the sole question to be determined, then, of course, the declarations of the deed, both as to the sale and the warranty, amounted to nothing. They were as if never written,—non-existent. The objection assumes that to be true and real—the deed attacked—which is charged to be fictitious and simulated, and is therefore wholly illogical. It is like pleading the judgment itself, which is charged to be null, *res judicata* against the action to annul it. This precise question was disposed of in the recent case of *Cole v. Cole*, 39 La. Ann. 878, 2 South. Rep. 794, and adversely to the pretensions of the defendant in the instant case. This counter-letter or writing was therefore properly admitted. Parol evidence was offered to establish the simulation of the act of 22d of November, 1870,—the conveyance to Mrs. Benham,—and was properly rejected, for the reason that a counter-letter, or some writing equivalent thereto, is alone admissible and sufficient to establish the falsity of a regular act of sale of immovable property.

The case therefore stands thus: The plaintiff by the two acts—of 22d of November, 1870, and May 22, 1871—divested himself of title to the entire Robertdale plantation, by the first-mentioned act selling the one undivided half of it to Mrs. Benham, and by the other the entire plantation to George C. Benham. The counter-letter of the 24th of May, 1875, admits that the act of the 22d of May, 1871, was inoperative and void, and, notwithstanding said act, that the plaintiff was the owner of one undivided half of the plantation. But there was no admission in the counter-letter, and nowhere else in the record, or other competent evidence, to establish the nullity of the conveyance of the 22d of November, 1870, to Mrs. Benham. This act, therefore, must be left intact. The plaintiff, by deeds regular on their face, having transferred to others the entire plantation, must make clear beyond peradventure, and by competent evidence, that he is, notwithstanding said acts, still the real owner, and that the acts purporting to pass the title from him were false and fictitious. He charges that the simulation of both acts is to be inferred from the fact that there was a community of *acquêts* and gains existing between Benham and his wife, and his (plaintiff's) conveyance to the latter was in truth a conveyance to Benham; and that Mrs. Benham's joining with Benham in the execution of the counter-letter was virtually an acknowledgment on her part that the sale to her was a simulation, and, together with the signature of Benham, that both deeds were false or fictitious. This is not sufficient. It is to be noted that in the counter-letter there is no allusion to the act in favor of Mrs. Benham, and this instrument admits or declares the ownership of the plaintiff in only one undivided half of the plantation, and not as to the whole of it, as alleged.

It appears from the record that this plantation belonged to the matrimonial community that existed between plaintiff's father and mother, both deceased; that one-half of it plaintiff inherited from his father, who died first, and the other half from his mother. There is a discussion by counsel as to which half of the property was conveyed to Mrs. Benham,—whether the portion derived from the father or the mother, and as to which portion, under the decree of the lower court, he (plaintiff) is to be recognized as the owner of. This is a question with which at present we are not concerned, and which, if it were material, from the record before us it would be impossible to determine. There was a question raised by the pleadings touching the rents and revenues of the property, but, by a written agreement of the parties found in the record, this question was reserved for future determination, and this reservation was properly recognized. The case was tried by a jury, and the judgment upon the verdict, as before stated, was in plaintiff's favor against the succession of Benham, and rejecting plaintiff's demand against Mrs. Benham. From the conclusion reached by us, and announced above, we see no reason to disturb that judgment, and the same is affirmed, with costs.

(40 La. Ann. 602)

FOLGER *et al.* v. ROOS.

(Supreme Court of Louisiana. April 16, 1888.)

**1. EXECUTION—ORDER FOR THE WRIT—JUDGMENT.**

A decree for executory process is not a judgment, in the strict sense of the term. It decides nothing, but may be appealed from.

**2. SAME—POWER TO ISSUE IN VACATION.**

It is an *ex parte* order which may be rendered at chambers, as well during vacation as during term-time.

**3. SAME.**

Act No. 86 of 1866 was not designed to prohibit the granting of such orders. It proposed to continue in the courts the power of hearing and determining contradictorily, during vacation, motions to quash, conservatory and other writs, on the face of the papers, and not on the merits, and suits to eject tenants.

**ON REHEARING.****SAME.**

Act 86 of 1866, which purported to enlarge the powers of the courts of New Orleans, as then composed, so as to authorize the hearing, during vacation, of motions to quash certain writs and orders, which are issued *ex parte*, has no reference to orders of seizure and sale, which are regulated exclusively by article 68 and article 733 *et seq.* of the Code of Practice.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

Controversy between Nellie Folger and others and Henry Roos, in which the heirs of Antonio Palacio seek to be recognized as owners of certain immovable property. From a judgment dismissing their suit this appeal is taken.

W. W. Handlin, for appellants. James McConnell, for appellee.

BERMUDEZ, C. J. This is a petitory action by the widow and heirs of Antonio Palacio to be recognized as the owners of certain real estate, and allowed the rents and revenues thereof from December 26, 1879, when it is charged the defendant took wrongful possession. The main defense is that the property was acquired by the defendant at a judicial sale, made on that day, which divested Antonio Palacio, and passed his title to the defendant. The plaintiff, retorting, charges that the sale in question is a nullity, having been made in furtherance of an order for executory process signed on September 4, 1879, by the judge of a district court in New Orleans during vacation, when, under the law, no such order could have been then validly granted. The district court heard the evidence adduced by the litigants in support of their conflicting claims, and dismissed the suit. From this judgment the plaintiff appeals.

In order to establish that the decree for executory process could not have been signed during vacation, and so is a nullity, the plaintiff relies on act No. 86 of 1866, and on the rulings made in *Culver v. Leovy*, 21 La. Ann. 306, and in *Hernandez v. James*, 23 La. Ann. 483. The act declares that the district courts of New Orleans shall be opened from the first Monday of November to the 4th of July, and shall remain open all the year for criminal and probate causes, for granting interlocutory orders, and writs of arrest, *habeas corpus*, injunctions, sequestrations, attachments, *mandamus*, and provisional seizures, on motions to quash, and not on their merits, and for proceedings to eject tenants. The rulings in the two cases relied on are to the effect that the signing of a judgment is a judicial act, and cannot validly take place, without the consent of parties, out of term-time; *i. e.*, during vacation. The judgments thus signed were judgments rendered after a contradictory trial. A decree for executory process is not a judgment, in any sense of the word, within the meaning of the authorities cited; for it decides nothing,—no more than an order for a conservatory writ of any description. It has been held to

be a judgment only so far that an appeal lies from it in a proper case. It is known to both the Spanish and French systems. See Esriche, *Diccionario de Legislacion y Jurisprudencia*, pp. 770, 819, 899, 979; and Merlin, *Vo. Execution Parée*. In the case of *Mitchell v. Logan*, 34 La. Ann. 998, (1003,) we took pains to show that it lacks the elements of an ordinary judgment, saying substantially: It is not preceded by a citation; it is rendered on no issue; it adjudicates to plaintiff no right not secured by his notarial act; it creates no judicial mortgage by registry; it authorizes no writ for the difference, in case of deficiencies between the net proceeds of the sale of the mortgaged property and the amount of the debt. Numerous authorities were quoted in support of those views, and one which is to the effect that an executory proceeding is not properly a suit, but merely the aid of judicial power to give force and effect to what is equivalent to a judgment confessed. *Rousseau v. Bourgeois*, 28 La. Ann. 186. It is therefore strictly no judgment. It is simply an *ex parte* order *in rem*, granted at chambers, without any previous hearing or notice to the ostensible owner of the property directed to be seized and sold to satisfy the debt acknowledged in the authentic form. In the case of *Rust v. Faust*, 15 La. Ann. 477, the court declared that the uniform practice is to issue executory process on decrees rendered and signed at chambers. The learned counsel for the plaintiffs concedes such to be the practice and the jurisprudence; but he distinguishes, and says that the practice is legal when the decrees are rendered and signed at chambers, provided this is done in term-time, and that such decrees cannot be thus made out of term, during vacation, because of the provisions of the act of 1866, No. 86, which do not specify that such decrees may be granted between the day of the adjournment and that of the reopening of a New Orleans district court, and which enumerates what judicial proceedings may take place contradictorily during vacation. This is a fallacy resulting from a confusion of ideas touching the purport of the act relied on, and from a too narrow conception of its meaning and object. The purpose in view was to enable litigants to try contradictorily with adverse parties, during vacation, motions to quash on the face of the papers and not on their merits, and suits to eject tenants, which otherwise would not have been entertained; but the act never was intended to abridge the right of parties to any *ex parte* or interlocutory decrees to which they would have been entitled during term-time. Article 68, Code Pr., has an immediate bearing on the subject. It provides that when the hypothecated property is in the hand of the debtor, and when the creditor, besides his hypothecary right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized immediately, and sold for the payment of the debt, etc. The word "immediately" was not inserted in the law for a useless purpose. It means instantly; without delay; at any time, whether within or without term,—and must receive its effect. The Code of Practice calls the fiat, in cases of executory process, an "order of seizure." Code Pr. art. 735. Far from shutting out the defendant from adequate relief when the claim or mortgage cannot be enforced, the law leaves to the debtor a door wide open to urge, after the order has been rendered, defenses which he might have pressed in ordinary cases only before judgment. This identical question of the validity of an order for executory process made during vacation was reached some 16 years ago, and was very summarily treated by the then court. See *Thompson v. Storrs*, No. 2,545, unreported, and found in O. B. 42, fol. 81, decided December 16, 1872. In that case the very authorities relied on (21 and 23 La. Ann.) were declared to be wholly inapplicable. The order attacked having been seasonably made, the objection to its validity fails. This conclusion is in perfect consonance with the spirit and letter of the law and the practice, and is eminently conservative.

Construing the judgment of dismissal rendered below as 'one rejecting plaintiffs' demand, it is affirmed, with costs.

## ON APPLICATION FOR REHEARING.

(May 7, 1888.)

POCHE, J. Plaintiff's counsel makes an earnest effort to induce us to reconsider our opinion in this case. The confusion in his mind evidently arises from a misapprehension of the true meaning of the statute under which he has rested his case. According to his construction, the law is said to mean that, in the absence of that legislation, the district courts for the city of New Orleans were at that time powerless to issue, in vacation, any writs of arrest, *habeas corpus*, injunction, sequestration, attachment, *mandamus*, and provisional seizure, and hence he argues that the omission of the law-maker to include orders of seizure and sale in the enumeration of the orders or writs which those courts were authorized to grant during vacation must be construed as a legislative intent to prohibit the issuance of such orders at any time between the 4th of July and the first Monday of November. But such is not the purport of the law. It nowhere appears, either in the title or in the body of the statute, that the legislature thereby intended to amend or otherwise alter the articles of the Code of Practice which treat of the manner of issuing the views with and orders hereinabove enumerated, and under which such writs have always been issued by all the courts in this state, including those of the city of New Orleans, in chambers and out of term-time, from the very beginning of our judicial history. The statute reads as follows: "The courts shall be opened from the first Monday of November to the 4th day of July; and for criminal and probate causes, for granting interlocutory orders and writs of arrest, *habeas corpus*, injunctions, sequestrations, attachments, *mandamus*, and provisional seizures, *on a motion to quash, and not upon their merits*, they shall remain open the whole year." (Italics are ours.) Its title is: "An act to amend an act entitled 'An act relative to district courts for the parish and city of New Orleans,' approved March 29, 1865."

By reference to the latter act, it appears that the only amendment which was proposed by the amending act was to add to the orders enumerated the two writs of attachment and *mandamus*, and the power of trying proceedings instituted by a landlord for the possession of leased property, which features were not contained in the amended act, and also to shorten the session of the courts. The manifest purpose of the legislature, as evidenced by both acts, was not to restrict, but, on the contrary, to enlarge, the powers of the courts referred to. Under the rules of the Code of Practice as uniformly construed in jurisprudence, it is clear that all the conservatory writs enumerated in the act were issued *ex parte*, at chambers, and at any time of the year. Hence the act could not purport to grant a power already in legal existence, and which had been exercised for more than half a century. But, without special legislative authority, the courts of New Orleans were without power to try and dispose, in vacation, of a motion to quash any of the writs enumerated, which they might have granted during such vacation. The ends of justice required that the defendant, under any of said writs, which might have been wrongfully issued, should be empowered to submit the question to judicial test, without the hardship of waiting until November following. The sole object of the legislation under consideration was to remedy that evil, and, under it, the courts were authorized to hold sessions, in order to hear such writs "on a motion to quash, and not upon their merits." Such is the true meaning of that statute, and it follows that it can have no possible reference to orders of seizure and sale, which are regulated exclusively by articles 68 and 782 *et seq.* of the Code of Practice. They are essentially *ex parte* orders, which are admittedly issued at chambers, and unquestionably in or out of term-time. *Cumming v. Archinard*, 1 La. Ann. 279.

We therefore conclude that we committed no error in our previous opinion. Rehearing refused.

(40 La. Ann. 581)

## Succession of MOORE.

*(Supreme Court of Louisiana. May 23, 1883.)*

1. **DESCENT AND DISTRIBUTION—EXCESSIVE DONATIONS—RIGHTS OF FORCED HEIRS.**  
Forced heirs have an action in reduction of excessive donations, which extends, not only against co-heirs, but even against strangers. It includes a spouse.
2. **SAME—EXCESSIVE DONATIONS—EFFECT.**  
Donations in excess of the disposable portion produce no effect for the surplus.
3. **SAME—APPRAISEMENT OF PROPERTY DONATED.**  
Property donated must be appraised at its value at the death of the donor, and fictitiously added to the property owned by him at his death, in order to ascertain the disposable portion.
4. **SAME.**  
Excessive donations are not null, but reducible.
5. **SAME—DONATIONS—BEQUEST TO DONEE.**  
When the property donated is less in value than the disposable portion, and that portion has been bequeathed to the donee, the latter is entitled to the difference from the estate of the testator.
6. **GIFT—OF BONDS WHICH PASS BY DELIVERY—HOW MADE.**  
Bonds payable to bearer, and title to which is transmissible without indorsement or assignment, but by simple delivery, may be the objects of a manual gift, and are not required to be donated by authentic act. This sort of donation is subject to no formality.
7. **HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHTS OF SURVIVOR.**  
The usufruct which the law allows to the surviving spouse over the share of the deceased in the property of the community, during widowhood, when there exists issue of the marriage, is not defeated by testamentary dispositions of the deceased, bequeathing the disposable portion, and the usufruct over his undisposed share of the community property, to the survivor. *WATKINS, J., dissents.*
8. **SAME.**  
Such usufruct can be defeated only where the predeceased has by will disposed of his share, in whole or in part, adversely to the usufruct, so that both the usufruct and the bequest cannot co-exist. *WATKINS, J., dissents.*
9. **SAME.**  
A husband may give to his wife that which he can to a stranger, but not more. In case of an excessive donation, the donation may be reduced at the instance of the forced heirs, whose *légitime* has been encroached upon, but only to make it good.

*(Syllabus by the Court.)*

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

The object of this suit is to have it judicially declared that the widow of the deceased, John T. Moore, is not entitled to a usufruct over his share in the community, and that certain donations by decedent to his wife are nullities; also for an accounting of certain individual property alleged to have been owned by decedent previous to his marriage. The plaintiffs in these suits are the minors Flannagan, represented by their natural tutor, who had married one of the daughters of the deceased; the minor Hickey, represented by his natural tutor, who had married another daughter; and Julia, another daughter of the deceased, who married John T. Moore, Jr. All the unmarried children of decedent adhere to their mother in this controversy. Plaintiffs demand the immediate possession and enjoyment of their share in the succession of the deceased free from the usufruct of the widow. There was judgment below, recognizing the succession as a creditor of the community for \$7,000, and the widow, as a creditor, for \$2,000; that the donations were simulated; that the widow was entitled to the disposable portion, and the plaintiffs to the share accruing to them, as forced heirs, in that portion of decedent's estate which the law prohibits him from disposing of. From this judgment the widow appeals.

*Robert G. Dugue*, for Mrs. John T. Moore, Jr., and Hickey. *Semmes & Legendre* and *W. B. Lancaster*, for appellant. *H. D. Ogden* and *Singleton*, *Broune & Choate*, for Flannagan, intervenor.

**BERMUDEZ, O. J.** The object of this suit is to have it judicially declared (1) that the widow of the deceased is not entitled to a usufruct over his share in the community property; (2) that the donations of securities and cash made by the deceased to his wife, in New York and New Orleans, are nullities, and, if not such, are excessive, and should be reduced to the legal quantum; (3) that the deceased left individual property, which he owned previous to his marriage, and which must be accounted for. The defense is that the deceased, by his will, confirmed the usufruct given by law to his widow, and has bequeathed to her the disposable portion of his estate; that the donations attacked are valid as having been made in New York during the existence of the domicile of the couple in that state, and agreeably to the local law. There was judgment recognizing the succession as a creditor of the community for \$7,000; the widow as a creditor for \$2,000; that Moore never acquired a domicile in New York; that the donations are simulated; that the effects donated should be inventoried; that the widow is entitled to the disposable portion, and the plaintiffs to the share accruing to them, as forced heirs, of that portion of his estate of which the law prohibits him from disposing. From this judgment the widow prosecutes this appeal. The appellees have prayed for no amendment. Three questions are therefore presented: (1) What are, in the eye of the law, the testamentary disposition of the deceased, and what is practically their extent? (2) Whether the donations made in New York are or not valid. (3) Whether the succession is a creditor or not of the community. John T. Moore died in this city on March 29, 1886. He left a surviving wife, seven children, and two sets of grandchildren, representing their deceased mothers. He executed a will on October 20, 1885, which was followed by a codicil dated February, 1886. The will contains the following clause: "All the property I am possessed of consists of community property. I give, devise, and bequeath unto my wife, Agnes Jane Byrne Moore, the usufruct during her natural life of all the property I may die possessed of, community or no community. I hereby appoint my said wife executrix of this, my last will and testament, with seizin of my entire estate, and without any bond or security whatever, and without an inventory of my estate." The codicil contains two special legacies, amounting to \$10,000, and the following clause: "I give and bequeath unto my said wife, Mrs. Agnes Jane Byrne Moore, the disposable portion of all the property, real and personal, movable and immovable, in whatsoever the same may consist and wherever situated, I may own or possess at the time of my death, and to that end I constitute my said wife my universal heir and legatee. I do hereby declare that this is a codicil to the last will and testament already referred to, as having been made by me by act before W. J. Castell, late a notary public in this city, on 20th of October, 1885, which said last will and testament shall be and remain in full force and effect."

1. These clauses must be taken and construed together in order to ascertain what the intention of the testator was. A careful consideration of them impresses the mind that his main object was to give to his wife all that the law allowed him to dispose of in her favor. He first expresses the wish that she should have the usufruct during life of all his property, and he next bequeaths to her the disposable portion of that property, constituting her, to the end, his universal legatee. The plaintiffs contend that, under the terms of the act of 1844, (now article 916, Rev. Civil Code,) and under article 1710, Rev. St., the widow cannot claim both the disposal portions and the usufruct. Article 916 reads: "In all cases when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed, by last will or testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease whenever the survivor shall enter into a

second marriage." This is a reproduction of the second section of the act of 1844, p. 99; Rev. St. art. 1711. Article 1710 justifies an action to revoke charges or conditions illegally imposed by a testator on the legitimate portion of forced heirs, and is a reproduction of article 1708 of the Code of 1825. The purpose of the law was obviously to enlarge the rights of the surviving spouse by conferring on him or her privileges not previously possessed. Under anterior laws, such spouse was entitled to take only his share of the community property, and had no claim whatever over the portion accruing to the issue of the marriage with the deceased as his share therein. Since the passage of the law, the surviving spouse has, *virtute legis*, a right of usufruct over the share of the deceased in the community property inherited by the issue of the marriage, whenever the deceased has not, by a testamentary disposition, provided to the contrary. The usufruct, under the provision of the law, continues during the widowhood of the survivor, when there exists issue of the marriage, and no will to the reverse. The law did not propose, by allowing the usufruct, to abridge any of the rights of the first dying spouse. On the contrary, it left it within his power, his discretion, even his caprice, to place his share in the community property in the condition in which it would have been in had not the law of 1844 been passed, as it provides that the usufruct will accrue to the survivor if the deceased has not disposed, by will, of his share, inherited by the issue of the marriage. The spirit and the letter of that portion of the law are simply that the surviving spouse shall have, during widowhood, the usufruct of the share of the deceased in the property of the community, there being issue of the marriage, when the deceased shall not, by will, have disposed of his entire share in the property, so as to defeat the legal usufruct over the whole; clearly implying that where the deceased shall have, in that mode, disposed of a part of his share, the usufruct created by law should extend only over the portion inherited by the issue of the marriage, due regard had to their *legittime*. At Moore's death, his widow was clearly entitled to her half of the community property; and, in the absence of any will to the contrary, she would also have been entitled to a usufruct, during her widowhood, over the remaining half,—that is, the share of her husband therein inherited by the issue of the marriage. *In nonorem preteriti matrimonii*. *A fortiori* would she be entitled to such usufruct when, there being a will, it provides that she shall have it. Surely, as the law did not design to curtail any of his rights over his property which he possessed previous to the law, Moore could have bequeathed the naked ownership of the disposable portion in favor of any stranger; for, under the previous laws, he could have disposed of that portion of his estate even unqualifiedly, such ownership to become eventually full ownership at the termination of the usufruct. His widow, in the case just stated, would have had a usufruct over the entire share, as well that portion bequeathed to the stranger as that inherited by his issue; the legatee taking nothing beyond the naked ownership of one-third, and the issue that of two-thirds. There could even be no objection to his bequeathing the disposable portion without any restriction, including both ownership and usufruct to a stranger, leaving the other two-thirds to accrue in naked ownership to his forced heirs as the maximum of their *legittime*, but subject to the usufruct of his widow. What he could do in favor of a stranger, he could validly do in favor of his wife. Who can do more can do less. It is apparent that the only condition imposed by law for the existence of the usufruct in favor of the survivor is that the deceased shall not have disposed, by will, adversely of his share in the community. As a consequence, it follows that, where the adverse disposition affects only part of the share, the usufruct shall not extend over the disposed portion, but shall exist over the undisposed portion inherited by the issue of the marriage. Disposing of the share means disposing of the entire share. To dispose of part of the share is not to dispose of the entire share,—is not to dispose of the

share. It is true that Moore could not encumber the portion for which his children are forced heirs, that is, their *legitime*; but the fact is that he has not done so, for the encumbrance is placed upon it by law, independent of his participation. All Moore did was to confirm it. It would have existed without the confirmation, which is practically a superfluity. The words used for the confirmation, and which apparently are expressive of a bequest, are of little or no significance, for the plain reason that, without such confirmation, the widow would have had the usufruct by the force of the law, and could have been deprived of it only by an adverse testamentary disposition of her husband. The contention of the plaintiffs is that "where there is a will which diverts from the issue the disposable part of the community property, which the issue would otherwise inherit, and so the issue does not inherit the whole, the usufruct does not attach." This proposition is untenable, and rests upon the inadmissible theory that disposing of a part is disposing of the whole of the thing. In support of this view, counsel relies on the decisions of a previous court in two cases, that of *Succession of Forstall*, 28 La. Ann. 198, and of *Succession of Denegre*, unreported, O. B. 45, fol. 529; also *Grayson v. Sanford*, 12 La. Ann. 646. The terms of the wills of Forstall and of Moore are not germane. The facts are different. The ruling, therefore, cannot be invoked as a precedent. The opinion shows that Forstall had disposed of his entire share in the community in favor of his wife, while in the instant case Moore has bequeathed to his wife only the disposable portion, confirming her legal usufruct over the remaining portion of his share in the community property, without affecting or attempting to encumber in the least the ownership of the two-thirds inherited by the issue. The court used the following language: "The condition upon which the survivor shall have the usufruct is that the predeceased husband or wife shall not have disposed of his or her share; that is, the share that he or she was permitted by law to dispose of." A thoughtful reading of the text of the law, and consideration of its spirit and purpose, shows that the disposition which is referred to as destructive of the usufruct is not one in favor of, but one adverse to, the survivor,—one which actually takes away from him, in unmistakable terms, the usufruct, in whole or in part. Hence, where the deceased spouse, leaving issue of the marriage, and owning separate and common property, bequeaths to the survivor the disposable portion and the usufruct of his undisposed share in the community property, the disposition is valid and binding on the heirs inheriting the undisposed portion. And the same is true where he institutes the survivor his universal legatee; for the bequest is not null, but reducible to the disposable portion and the usufruct over the undisposed share. Rev. Civil Code, art. 1502. In *Succession of Denegre*, subsequently decided, it was held by a divided court that, as the testator had bequeathed \$10,000 to one of his daughters, and directed that the rest of his property be administered for the benefit of his widow and children, he had disposed of his share in the community, and that his widow was not entitled to the usufruct. The error consists not so much in the construction of the law as in the interpretation placed on the will; for it is clear that if, after making the legacy, the testator had provided that his estate should, at his death, pass to his heirs, the decision would have been correct. Such was the condition of things presented in *Succession of Schiller*, 53 La. Ann. 1, in which the testator had willed that his estate be distributed among his legal heirs according to the law in force in the state. The word "distribution" implying a division, and therefore a partition, the present court held that the widow was not entitled to the usufruct which she claimed. The facts in the *Grayson Case*, 12 La. Ann. 646, are not analogous to those here. The widow did not claim both the disposable portion and the usufruct, and the court did not say that she could not have both. The matter under consideration was the interpretation of the will. The same may be said of the ruling in the *Grayson Case*, *supra*.

It is a fallacy to suppose that where a person dies owning separate property, and, besides, his share in the community, the disposable portion consists only of part of that share. His succession is necessarily made up of his separate estate and of his share in the community; the disposable portion varying, according to the number of the children left, from two-thirds to half and to one-third of the entire estate. Hence, in the present case, as the property left by Moore consists of not only his separate estate, but also of his half of the assets of the community, the disposable portion is of one-third of both, as he left more than three children. From all the foregoing, it is perfectly clear that, as Moore has not in any manner disposed, by testamentary disposition, adversely to the usufruct created by law in favor of his surviving wife, but has, on the contrary, confirmed that usufruct, it follows that his will must be maintained, and his widow recognized as entitled to the disposable portion, and to the usufruct over the rest of his property to the extent to be hereafter set forth.

2. The next question to be considered relates to the donation of securities and cash made by Moore to his wife in New York and New Orleans. We deem it unnecessary to review the testimony which was offered to show that Moore has never lost his domicile in New Orleans, and has never acquired any in New York. We are satisfied that the circumstances under which he left New Orleans, and which it is needless to state, were such as to inspire him with the desire of leaving the city to seek tranquillity elsewhere; that he left with the intention of establishing another domicile in some other place; but we are not convinced that he did so in New York, as is claimed. The intention and the fact must co-exist. There is nothing substantial to show that that intention was ever realized beyond a doubt. It does not, however, follow that the donations made by Moore to his wife while they were in New York, and subsequently here, are nullities. They must be viewed as made in New Orleans. They, no doubt, were made and accepted *bona fide*. The donation made in New York consists in United States bonds to the amount of \$100,000, and that in New Orleans of money, \$7,935.55, aggregating \$107,935.55. The defendant denies that the donations are excessive, and, even if such, that they can be reduced. Surely, the widow, not being an heir, cannot be required to collate if the donations exceed the disposable portion; but it is beyond all dispute that the plaintiffs, who are forced heirs, have by the law the right to bring an action in reduction. It is manifest that, unless they enjoyed that privilege, the exercise of which is optional with them, the articles of the Code which prohibit excessive donations where there exist forced heirs would be dead letters,—nay, read out of the book altogether. Rev. Civil Code, art. 1493 *et seq.* Article 1504 admits the right, saying that it can be exercised by forced heirs only, but not by donees, legatees, or creditors. Rev. Civil Code, arts. 1502, 1703. Also H. D. Vo. Donations, II., (a) 1, 5, 11, 15, 16, 18; C. N. 921, 922; Chabot, Vo. Adoption Locri, p. 386, No. 28. The authors are unanimous on the question, and recognize the extension of the right, not only against concurrent heirs, but even against strangers. The wife may be benefited as much as the stranger, but not more. She forms no exception. Rev. Civil Code, art. 1746; *Miller v. Andrus*, 1 La. Ann. 237; *Grover v. Clarke*, 7 La. Ann. 175; C. N. 920 *et seq.*; V. Demolombe, V. 19, No. 189; Pothier, Don. § 3, art. 5; Locri, 11, p. 451; Duranton, 8, n. 316; Merlin, Vo. Inst. O'her, § 1, No. 9; Aubry & Rau, V. 7, p. 184, § 683; Laurent, V. 12, No. 152. See, also, Baudry, Lacantinerie, V. 2, pp. 165, 166. It is because of that right of action that the law provides that, in determining the question of reduction, the property disposed of *inter vivos* must be fictitiously added to that belonging to the donor at the time of his death, and appraised at its value then. Rev. Civil Code, arts. 1235, 1505. It also emphatically provides, in calculating the disposable portion, that all the property donated or bequeathed by the deceased must be included, whether given to the children, to relations.

or to strangers. Rev. Civil Code, art. 1234. It therefore follows that the plaintiffs in this suit have a standing to demand a reduction of the donations if the effects donated were, at the death of the donor, worth more than the disposable portion. The amount of the property inventoried nears \$245,000; that of the bonds and cash foots some \$108,000. It is claimed that to the inventory should be added the separate property of the deceased, valued in the judgment at \$7,000. This would swell the inventory beyond \$350,000, donations included. There is no proof in the record, that we have been able to discover, establishing the value of the bonds at the death of Moore, and there is no specific argument or prayer on the subject that can justify a decision presently of the question whether the donations exceed or not the disposable portion; so that this matter must be left open for future consideration and determination in other proceedings. The donations, if excessive, would not on that account be null, but simply reducible. Rev. Civil Code, art. 1502. In relation to the amount which Mrs. Moore claims to have loaned her husband, *i. e.*, \$20,000, and which were the proceeds of coupons on the bonds, and were subsequently returned by him to her, it is enough to say that, if the bonds became her property by the donation or gift made of them to her, she necessarily was likewise the owner of the fruits yielded by them, and is not accountable therefor. It has been contended that the donations are null because not made in the proper form; that is, by notarial act, under article 1538, Rev. Civil Code. The bonds, payable to bearer, were corporeal movable effects, which could pass, without indorsement or assignment, by simple delivery, and may be considered as proper objects of a manual gift, which is not subject to any formality. Rev. Civil Code, art. 1539; V. Laurent, vol. 12, pp. 351, 352, Nos. 280, 281.

3. The third subject to be considered is the claim of the succession against the community for the separate property of Moore, owned by him anterior to his marriage, and which was used for the benefit and advantage of the community. The claim is stated to amount to \$20,000. The district judge, however, did not recognize it to be so large. He admitted the claim for \$7,000 only. The plaintiffs have not prayed, by answer to the appeal, any increase of that allowance. The appellant has not shown in what particular it is erroneous, and the evidence does not satisfy us that the finding of the lower court in that respect ought to be disturbed. The judgment appealed from has recognized Mrs. Moore as a creditor of the community for \$2,000. The appellees have not complained of the allowance, and cannot expect any amendment on the subject. The condition of the transcript and the absence of any pointed demand for any specific relief, as far as figures go in all cases, particularly as concerning the reduction of the donations eventually, do not permit us, as already intimated, to arrive at any particular result in that regard.

We will conclude instating the manner and mode in which, keeping in view the matters involved in the present controversy, the succession of John T. Moore ought to be and must be settled. The mass of the succession must be composed of the separate property of the deceased, of his share in the common property, and of the value of the effects donated at the time of his death. After payment of the debts and charges against his estate, including the legacies and the \$2,000 found in favor of Mrs. Moore, the net residue must be divided into three equal parts. The first third should be composed of the separate property of Mr. Moore, and, in addition, of such portion of his share in the community as may be necessary to complete that third. Out of that third must be deducted the two legacies of \$10,000, and the residue of the third will accrue to Mrs. Moore in full satisfaction of the legacy of the disposable portion made to her by her husband, including the value of the effects and money donated to her by him in New York and in New Orleans. Should there remain a deficit between the amount of the legacies added to the donations and the third of the entire estate, the deficit will have to be satisfied out of the

share of the deceased in the community; but should, on the contrary, the amount of the legacies, added to that of the donations, encroach beyond the third, on the remaining two-thirds, this surplus shall be forfeited by the widow, and she would take only the difference between the legacies and the amount of the third. Rev. Civil Code, art. 1510. Next, Mrs. Moore will be entitled to the usufruct of the remaining share of the deceased in the community during her widowhood, under the law, as confirmed by the will; and, finally, the portion of the estate of the deceased as shall be thus subjected to the usufruct of Mrs. Moore shall be deemed as the *légitime*, accruing in naked ownership to the nine children, as forced heirs of the deceased, share alike,—the plaintiffs herein, viz., the minors Flannagan and Mrs. Moore, Jr., jointly to be entitled to two-ninths, and the minor Hickey to one twenty-seventh of that portion. For those reasons it is ordered and decreed that so much of the judgment appealed from as recognizes Mrs. Moore as a legatee for the disposable portion, and as a creditor for \$2,000, and the succession as a creditor for \$7,000, be affirmed, and that in all other respects it be reversed. It is further ordered and decreed that the donations made in New York and New Orleans be recognized as valid, the same to be allowed to Mrs. Moore in part satisfaction of her legacy of the disposable portion; and, in case the same exceed that portion, that the surplus be declared forfeited by Mrs. Moore, to be made good by her to the succession,—it being understood that the legacies of \$10,000 are to be first deducted from the disposable portion. It is further ordered and decreed that Mrs. Moore be declared entitled, during her widowhood, to the usufruct of the share of her husband, inherited by the issue of their marriage, as shall remain after satisfaction of the disposable portion. And it is further ordered and decreed that the plaintiffs and the other children and grandchildren be recognized together as entitled, in their capacity of forced heirs of the deceased, to the naked ownership of the two-thirds or portion of his share in the community as is subjected to the usufruct of Mrs. Moore; or the minors Sullivan and Mrs. Moore, Jr., to one-ninth each of said same share, and the minor Hickey to one twenty-seventh thereof. It is further ordered and decreed that the appellees pay costs of appeal.

Mr. Justice WATKINS dissents on the question of usufruct, but concurs in all other respects.

#### ON APPLICATION FOR A REHEARING.

(May 31, 1888.)

BERMUDEZ, C. J. The salient complaint is leveled against the allowance of the disposable portion and usufruct claimed by the widow. The brief in support is a mere repetition of what had been previously said and written on the subject on behalf of the plaintiffs, and an ingenious criticism of the opinion in the case, attacking it on matters of secondary importance, without in the least impairing its solidity and correctness on the main issues.

1. The petitioners rely explicitly on a decision which we had not thought proper to notice specially, and which they contend has an immediate favorable bearing; that is, the case of *Grayson v. Sanford*, 12 La. Ann. 646. In that suit it appears that the testator had bequeathed to his widow the usufruct of his property, and, in case of a suit for a partition by any of his children, all the property he could dispose of by law, forever. There was brought such suit, and the widow claimed the usufruct, but not the disposable portion. The court said that the principal question was whether she was entitled to the usufruct, or to the disposable portion, and that the solution of the issue depended on the interpretation of the will. The question did not arise whether the widow was entitled to both the usufruct and the disposable portion, for the plain reason that it was not the intention of the testator that she should

have both, but either the one or the other. He willed her the usufruct, and eventually the disposable portion. It is true that the court gave her the disposable portion, *i. e.*, one-third, there being more than three children; but it does not appear that she ever claimed that this portion included the usufruct over the share of the deceased in the community, and hence the court did not pass upon it. It could not have rendered judgment *ultra petitum*, or for more than was at issue. There is to be found no precedent in the reports in which both the usufruct and the disposable portion, as known previous to the passage of the act of 1844, were claimed by the surviving spouse. The rulings in *Lee's Case*, 9 La. Ann. 398, and in *Clarkson's Case*, 18 La. Ann. 424, have no bearing upon the present controversy. The first relates to matter within the first provision of the act, and the second has already been met in the opinion. The construction placed by the petitioners on the purport or tenor of the act of 1844, or article 916, Rev. Civil Code, is the result of a confusion of ideas on the subject. They seem to consider that certain articles of the Code of 1825 form part of the organic law, and are not susceptible of repeal or amendment by the law-making power; but such is not the case. The act of 1844 has surely modified those articles, so that the right which the surviving spouse had, when there existed a community with the deceased, prior to that legislation, are broader eventually to-day, and that the same extend over the share of the deceased in the community in the shape of a usufruct for a time, varying according to certain circumstances stated, subject to the right of the predeceased spouse of disposing by will, so as to defeat that usufruct. We have not held that the share constituting the *legitime*, reserved to forced heirs, has been decreased, or may be incumbered, by a testator. The share accruing to such heirs is the same to-day as it ever was, with this difference: that it is incumbered, not by the testator, but by the law, with a usufruct in favor of the surviving spouse in community, when the predeceased has not by his will determined otherwise. We hold that a spouse in community can legally bequeath to the survivor the disposable portion of his or her estate, as it always was known, and may confirm in his or her favor the usufruct provided by law, either by remaining silent, or by expressing himself clearly on the subject; the language used, whether a bequest or a ratification, being immaterial.

2. After a review of what we said on the question of the \$20,000, included in the \$27,630.55, and claimed by Mrs. Moore as so much reimbursed to her by her husband in satisfaction of coupons lent him by her, we think it preferable that the whole matter be left open for future consideration in the proceeding which the heirs may bring against Mrs. Moore for an account. Our opinion will therefore be accordingly considered as silent on the subject. The same may be said of the portion of the decree which alludes to the New Orleans donation. This disposition embraces the surplus of the \$20,000, namely, the \$7,635.55, which will have also to be accounted for.

3. We have not considered the \$10,720.58 to which the petition for a rehearing refers, as having been deposited in bank to the credit of Mrs. Moore after October 20, 1885, and which are said to belong to Moore or his succession. We did not deem them at issue by the pleadings. The door remains open for any claim which the plaintiffs may have on this or any other subject not expressly passed upon, when they will call on Mrs. Moore for an account of anything which is not hers.

4. Neither did we allude, for a like reason, to the city consolidated bonds alleged to have been taken from the bank-box, between Moore's death and the day of inventory by Mrs. Moore, in satisfaction of her claim of \$2,000, which the plaintiffs admit to be due her. The liability of Mrs. Moore for these bonds remains also a matter for future consideration.

5. Neither did we concern ourselves with the alleged donation made to Mrs. Gibbons, a daughter of Moore, as there was no issue on the subject. Neces-

sarily, if the donation was made and is subject to collation, it will have to be deducted from the disposable portion when ascertained.

6. It was a matter of indifference, for the purposes of the opinion, to consider the value of the United States bonds at Moore's death. All effects donated, to whomsoever, or illegally withheld, will have to be fictitiously or actually added to the property left by Moore, and in actual existence, as his, at the time of his death, and will have to be appraised at their value then, in order to ascertain the disposable portion.

7. Finally, we see no reason to change the conclusion previously reached, that the bonds, which are payable to bearer, and the title to which is transmissible, without any indorsement, or assignment by mere delivery, are not subject to any formality save that of tradition and acceptance.

To make the alterations mentioned, it is unnecessary to grant a rehearing. It is therefore ordered and decreed that the original judgment herein be amended so as to eliminate from it such portion as refers to any donation made in New Orleans, and that, in other respects, it remain undisturbed. Rehearing refused.

WATKINS, J., adheres to his original opinion on the question of usufruct, and concurs in other respects.

FENNER, J., (*concurring*.) Under the light thrown on it by the able brief for rehearing, I have given additional consideration to the interesting question touching the usufruct. To my mind it is perfectly clear that articles 915 and 916 of the Civil Code announce the policy of the law concerning the disposition of community property at the death of one of the spouses. That policy is that the survivor shall have the usufruct of the share of the deceased therein in two cases, viz.: (1) Where the deceased has left no ascendant or descendant; (2) where he has left descendants, issue of the marriage with the survivor, in which case the usufruct extends only to the portion inherited by such issue. But these, like most other provisions for legal inheritance, are subjected to the power of testamentary disposition by the decedent. They are based upon the assumption that the legal dispositions conform to the natural desires and wishes of the deceased in absence of any expression of a contrary will. But when he has exercised the testamentary power, and has not left his property to be disposed of by the law, but has himself directed how it shall go, so that those who take it take under the will, and not under the law, then the will must be executed, and so much of the community property as passes under the will passes free from the usufruct. Hence the law says that the usufruct shall accrue only when the deceased "shall not have disposed by last will or testament of his or her share in the community property." Why? Because, when he has thus disposed of his share, he has left nothing for the law to operate upon, but has subjected the whole to the domination of his own will. Even if the testamentary donation be excessive, and be reducible to the disposable portion, such reduction inures only to the benefit of the forced heirs, and not of the surviving spouse, who stands deprived of the usufruct, because it was the plainly-expressed will of the testator that she should be deprived of it. But when the deceased has disposed of only part of his share, even though that part be the whole disposable portion, he leaves the balance to be disposed of by the law, free from any expression of his own will in reference thereto; and the issue of the marriage, inheriting solely under and by virtue of the law, must take subject to the burden which the law has imposed upon it, and which the testator has not interfered with, viz., the usufruct. In this case the testator has added a clear expression of his own wish that his wife should enjoy the usufruct, accorded by the law, of "so much of the share of the deceased in such community property as may be inherited by such issue." It is said, however, that this trenches upon the la-

*gitime* of the forced heirs, by adding to the whole disposable portion the usufruct of the rest. Suppose it does. It is the law which so operates; and the *legitime* is a mere creature of law, which it may alter at pleasure. I am unable to understand why the policy of the law, which attaches the usufruct to the whole when there is no will, should not equally apply to the residue when there is only a partial will; and still less am I able to discover any judicial authority to add to the plain legislative expression, "his or her share in the community," the words "or any part thereof," as claimed by counsel for appellees. It would require a strong current of authority to overcome my clear convictions on this subject. I find but a single decision directly in point, and that is *Denegre's Case*, which is unreasoned and unreported. *Lee's Case*, 9 La. Ann. 398, arose under article 915; and, as the decedent left an ascendant, the article did not apply. *Clarkson's Case*, 13 La. Ann. 424, did not concern these articles of the Code at all. *Schiller's Case*, 33 La. Ann. 1, harmonizes fully with the views above expressed, because we held that the whole estate was disposed of by the will. *Grayson v. Sanford*, 12 La. Ann. 646, though containing *dicta* hostile to our views, may be reconciled on the ground that it was doubtful whether the will did not intend to deprive the widow of the usufruct in case the contingency arose in which she took the legacy of the disposable portion. I therefore adhere to our original opinion on this point.

WATKINS, J., (*dissenting*.) I make the following extract from the brief of Mrs. Moore's counsel, viz.: "John T. Moore died on 29th March, 1886, in this city, leaving nine children, or their descendants, and a surviving spouse, the mother of said children. All his property belonged to the community which had subsisted between him and his surviving widow, Agnes Jane Byrne, to whom he was married in 1845. The plaintiffs in these suits are the minors Flannagan, represented by their natural tutor, who had married one of the daughters of the deceased, and the minor Hickey, represented by his natural tutor, who had married another daughter, and Julia, another daughter of the deceased, who married John T. Moore, Jr. All the unmarried children of the deceased, and also Mrs. Gibbons, a married daughter, living in St. Louis, adhere to their mother in this controversy. John T. Moore died testate, having executed a will dated 20th October, 1885, and a codicil dated 27th February, 1886. The will is in these words: "All the property I am possessed of consists of community property. I give, devise, and bequeath unto my wife, Agnes Jane Byrne Moore, the usufruct, during her natural life, of all the property I may die possessed of, community or not community. I hereby appoint my said wife executrix of this, my last will and testament, with seizin of my entire estate, and without any bond or security whatever, and without an inventory of my estate." The codicil, after giving a special legacy of \$5,000 unto Mrs. Burke, a sister of the deceased, and a special legacy of \$5,000 to the Society of St. Vincent de Paul, proceeds as follows: "I give and bequeath unto my said wife, Mrs. Agnes Jane Byrne Moore, the disposable portion of all the property, real and personal, movable and immovable, in whatsoever the same may consist, and wheresoever situated, I may own or possess at the time of my death, and to that end I constitute my said wife my universal heir and legatee. I do hereby declare that this is a codicil to the last will and testament already referred to as having been made by me by act before W. J. Castell, late a notary public in this city, on 20th October, 1885, which said last will and testament shall be and remain in full force and effect." The plaintiffs in these cases demand the immediate possession and enjoyment of their share of the succession of the deceased, free from the usufruct of the surviving widow. The act of 1844 in relation to the survivor's legal usufruct of his share in the community was, in its revision in 1870, incorporated into the Civil Code as articles 916 and 917; and the former is

couched in these words, viz.: "In all cases when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue," etc. The question for decision is whether or not the deceased disposed, by last will, in favor of his wife, "of his \* \* \* share in the community property."

What was the "share in the community property" of which he could have disposed, by last will, in favor of his surviving widow; his entire estate consisting of his half of the community property? His will bequeathed in her favor "the disposable portion of his property." Now, inasmuch as his half of the community property was his estate, he necessarily bequeathed one-third of his half of the community property, and he could not have validly bequeathed her more. *Ergo*, the deceased did dispose, by last will, "of his share in the community property;" i. e., the share in it of which he could legally dispose by last will. What is the necessary result? In my opinion, it is that the surviving widow cannot "hold in usufruct so much of the share of the deceased in such community property as may be inherited by such issue." It must be carefully observed that the phrase "share in the community property" is repeated in the cited article, and, as repeated, one serves to interpret the other. Paraphrase and state the sentence affirmatively, thus: In case the predeceased husband shall have left issue of his marriage with the survivor, and shall have disposed, by last will, of "his share in the community property, the survivor shall [not] hold in usufruct \* \* \* so much of the share of the deceased in such community property as may be inherited by such issue." Now, I respectfully submit that, if the true intent of the legislature was, and the true meaning of the law is, that, in order to have the effect of destroying the legal usufruct of the survivor, the last will of the deceased should have disposed of his half of the community property, the second clause of said article would be rendered nugatory and meaningless, for the obvious reason that there would remain nothing "to be inherited by such issue." The law contemplated that the bequest should leave something that might "be inherited by such issue." The law would have been inconsistent with itself if it were otherwise, because "the issue of the marriage" are forced heirs. To my thinking, the conclusion is irresistible that when, as in this case, the deceased husband, leaving more than three children as "the issue of his marriage with the survivor," has bequeathed to her the disposable portion of his estate, it being one-half of the community property, the remaining two-thirds of such half is liberated from the widow's legal usufruct, and passes to "such issue" in full ownership. This two-thirds is "so much of the share in such community property" as would remain after the widow's one-third is subtracted therefrom; and is "so much of the share in such community as may be inherited by such issue." I understand that the question here was squarely presented, and as squarely decided by the court, in *Forstall v. Forstall*, 28 La. Ann. 197, to which reference is made in the opinion of the court. The court says: "This is a controversy between the surviving widow and universal legatee of Edmond J. Forstall and the children, the forced heirs, in regard to the share of the deceased in the community property; the widow contending that she is entitled to one-third, the disposable quantum, and to a usufruct of the two-thirds reserved by law to the numerous heirs of the deceased, and the heirs contending that they are entitled, in full ownership, to the two-thirds reserved to them by law. \* \* \* Edmond J. Forstall disposed in favor of the surviving widow, by last will and testament, bequeathing to her his share of the community property. As there are more than three legitimate children, the legacy must be reduced to one-third, and the heirs are entitled, in full ownership, to two-thirds of the property of their father. The surviving

widow is not entitled to the usufruct of this two-thirds, because the deceased disposed by last will and testament of his share of the community property. \* \* \* When there has been no testamentary disposition of the disposable share of the predeceased husband or wife in the community property, the survivor shall be entitled to a usufruct, during his or her natural life, of so much of the share of the deceased in such community property as may be inherited by such issue. The condition upon which the survivor shall have a usufruct is that the predeceased husband or wife shall not have disposed of his or her share; that is, the share that he or she was permitted by law to dispose of." That case was argued and decided on the theory that the legacy of the widow was not only reducible, but reduced to the disposable quantum. That was all she claimed under the will. As thus presented, the instant case is precisely the same. The argument is made, in support of the defendant's contention, that the entire share of the deceased is meant; that the deceased could have bequeathed to his children his half of the community property; and that such a bequest could dissolve the survivor's usufruct, and no other. But I deny that the deceased could have made such a will. An excessive donation *mortis causa* is valid only for the disposable quantum, because the law vests the remainder in the forced heirs.

In *Succession of Schiller*, 33 La. Ann. 1, this court considered and interpreted a will couched in these words, viz.: "It is my will and desire that my debts be paid, and that my estate be distributed among my legal heirs according to the laws now in force in Louisiana." The court says: "The question presented simply is whether, by the phrase used, Schiller has or not disposed of his share in the community. If he has, his three children have inherited his half therein free from their mother's usufruct. If he has not, they have inherited it subject to that usufruct during widowhood. \* \* \* It is manifest that he has disposed of his estate, that is, of all the property belonging to him at his death, in favor of certain persons, and in certain proportions. That property consisted of his half interest in the community between him and his wife," etc. The court held this language to mean that the deceased's one-half of the community property "should accrue unburdened, and be delivered at once, to his three children." But they did not say that such one-half passed to them by the will. On the contrary, they do say: "The children inherit the naked ownership of two-thirds of the one-half of their father in the community property by the effect of the law. They inherit the remaining one-third, and the enjoyment of the entire half, to the exclusion of their mother's usufruct, by the effect of the will of their father, who, by abstaining from making any will, could have permitted his wife to enjoy such half as usufructuary during her widowhood." In this opinion the following propositions are distinctly announced, viz.: (1) That the will of the deceased disposed of his share in the community property; (2) that his estate was his share in the community property; (3) that the three children inherited two-thirds thereof by the effect of the law; (4) that they inherited the remaining one-third by the effect of the will; (5) that the children were entitled to the enjoyment of the half, to the exclusion of their mother's usufruct. These conclusions, in my opinion, are correct, and confirm those I have herein expressed. They are in exact accord with those entertained by our predecessors, as found reported in *Grayson v. Sanford*, 12 La. Ann. 647, in which the court said: "The principal point at issue in this cause is whether the surviving widow is entitled to the usufruct of the half of the community belonging to the estate of her deceased husband, or whether she shall take the portion thereof which her husband could dispose by law." The intimation is clear that she could not be allowed both. Thereupon the court decided that "the rights of the widow are fixed, by the will, to the disposable portion," and declared her entitled to one-half of the community property in her own right, and to one-third of her deceased husband's share in said community, and the legal heirs,

of whom there were seven, to the remaining two-thirds of same, in full ownership, and to a decree of partition. That opinion describes with precision and accuracy the claims of the forced heirs of Mr. Moore, and clearly defines their legal rights. It is my opinion that the legal usufruct of his widow and their mother was broken by her acceptance of the benefits of his will, and that his forced heirs are entitled to be put into immediate possession of their inheritance.

For these reasons I cannot concur in this part of the opinion and decision of the majority.

(40 La. Ann. 500)

LEVY v. NITSCHÉ.

(*Supreme Court of Louisiana. May 7, 1888.*)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—JURISDICTION OF PROBATE COURTS.  
Under the law in force antecedent to the adoption of the present constitution, courts of probate had jurisdiction for the partition and settlement of community rights and property, in which the heirs and legal representatives of a deceased spouse seek to ascertain, establish, and recover a share in the active mass of the community.
2. SAME—DISTRICT COURT OF PARISH OF ORLEANS.  
The Second district court of the parish of Orleans, as it existed at that time, was vested with exclusive jurisdiction of probate matters, and consequently of suits for the partition of community property in liquidation and not in possession of major heirs, as the co-proprietors thereof.
3. STATUTES—CONSTRUCTION—EFFECT.  
After the intent and meaning of a law has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the law as the text itself, and a change in the construction is the same in effect on contracts as an amendment of the law by means of a legislative enactment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge. Plaintiff, Mrs. Bertha Levy, agreed to sell to defendant, Julius Nitsche, a certain piece of real estate for \$3,150. After examination of the title, the defendant refused compliance with his bargain. Thereupon plaintiff instituted this suit to compel him to accept the title which she tendered and which she claims to be valid. Defendant appeals from an adverse judgment.

*Henry P. Dart*, for appellant. *White & Saunders*, for appellee.

WATKINS, J. This is a suit to compel the defendant to accept title to a piece of real estate, described in petition, and to which he makes the following objections, viz.: *First*, that it is derived through certain partition proceedings had in the Second district court of the parish of Orleans, wherein one succession obtained a decree against another, ordering a partition in kind; and that said court was without jurisdiction to entertain and decide it. *Second*, that, to said partition proceedings, the universal legatees, nominated in the will of the deceased defendant, were necessary parties, and were not cited; or, if they were cited, no judgment by default was taken against them antecedent to the rendition of final judgment. The case was submitted on an agreed statement of facts, and from an adverse judgment the defendant has appealed. The pertinent facts disclosed by the record are as follows: Ann Hugh and John Hugh were partners in community, and, at the death of the former, on the 4th of December, 1875, the assets thereof aggregated in value \$11,500. On the 10th of December following, her succession was opened in the Second district court of the parish of Orleans; her will admitted to probate; an inventory which consisted exclusively of an undivided one half interest in the community property was taken; and her testamentary executor qualified. Her will bequeathed special legacies amounting to \$3,700, and bestowed the *residuum* of her estate on certain universal legatees, all of whom were minors. Contemporaneously with these mortuary proceedings, John

Hugh, the surviving partner in community, was interdicted by a judgment of the Second district court, and a curator was appointed and qualified. An inventory was taken of his share in the community property as his only estate. This consisted of about \$6,000 worth of real estate and \$5,000 of money, and rights and credits. On the 4th of November, 1876, the curator brought suit in the Second district court against Mrs. Hugh's executor for a partition of this community property. On an exception of the executor to his capacity to stand in judgment alone, the curator filed a supplemental petition demanding that the special and universal legatees be cited. Some of them appeared and answered, but others did not. Neither the record or the court docket shows that any judgment by default was entered in the case against those not answering. Neither John Hugh or Ann Hugh left any forced heirs at the latter's death. Judgment decreeing a partition in kind was rendered on the 11th of June, 1877; the proceedings had thereunder were regular and formal; and, in pursuance thereof, a partition of the effects of the community was made in presence of a notary. In the partition in kind the allotment was as follows: (a) To the interdict John Hugh, two pieces of real estate, \$2,800 and \$1,200, \$4,000; money, \$1,997.64½; total, \$5,997.64½. (b) To the succession of Mrs. Ann Hugh, one piece of real estate, \$2,800; bonds, etc., \$345; money, \$2,852.64½; total \$5,997.64½. This partition was duly homologated and executed. The interdict died in 1881, and his succession was opened in the civil district court. The piece of real estate in contestation now was acquired by his estate while in the charge of the curator. After his succession was opened, it was sold under an order for the sale to pay debts; and from the proceeds of sale realized his individual debts were paid, and also one of the debts of the community, which was for taxes of 1875,—the year in which Ann Hugh died. After his debts were paid, nothing remained for distribution among his collateral heirs. The property that was allotted to the succession of Ann Hugh in the partition was insufficient to discharge its debt and special legacies, and the latter prorated on the proceeds remaining in the hands of the executor. There was nothing applicable to the bequests in favor of the universal legatees.

1. On this state of facts the abstract legal question is raised as to the lack of jurisdiction in the Second district court, under the constitution and laws then in force, to entertain and decide that partition suit. From 1854 to 1880 the Second district court of the parish of Orleans had exclusive cognizance of all probate proceedings therein. No change in the law took place, in this respect, under the constitution of 1868. *Vide* act 80 of 1869. The reorganization of the district courts of the parish of Orleans, under the present constitution, resulted in the abolition of the Second district court, and its jurisdiction and power were vested in the civil district court of said parish. It is of first importance, therefore, to make an examination of the jurisprudence of that period, in connection with the articles of the Codes conferring probate jurisdiction on the courts, in order to get a clear idea of the question in dispute. The Code of Practice provides that "courts of probate shall have exclusive power \* \* \* to ordain and regulate all partitions of successions in which minors, interdicted, or absent persons are interested, or even those which were made by authority of law between persons of lawful age and residing in the state, when such persons cannot agree upon the partition and the mode of making it." Article 924, § 14. It also provides that all partitions of succession property shall be made by the court of probate of the place where the succession is opened." *Id.* art. 1022. These articles have been the subject of frequent adjudications, by our early predecessors from which we have selected the following extracts. In *Gosselin v. Gosselin*, 7 Mart. (N. S.) 469, the court said: "By the Code of Practice, (article 924, par. 14,) the court of probates has exclusive jurisdiction of partitions. This Code was approved in 1824, and, after its approbation, but before its promulgation, the legislature, by an act

of 1825, (page 122, § 3.) gave to the district court jurisdiction of suits for partition. \* \* \* Thus the jurisdiction of the court of probates, which was exclusive in cases of partition by the Code of Practice, was rendered concurrent only by the act of 1825,—posterior to the approbation of the Code by the government, and anterior to its promulgation.” In many subsequent decisions their successors maintained the concurrent jurisdiction of the ordinary and probate courts in partition suits, while all upheld the exclusive jurisdiction of the courts of probate in all other respects. *Gague v. Gague*, 3 Mart. (N. S.) 172; *Hooke v. Hooke*, 6 La. 420; *Craighead v. Hynes*, 2 La. Ann. 150. This resulted in a line of demarcation being drawn between the character of partition suits which could be brought in each respectively. Hence we have the provision of the Civil Code that actions for “partitions between co-proprietors of the same thing \* \* \* must be brought before the judge of the place where the property to be divided is situated,”—Rev. Civil Code, art. 1290, (1804,)—as contradistinguished from those of Code Pr. art. 1022, above quoted, but which did not interfere in any wise with those of Code Pr. art. 924, § 14. The adjustment of the jurisdiction of the ordinary and probate courts, in matters of partition, under those textual provisions, was attended with difficulty; but it was effectually accomplished, and the jurisprudence settled. One of the questions on which most frequent discussions arose during this process of adjustment was whether or not an action for the partition of community property between the survivor and the heirs of the deceased spouse should be brought in a court of ordinary or probate jurisdiction. In the case of *Babin v. Nolan*, 4 Rob. (La.) 278, it arose and was decided; and, in the course of their argument, the court took occasion to review the jurisprudence, and pronounced their opinion in the following unmistakable terms: This “is essentially an action for the settlement and partition of the community, in which the plaintiff, in the right of his sister, who was the defendant’s late wife, seeks to ascertain, establish, and recover the portion to which the deceased was entitled in the active mass of the community; and, ever since the decision of the court in *Turner v. Collins*, 1 Mart. (N. S.) 370, courts of probate have been repeatedly and uniformly recognized in our jurisprudence to have jurisdiction, if not exclusive, at least concurrent with the district courts in such cases. In the case of *Broussard v. Bernard*, 3 Mart. (N. S.) 37, which originated in a suit instituted by the heirs of the wife against the (surviving) husband, for the division of the community property, the concurrent jurisdiction was positively recognized. And so again it was decided in *Gague v. Gague*, 3 Mart. (N. S.) 172; *Gosselin v. Gosselin*, 7 Mart. (N. S.) 470; *German v. Gay*, 9 La. 584; *Stein v. Stein*, Id. 278. That principle has been affirmed in the following cases: *Lawson v. Ripley*, 17 La. 246; *Griffin v. Waters*, 1 Rob. (La.) 149; *McCullum v. Palmer*, Id. 512; *Walker v. Kimbrough*, 23 La. Ann. 637. It must be borne in mind, however, that these decisions do not impeach the authority that is conferred on probate courts by Code Pr. art. 924, § 14, which has been considered and treated as vesting them with jurisdictions of partitions in which minors were interested” independently of the property to be divided. We find, in *Craighead v. Hynes*, 2 La. Ann. 150, a terse and forcible expression of this view, and which was expressed in the following terms, viz.: “By section 14 of article 924 of the Code of Practice, courts of probate had power to ordain and regulate all partitions of successions in which minors, interdicted, or absent persons, are interested; or even those which are made by the authority of law between persons of lawful age and residing in the state, when such persons cannot agree upon the partition, and the mode of making it.” “By a subsequent act, jurisdiction was given to the district courts. Our impression is that, under the latter clause of the above section, courts of probate have jurisdiction in cases of partition in which minors are concerned.” While, on the other hand, it has been frequently decided that in case a succession has been fully administered by a testamentary executor, tu-

tor, curator, or administrator, and the heirs, all of whom are majors, have come into the possession of the *residuum*, as an inheritance, or the same has been unconditionally accepted by them, the probate jurisdiction over the property ceases, and the co-proprietorship of such heirs supervenes. *Babin v. Dodd*, 4 Rob. (La.) 20; *Saunders v. Taylor*, 6 Mart. (N.S.) 528; *Roman v. Roman*, 4 La. 202; *Watts v. Frazer*, 5 La. 383; *Pool v. Brooks*, 10 La. 18; *Greig v. Muggah*, 11 La. 359; *Picou v. Dussau*, 4 Rob. (La.) 412; *Succession of Rofsignac*, 21 La. Ann. 364. And particularly in the cases decided by our immediate predecessors, viz.: *Woolfolk v. Woolfolk*, 30 La. Ann. 139, and *Freret v. Freret*, 31 La. Ann. 506. This lengthy and careful examination of adjudicated cases would not have been necessary but for the opinion expressed in the case of *Boutte v. Boutte's Ex'rs*, 30 La. Ann. 181, and that of *Buddecke v. Buddecke*, 31 La. Ann. 572, in which a contrary doctrine was announced by the court. The former is diametrically opposed to the theory announced in *Craighead v. Hynes*, and the latter is equally opposed to that in *Babin v. Nolan*, quoted *supra*. The facts in the *Boutte Case* were that Charles and Francois owned in indivision a valuable property in this city. Charles died, leaving 13 children; and, subsequently, Francois died, leaving a widow and 13 children,—some of the children of each being minors. The latter left a will, and the appointed executor qualified and took possession of his estate. Nine of the heirs of Charles were the plaintiff's, and the remaining four and the executor of Francois were the defendants in a suit in the Second district court for the partition of that property. The question of the jurisdiction of the court was not raised by the counsel of either party, but the court, on its own motion, said: "Here is not a succession to be settled, and property, exclusively its own, to be partitioned among the heirs of that succession. \* \* \* The Second court had not jurisdiction of the action, just as it is without jurisdiction of an action of partition between two individuals who are majors, and own property in common in their own right." The heirs of neither decedent were in possession of the property as proprietors. The succession of one was under administration in the Second court at the time. Each decedent left minor children, and one a surviving widow, interested in the property which was the subject of the adjudication. The state of facts on which the opinion of the court in the *Buddecke Case* was predicated are that the matrimonial community existing between Christian T. Buddecke and his wife was dissolved by the death of the latter; the former, and 11 children surviving,—three of the latter being minors. The deceased left a will which was probated in the Second district court. One of the major heirs of the deceased instituted suit against her father and brothers and sisters, in the Fifth district court for a partition of the property of the late community, and it was ordered to be sold in order to effect a partition. When the title was subsequently tendered to the purchaser, he objected to it on the ground that the court had no jurisdiction to order the partition sale, and he was ruled to accept it. The court said: "We are surprised to learn that the decision in *Boutte v. Boutte's Ex'rs*, upset opinions of some of the profession on the matter of jurisdiction upon which their practice had been based. That decision but followed the old and beaten path. Forty years ago the same rule was expressly laid down by this court in a case which has been 'reported,' in the legal sense of that word, and, from the reporter's statement of the facts, we know its whole history. *Henry v. Keays*, 12 La. 214." From a critical examination of those two opinions it will appear that each stands alone, and is unsupported by pertinent authority. In the former no opinion is cited, and in the latter only that in *Henry v. Keays*. In that case suit was brought to annul a judgment of the district court ordering a partition of property of a deceased sister between her surviving sister and brother, both of whom were of full age at the time. It will appear that one of the determinative factors in that case was the claim made by the plaintiff in the partition suit to one-fourth interest in the property to be partitioned

by virtue of a donation; and another was a claim set up by the defendant therein for a share of the same by virtue of a sale. On the facts of that case the court said, in regard to the jurisdiction: "The court of probates, on the contrary, can exercise no power not expressly given to it by statute, and is therefore of limited jurisdiction. By the Code of Practice, the authority of that court is exclusive to ordain and regulate partitions of successions, even among persons of lawful age and residing in the state, when they cannot agree upon the partition and the mode of making it. Under this grant of authority this court has thought that the court of probates might well act upon certain questions arising incidentally in the course of the partition which would more properly belong to the ordinary jurisdiction, if presented separately, etc. \* \* \* But "the authority of the district court to ordain and regulate a partition of property held in common by other title than hereditary succession at the suit of the co-proprietor can hardly be questioned at this time." Instead of these views giving any support to the opinion expressed in the *Buddecke Case*, in our conception they are precisely in line with prior and subsequent adjudications herein cited by us. The sole ground on which the court sustained the jurisdiction of the district court was that as to the pretensions of the plaintiff based on a donation she was a stranger to the succession, and not an heir. That was an appeal brought up from the First judicial district, outside of the parish of Orleans; and there was no minor or interdicted person interested in the property partitioned.

While we are at all times desirous of following the decisions of our predecessors, and feel ourselves instructed by their wisdom and learning, yet, in a situation like the present one, we feel constrained to adhere to those decisions which were rendered during a *regime* in which the controversies they acted on were living and vital, and the court, whose jurisdiction is questioned, was still in existence. Indeed, the jurisprudence of that time constituted a rule of property on which titles to real estate were adjusted, and to disturb it now that the court, on whose order the property was partitioned, has ceased to be, would be straining a legal technicality too far and to no useful purpose. In a recent case this court said: "A familiar rule is that judicial construction of statutes becomes incorporated in it." *Hawkins v. Beer*, 37 La. Ann. 55. In *Insurance Co. v. Debolt*, 16 How. 431, Chief Justice TANEY, as the organ of the court, said: "And the sound and true rule is that if the contract when made was valid by the law of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its courts altering the construction of the law." In *Douglas v. County of Pike*, 101 U. S. 677, the late Chief Justice WARRE announced the same principle in even more perspicuous language: "The true rule is to give a change of judicial construction in respect to a statute the same effect, in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective, and not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change in the decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment." In *State v. Thompson*, 10 La. Ann. 122, Mr. Justice SPOFFORD stated the rule in this wise: "Whatever might be our impression, were the matters *res integra*, we deem it important, in the construction of statutes, to adhere to what has already been adjudged. The judicial interpretation becomes, as it were, a part of the statute, and should not be changed but for the most cogent reasons." We feel constrained to follow the jurisprudence as it was established by this court at a time when the second court was in existence, and to give a like interpretation to the law defining its jurisdiction. It is not our purpose, nor do we

deem it necessary, to any more specifically overrule the decisions in *Boutte v. Boutte's Ex'rs*, and *Buddecke v. Buddecke*. We simply decline to follow them, because we think they are departures from the established jurisprudence with reference to the jurisdiction of the Second court in probate matters, and which jurisprudence constituted and is a rule of property that cannot be altered to the prejudice of titles which were adjusted and settled thereunder.

2. With respect to the defendant's second ground of complaint,—the absence from the record of the partition proceedings complained of of a judgment by default,—it is sufficient to say that it appears from the record that the universal legatees of Mrs. Ann Hugh took nothing by the bequest,—her succession proving inadequate to meet her debts and special legacies. It further appears that some of the legatees appeared and answered plaintiff's demands. We cannot regard this objection as serious. *Omnia rite acta* may well be applied to the action of the judge of the Second court. We are of the opinion that the judge *a quo* decided correctly. Judgment affirmed.

(40 La. Ann. 525)

STATE v. TIERNAN.

(Supreme Court of Louisiana. May 7, 1883.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

A ruling of the trial judge cannot be reversed, unless the bill of exceptions makes such showing of the facts and circumstances as will enable this court to decide that he erred.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; ALFRED ROMAN, Judge.

Prosecution by the state of Louisiana against Thomas Tiernan for the willful murder of one Joseph D. McCarthy. From a sentence of life-imprisonment in the state penitentiary defendant appeals.

Wm. L. Thompson, for appellant. M. J. Cunningham, Atty. Gen., and Lionel Adams, Dist. Atty., for appellee.

FENNER, J. The record presents for our consideration a single bill of exceptions, (others being waived,) which recites that Thomas Howe, state's witness, testified "that he told McCarthy, the deceased, to come with me, that Tiernan was coming with a pistol; to which evidence or statement defendant objected, because it was the mere opinion of the witness, and as such not entitled to go to the jury as evidence; that the court overruled said objection," etc. This is the entire bill, as offered to the judge for signature, and its insufficiency, as failing to show in what way the statement was a mere opinion, is apparent. The judge, however, in his reasons, states that the defendant's objections were of an entirely different character, as was also the evidence objected to. He gives the statement objected to as follows: "The witness said that, having seen Tiernan's coat lying on a bucket in the bar-room, he inquired where Tiernan had gone to, when some one in the crowd said: 'Here he is, coming with a gun.' Witness then told McCarthy to come along with him. At that time the accused was coming down the street with something in his hand." The judge states that the grounds of defendant's objections were that the words spoken and repeated were hearsay, and had not been uttered in the presence and within the hearing of the witness. The judge ruled that the words spoken formed part of the *res gestæ* of the transaction then going on, and were admissible. If we give the exceptor the benefit of the judge's reasons, as part of his bill, nothing appears on the bill anywhere to show any error in the judge's ruling. For aught that appears to the contrary, the expression may have been strictly part of the *res gestæ*, and we cannot reverse his ruling without clear showing of error. Judgment affirmed.

(40 La. Ann. 479)

## REGGIO v. McCANN.

(Supreme Court of Louisiana. May 7, 1883.)

**MORTGAGEES—FORECLOSURE—DISPOSITION OF SURPLUS.**

When a plantation owned jointly by a number of persons is mortgaged to secure a debt which they, the mortgagors, alone owe, and the owner of the outstanding interest in the property, not bound for the debt, conveys that interest to the mortgagors, his co-proprietors, and waives in favor of their creditor his privilege and mortgage, upon the sale of the plantation to pay the mortgage debt, the creditor, after the full satisfaction of his debt, cannot apply the balance of the price at which the property is adjudicated to the payment of a subsequent mortgage in his favor. He cannot encroach upon the mortgage and vendor's privilege of the co-proprietor beyond what is required to pay the mortgage debt for the benefit of which the waiver was made.

(Syllabus by the Court.)

Appeal from the civil district court, parish of Orleans; W. T. Houston, Judge.

Controversy between E. Reggio and D. C. McCann, involving a claim to a certain plantation. Defendant appeals from a judgment allowing plaintiff \$2,617.

*Harry H. Hall*, for appellant. *Armand Pille* and *Jerome Meunier*, for appellee.

TODD, J. On the 17th of March, 1880, Alph C. Reggio, Louise and Edward Reggio, mortgaged to Charles P. McCann a plantation situated in the parish of Plaquemine, known as the "Promised Land Plantation," to secure a debt of \$8,700. On the same day Miss Ernestine Reggio sold to the other Reggios, the above-named mortgagees, six twenty-fifths of the same plantation for \$7,200, and retained a mortgage to secure the payment of the price. This act of sale contains the following stipulation, (quoting:) "It being distinctly understood, however, by and between the parties hereto, that the mortgage which the said Alph Reggio, in conjunction with Edward Reggio and Louise Reggio, has this day granted upon the above-described plantation, in favor of Charles P. McCann, by an act passed before a notary, shall have preference and priority of rank and privilege over the mortgage and vendor's privilege herein granted, in consequence of the indebtedness due said McCann, arising from matters connected with the present vendor's ownership of part of said plantation prior to this date, and the assumption of such indebtedness by said Messrs. Reggio and Miss Louise Reggio, to the acquittance and discharge of the present vendor. And that, in case of the sale of the herein described plantation, whatever amount may be due under the aforesaid mortgage, granted in favor of said McCann, shall be paid in preference and without regard to the mortgage granted by these presents," etc. On the 17th of June, 1882, the mortgaged property was sold under foreclosure proceedings, and adjudicated to the mortgagee, Charles P. McCann, for \$16,700. Of this sum, \$3,264.50 was applied to the payment of a prior judicial mortgage, and the residue retained by the purchaser. On the 1st of February, 1883, the property was acquired by the defendant. Ernestine Reggio having died before this judicial sale took place, Edward Reggio, her testamentary executor, brought suit to subject the said plantation named, and in possession of the defendant as third possessor, to the payment of \$2,617.80, being the balance remaining out of the proceeds of said judicial sale, after the satisfaction of the mortgage of Charles P. McCann, and which it is claimed should have been applied to the payment of the mortgage of Ernestine Reggio. The answer avers that, after the payment of the prior incumbrance on the plantation and costs, there remained out of the proceeds of the judicial sale made on the 17th of June, 1882, \$13,435.50; and in resistance of the plaintiff's demand it is averred: "(1) That inasmuch as the respondent's 'mortgage claim of \$10,817.70 rested, not alone upon nineteen twenty-fifths of the plantation sold,

but upon the entire place; and inasmuch as by her act of sale of Ernestine Reggio gave to said mortgage preference and priority of rank over her mortgage and vendor's privilege, which she expressly made subordinate and inferior in rank to the said mortgage of C. P. McCann; and inasmuch as McCann's mortgage was given to secure a debt for which she was primarily liable in part; and inasmuch as her vendor's privilege only rested upon six twenty-fifths of said plantation,—it follows that the sum of \$10,817.20 should be deducted from said balance of \$13,435.50, leaving for *pro rata* distribution the sum of \$2,617.78. (2) That McCann holding subsequent mortgages upon said plantation, and Ernestine Reggio holding a vendor's privilege only upon six twenty-fifths thereof, she is entitled to \$628.26 only of said residuum, which respondent has always been ready and willing to pay, with eight per cent. per annum interest from June 17, 1882." There was judgment for plaintiff for the full amount claimed, and defendant has appealed.

The determination of the cause rests entirely upon the construction of the clause in the act of the 17th March, 1880, quoted above, containing the waiver or renunciation of Miss Ernestine Reggio in favor of McCann. Construed in connection with the circumstances preceding and attending the execution of the act, as disclosed by the record, we find no difficulty in discovering what we conceive to be the motive that prompted its execution, and its real meaning and intent. The mortgage given to McCann by the three Reggios named, though given on the entire plantation, operated only on nineteen twenty-fifths of it; that being the extent of their interest in it. There was an outstanding interest belonging to Miss Ernestine Reggio of six twenty-fifths of the property. Miss Reggio evidently desired that McCann's debt should be fully secured, and the reason why she so wished is explained in the writing; being, as therein stated, that McCann's debt arose out of matters with which she had been connected as part owner of the land, and the assumption of her indebtedness by her co-owners, and her acquittance and discharge therefrom. To remove any doubt about the sufficiency of the security for McCann's debt, she agrees that his mortgage (quoting) "shall have preference and priority of rank and privilege over the mortgage and vendor's privilege herein granted." This mortgage and privilege was the first mortgage and privilege upon the interest of Miss Reggio in the land. She waived its rank in favor of McCann, and by this act also subjected her interest in the land to the mortgage given by her co-proprietors over the residue of the plantation, and which but for this act would be free from the mortgage. The only purpose of this contract on the part of Miss Reggio was to secure the identical debt for which the mortgage had just been executed by the other proprietors. It looked to none other, and certainly could not have referred to any subsequent mortgage that McCann might have on the land, and which at the time of her contract was not even in existence. Nor did she bind herself personally for the debt, but her engagement was strictly limited by the language of the act to giving the preference to McCann's mortgage over the portion of the land on which her own mortgage and vendor's privilege rested. And what was the full scope of her obligation under this waiver or renunciation? It was simply that any deficit there might be after exhausting the mortgaged property of his debtors should be made good out of the proceeds of her portion of the land on which her mortgage and privilege operated. This is plainly the full extent of Miss Reggio's liability, without invoking or considering the elementary rule of construction substantially to the effect that if from the language of a written instrument any doubt can exist as to the fact of liability, or extent of the liability, of an obligor, it must be construed most favorably to such obligor. The mortgage of McCann was enforced against the plantation, and it was sold. The debt was then, with interest and costs, \$10,817.70. The property brought \$16,700. From this total was deducted \$3,264.50, leaving for distribution in the sheriff's hand \$13,435.50. Out of this McCann's entire debt was paid,

leaving a balance of \$2,617.80. This balance the plaintiff, as the legal representative of Ernestine Reggio, claims should be applied to paying the mortgage and privilege in favor of her estate, and the defendant, McCann, contends that nineteen twenty-fifths of this residuum should be applied to the extinguishment of his subsequent mortgage on the property; leaving to the plaintiff only the excess of such proceeds over such mortgages, amounting to \$628.26. The judge of the first instance rejected this contention or proposition, and gave judgment in favor of the plaintiff for this balance or residuum after the full satisfaction of McCann's mortgage.

We think the judge was right, and his judgment is affirmed.

(40 La. Ann. 498)

LYONS v. KELLY.

(Supreme Court of Louisiana. May 7, 1888.)

1. JUDGMENT BY CONFESSION—WHERE RENDERED—JURISDICTION OF PARTIES.

When a party about to be sued is presented, by his adversary, with a petition addressed to a particular court, and indorses thereon his acceptance of service, waiver of citation, and confession of judgment, and when, two days afterwards, said petition and confession are filed in court, and judgment rendered thereon, defendant cannot claim that such judgment is a nullity because violating article 162, Code Pr., prohibiting election of a domicile other than his own for the purposes of being sued.

2. SAME—CONSTRUCTION—DATE OF FILING.

The confession of judgment was a pleading to the merits, and, being filed with his authorization, its effect is to be governed by the date of filing, and not by the date of its preparation.

3. SAME—WAIVER OF OBJECTIONS.

Having thus pleaded to the merits without exception to the jurisdiction, the judgment rendered is valid.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge. Suit by John F. Kelly against Isaac L. Lyons. From a judgment maintaining an exception of no cause of action, and dismissing the suit, Kelly appeals.

*Farrar, Jonas & Kruttschnitt*, for appellee. *Merrick & Merrick, D. B. Graham, and Roberts & Milling*, for appellant.

FENNER, J. On the 8th day of February, 1886, Lyons filed in the civil district court a petition against Kelly upon notes and accounts aggregating \$4,250. The petition, when filed, contained the following indorsement: "Service of the foregoing petition accepted, and citation waived, and judgment confessed in favor of plaintiff as therein prayed for, with interest and costs," which indorsement was signed by Kelly, and duly acknowledged before a notary public on February 6, 1886. On February 10, 1886, judgment was rendered against Kelly as prayed for, which recites, as its reasons, "considering the written confession herein on file, and on producing due proof in support of the demand, the law and evidence being in favor of plaintiff." In February, 1887, a writ of  *fieri facias*  was issued, addressed to the sheriff of the parish of Winn, under which certain property of Kelly was seized and sold, and the writ was returned partially satisfied. On May 10, 1887, Kelly filed an action to have the judgment declared a nullity on the grounds that, at the date of his waiver of citation and confession, and of the filing of the suit, and of the rendition of the judgment, he was a resident of the parish of Winn, which "is not within the jurisdiction of the civil district court of Orleans, and that the said court had no civil jurisdiction of the person of your petitioner, and that the judgment aforesaid is void and of no effect, having been rendered in violation of articles 90 and 162 of the Code of Practice." To this petition, of which the original proceedings were made part, Lyons filed an exception of no cause of action, which was sustained in the court below, from which judgment the present appeal is taken.

The sole question is whether the case, on the showing made, is controlled by the concluding paragraph of article 162, Code Pr., which lays down the general rule that a party must be sued at his domicile, "and shall not be permitted to elect any other domicile or residence for the purpose of being sued, subject to those exceptions expressly provided by law;" or by articles 98, 333, 334, 335, and 336, the last four of which provide, in effect, that exceptions to the jurisdiction *ratione personæ* must be pleaded *in limine*, and the first declares that, in absence of such exception, the judgment rendered shall be valid, notwithstanding the suit may have been brought elsewhere than at the domicile. We consider it beyond question that the case is governed by article 98. Knowing that he was to be sued forthwith, and presented, indeed, with a petition actually drawn for the purpose, and addressed to a particular court, he indorsed thereon his acceptance of service, waiver of citation, and confession of judgment. It is evident, and not disputed, that this gave authority to the attorney who drew the petition to file in court his indorsement; and the act of filing, being done by his authorization, was his act, and is to be treated precisely as if, on the filing of the petition, he had himself appeared in court, and entered the confession. Such confession was a pleading to the merits, and the judgment thereon was valid under the very terms of article 98. The mere reading of the recent cases interpreting article 162, Code Pr., will show that this is not the election of domicile which is prohibited by either the letter or spirit of that article. *Phipps v. Snodgrass*, 31 La. Ann. 88; *Stevenson v. Whitney*, 33 La. Ann. 655; *Stackhouse v. Zuntz*, 36 La. Ann. 531. In the last case, we broadly said: "It is now the settled jurisprudence that parties may, by consent, waive personal jurisdiction, and submit their controversy to the determination of another tribunal than that of their domicile, having jurisdiction over the subject-matter, and that this latter thereby becomes vested with complete jurisdiction over the matter." It is true that this applies generally to waivers made in pending suits; but, when the waiver is made in the shape of a pleading, its effect is governed, not by the date when it was prepared, but by that on which it was filed in court. If a non-resident defendant, advised that a suit was about to be brought against him here, should employ his attorney, and instruct him, when the suit was brought, to file a particular answer, surely the validity of the pleading, when filed, to waive jurisdiction, would not be affected by the fact that the instructions had been given and the plea prepared before the suit. We think the instant case stands on the same footing. In *Phipps v. Snodgrass* it was held that article 162 "relates to cases where parties, by agreement and with a view to a future suit, designate a place other than defendant's domicile in which to bring it." Here there is no allegation of any agreement whatever, on the subject of the place where the suit should be brought; and it is not even alleged, nor does it appear, that plaintiff even knew that New Orleans was not defendant's domicile, or used any influence or inducement to obtain his confession. Judgment affirmed.

(40 La. Ann. 433)

## STATE v. YOUNG.

(Supreme Court of Louisiana. May 7, 1888.)

## EXCEPTIONS, BILL OF—CONFLICTING STATEMENTS—HOW DETERMINED.

In considering bills of exceptions which contain conflicting recitals by counsel and by the trial judge, the supreme court will be guided by the statement made by the judge.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; EDWARD T. LEWIS, Judge.

Defendant, Jesse Young, was indicted for murder, and convicted of manslaughter, with a recommendation to the extreme mercy of the court, and  
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prosecutes this appeal on three bills of exception, two of which were abandoned.

*E. P. Veazie* and *Chas. W. Duroy*, for appellant. *M. J. Cunningham*, Atty. Gen., and *John W. Ogden*, Dist. Atty., for appellee.

POCHE, J. Appellant, who was convicted of manslaughter under an indictment for murder, complains of an erroneous ruling of the trial judge, made under the following circumstances: During the examination of a state witness, who was a deputy-sheriff, the district attorney asked him the following question: "Did the accused run away when he struck the man?" To which the witness gave the following answer: "I was so informed when I first arrived at the place where the killing was done." The bill informs us that counsel for the accused objected to the evidence, but the recital is conflicting as to the precise objections which they urged. That part of the bill which was drawn by the attorneys of the defendant contains the statement that the objections were that the evidence was inadmissible, because it was parol testimony, and because it was hearsay. But the latter portion of the statement is denied by the trial judge, who declares very emphatically that the only objection urged by counsel was the ground that flight could not be proved by parol testimony. Thus the case presents one of those frequently occurring, and withal very unpleasant, conflicts of statements between counsel and the trial judge. In keeping with the well-established rule, we must be guided by the statement which emanates from the judge. We can but repeat here what we said in *State v. Waggoner*, 39 La. Ann. 920, 8 South. Rep. 119: "With due deference to counsel, we must be guided by the bill, which is the recital of the incident under the signature of the trial judge. We have had frequent occasions to announce and to follow this rule, which we feel compelled to adhere to, as long as proper means are not resorted to or provided for the purpose of adjusting differences of that nature which arise between judge and counsel." Under the judge's version, the objection remains without force, as it is clear that parol testimony is competent to prove flight of an accused in a criminal trial. Defendant's counsel had reserved two other bills, but, as they do not refer to either of them in their brief, we pass them over with like silence. Judgment affirmed.

(40 La. Ann. 598)

**STATE *ex rel.* O'DONNELL *v.* HOUSTON *et al.*, Judges.**

(*Supreme Court of Louisiana*. May 11, 1888.)

**1. CONSTITUTIONAL LAW—LEGISLATIVE POWERS—CONTESTED ELECTION OF MEMBERS OF ASSEMBLY.**

The constitution of the state makes each house of the general assembly the sole judge of the qualifications, election, and return of its members; consequently the district courts are without jurisdiction to determine contested elections touching the right to seats or membership in the legislature.

**2. SAME.**

Nor have they the power to take the depositions of witnesses relating to such contests, nor the authority to cause the ballot-boxes to be produced in court, and the seals placed thereon by the commissioners of election removed, the boxes opened, and the ballots recounted.

**3. SAME—JUDICIAL POWERS.**

Judges cannot exercise other than strictly judicial powers. They cannot combine with such power those that properly pertain only to the duties of a commissioner to examine witnesses, and take in writing their depositions, for the purpose of forwarding them to another tribunal.

(*Syllabus by the Court.*)

Application by *W. E. O'Donnell* for writs of prohibition and *certiorari* against *W. T. Houston* and *A. L. Tissot*, judges civil district court for the parish of Orleans. Relator was a candidate at a certain election held in New Orleans, and was elected. His opponents on the opposition ticket filed a pe-

tion in the civil district court contesting his election, and the court ordered a recount to be made. Relator seeks in this action to prevent the respondent judges from proceeding further in the matter.

*Augustus Bernau*, for relator. *Alfred Goldthwaite*, *Chas. H. Luxemburg*, and *Walter D. Denegre*, for respondents.

TODD, J. This is an application for writs of *certiorari* and prohibition. The relator represents, substantially, that he was a candidate at the recent election for the legislature (house of representatives) from the Third ward of the city of New Orleans, on the regular Democratic ticket, and was elected over his opponents, Otto Helmann and William Mehle and Charles B. Wilson,—the two first named the candidates of the "Young Men's Democratic Association," and the latter on the Republican ticket; that he was declared elected by the commissioners of election, and returns of the election promulgated by the returning officers showed his election; that the said defeated candidates have filed a petition in the civil district court contesting relator's election; that the suits of Mehle and Wilson were allotted to Division B of said court, and of Helmann to Division A; that the said contestants admit the election of relator on the face of the returns, but insist that a recount of the votes will show a different result; that they have cited relator into said court, and have asked that the returns showing relator's election be revoked, and that they (contestants) be declared elected. The relator further avers that he filed a plea to the jurisdiction of the court,—the power to entertain said suits,—but the respondent judges overruled the plea, have taken jurisdiction, have appointed a day for taking testimony in the suits, have issued subpoenas *duces tecum* commanding the clerk of the criminal district court, the custodian of the ballot-boxes, to produce the boxes, returns, tally-sheets, etc., in open court, and that it is the intention to break the seals placed on said ballot-boxes by the commissioners of election, to have the ballots again counted and by those not authorized to do so. It was charged that said action on the part of the judges was arbitrary, and involved a usurpation of authority, and was in contravention of the constitution and laws of the state. The respondent judges in their answer, while admitting that the exclusive power is vested in the general assembly to judge of the qualifications, elections, and returns of its members, alleged that the proceedings before them do not infringe upon this legislative prerogative; that it is a proceeding such as is known in a proceeding to perpetuate testimony, and assist the legislature to dispose of these election contests more speedily; and that it is not their purpose to interfere with the custody of the ballot-boxes. Article 23 of the present state constitution provides that "each house shall judge of the qualification, election, and return of its own members." In the face of this provision, it requires no argument to show that the courts have no power to judge or determine with regard to these essentials. That is, that it is manifest that in so far as the judges have been asked by these contestants to determine the contest and annul the return already made in favor of relator, and declare the contestants duly and legally elected, they have not the shadow of authority to do so. Therefore that part of the petition of these contestants that invokes judicial authority in these respects must be eliminated from the controversy. The respondents do not, in fact, claim such power, but, as intimated before, they seem to limit their authority to the production of the ballot-boxes, the removing of the seals therefrom, the recounting of the ballots, and the examination of witnesses, for the purpose of assisting the legislature in the final determination of these contests; and we do not understand the counsel of the contestants in their oral and written arguments before this court to claim more than this. But have the judges authority to go even thus far? In these contested election suits, instituted and pending before them, does their power and jurisdiction extend over any matter pertaining to such suits; such, for

instance, as is claimed, of compelling the custodian of the ballot-boxes to bring the boxes into court to have the seals placed thereon by the prescribed authority removed, the boxes opened, and the ballots manipulated and counted by persons other than the law has designated, and depositions taken with respect to these matters? That is the question we have to determine.

The provision quoted from the present constitution, "that each house shall judge of the qualification, election, and return of its members,"—appears in every state constitution that precedes the present one; but in these preceding constitutions this provision is followed by these words, (quoting:) "But a contested election shall be determined in such manner as shall be directed by law." The suppression of these words in the present constitution is not without meaning and significance. What is the inference to be drawn from it? Evidently it was to give emphasis to the declaration that each house was to judge of the qualifications, elections, and returns of its members by stripping it of any restriction or condition that could limit its scope or impair its full force, and to make each house in truth and in fact, in all cases and under all circumstances, the judge, and the sole judge, of all matters pertaining to the election of its members. These qualifying words found in the previous constitutions were the sole warrant for contests before the courts relating to election for members of the general assembly. In 1814 an act was passed the provisions of which are embodied in sections 1431, 1432, 1433, Rev. St., which authorize proceedings before the court inaugurating, as it were, contests, to be subsequently conducted and determined by the legislature, and providing for the taking of depositions of witnesses to be cited in such contests, etc. It is under these provisions, and also under a proviso in section 1386, it is to be presumed, that this proceeding before us for review was instituted. It was legislation that could not be deemed objectionable under the former constitution, but, on the contrary, might be construed as necessary and in strict conformity with the provision referred to, looking to contested elections relating to membership in the general assembly. But these provisions, and none other that we can find, confer power or authority on the judges to determine the contests, and adjudge and declare the result of the elections contested. Nor is such power claimed by the judges in the instant case, as we have seen from their answers, although formally invoked by the contestants. The only law cited by counsel for the contestants that would seemingly authorize such contests before the courts, and give power to the judges to determine them, is the proviso in section 1386, Rev. St., quoted by the counsel in his brief, and which, in our opinion, has no reference to contests for the legislature, but exclusively relates to contested elections for other state offices. If, then, as it seems plain and even conceded by all parties, there is no power or jurisdiction in the courts to judge and decide these contests, but the duties of the judges in such cases as the one before us are to be directed and confined to the taking of depositions, or, as the judges themselves say, a proceeding simply looking to the perpetuation of evidence, what will be the character of the functions they are to exercise in this instance? Evidently not judicial. This has been expressly decided. *Redon v. Spearing*, 31 La. Ann. 122; *U. S. v. Ferreira*, 13 How. 40; *Elliott v. Peirso*, 1 Pet. 341. If the services or acts in question are not judicial, such as do not strictly belong to their office or duties as judges, then in rendering the service required they could be viewed in no other light than simply as commissioners. See same authorities. But under article 92 of the present constitution, judges are forbidden from exercising any functions but such as are strictly judicial. In the face of this prohibition, their contemplated acts, even in the restricted sense in which they are viewed by themselves, are in contravention of the constitution, and are therefore void. We hold also that the law invoked as justifying this proceeding is obsolete, in view of the constitution as it now stands, unfettered by any restrictive condition, touching the power expressly conferred on the legis-

lature to judge of the election of its members. Entertaining these views, we conclude that the acts and proceedings of the respondent judges complained of by the relator are unwarranted and illegal, and that the same should be annulled and set aside, and the prohibition be made peremptory.

(40 La. Ann. 607)

STATE *ex rel.* SHAKESPEARE, Mayor, *et al.* v. VOORHIES, Judge.

(Supreme Court of Louisiana. May 19, 1888.)

1. PROHIBITION—WHEN LIES—USURPATION OF JURISDICTION.

Application for a prohibition asked to issue to a court which is charged with usurpation of jurisdiction, or exceeding its power, will not be entertained unless an exception has been made to its jurisdiction, and has been overruled.

2. MANDAMUS—TO COMPEL SUSPENSIVE APPEAL—WHEN LIES.

*Mandamus* does not lie to compel a suspensive appeal from an order *in limine*, granting an injunction, unless after exhaustion of adequate means to dissolve, and the act enjoined, if committed, would cause irreparable injury.

(Syllabus by the Court.)

Application for prohibition, *mandamus*, and *certiorari*.

Application by Joseph A. Shakespeare, mayor of the city of New Orleans, and others, for writs of prohibition, *mandamus*, and *certiorari*, against Albert Voorhies, judge Division E, civil district court, in which relator seeks to prevent the execution of a certain judgment rendered below.

Carleton Hunt, City Atty., and Horace L. Dufour, for relators. Braughn, Buck, Dinkelspiel & Hart, Farrar, Jonas & Kruttschnitt, and Lionel Adams, for respondents.

BERMUDEZ, C. J. 1. This is an application for a prohibition and for a *mandamus*, coupled with a prayer for a *certiorari* for the transmission to this court of the proceedings below. The complaint is that the district judge has usurped jurisdiction in issuing against the relator, and his executive subordinates, an injunction to prevent him from executing act No. 18 of 1886, known as the "Sunday Law," at a public entertainment proposed to be had on Sunday, the 20th of May, instant, at the fair grounds in this city; that relator moved to set the injunction aside on the ground that the court had no jurisdiction *ratione materie* to entertain the application on which the writ was allowed; that said motion was denied hearing, and the injunction remains in full force and effect. The relator further charges that he applied for a suspensive appeal from the order of injunction, and that the same was denied. Hence relator prays that the district judge be prohibited from taking cognizance of the case, and, in the alternative, that a *mandamus* issue to him to grant the appeal asked. The district judge makes return to justify his action on the premises. It appears that, before granting the injunction complained of, the district judge caused a rule to be taken by the parties asking it, on the defendants in the case, the mayor *et al.*, to show cause why the injunction should not be granted; that the mayor made a written answer, in which it is not charged that the court had no jurisdiction; that, after hearing, the court, for reasons assigned, granted the order prayed for; and that under it the writ issued. It also appears that, after this was done, the defendant took a rule to dissolve the injunction on the ground of want of jurisdiction *ratione materie*, asking that the matter be submitted and determined at once. The district judge declined taking immediate action, and made the rule returnable on the 18th, three days after the application for relief now under consideration had been filed here. When the present application was argued and submitted, the objection to the jurisdiction had not been acted upon. It is established by the jurisprudence of this court that no application for a prohibition can be entertained until after a plea to the jurisdiction of the lower court has been urged and overruled. The cases in which this has been held are so numerous that

it would be cumbersome to enumerate them all. *Vide State v. Judge*, 29 La. Ann. 806; *State v. Judges*, 87 La. Ann. 845; *State v. Steele*, 88 La. Ann. 569; *State v. Judge*, Id. 920.

2. The next question to be considered is whether a *mandamus* lies to compel a judge to grant a suspensive appeal from an order made by him *in limine* directing the writ to issue. There is no doubt that such appeal lies, in an appealable case, from any interlocutory decree therein rendered, the execution of which may cause the party affected thereby an irreparable injury; but we were not informed of any case in which it has been held that an order *in limine*, granting an injunction, belongs to that class of decrees. On the contrary, it has pointedly been held that a suspensive appeal will not lie from such an order, at least without clear showing that such a decree must of itself work an irreparable injury. *State v. Judge*, 29 La. Ann. 869. It must be admitted that an appeal on the merits of the case would afford no adequate remedy, as the controversy can be decided only after the 20th of May shall have passed; but it is apparent that the complainant has not exhausted his opportunities for prompt relief in the lower court. He is entitled to move for the dissolution of the injunction, and he has actually made a motion to that effect, which was pending and undetermined in the lower court, when he applied for relief here. *Non constat* that the district judge has not or will not, on hearing, dissolve the injunction; and this leaves relator without any ground of complaint. We cannot, under such circumstances, listen to the premature appeal to our supervisory jurisdiction.

It is therefore ordered and decreed that the application herein be dismissed, with costs.

(40 La. Ann. 589)

#### STATE v. WRIGHT.

(*Supreme Court of Louisiana. May 23, 1883.*)

##### 1. CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION.

In criminal cases the cross-examination of a witness must be confined to the matter stated by him in his direct examination, or clearly connected therewith.

##### 2. HOMICIDE—MURDER—EVIDENCE—EXAMINATION OF ACCUSED.

Where, in a prosecution for murder, it was proved that the accused went into the room where the killing occurred, with a drawn pistol, he (the accused) may be asked, when on the stand as a witness, what his intention was at the time he entered the room.

##### 3. SAME—REFUSAL TO CHARGE—CREDIBILITY OF EVIDENCE.

Where, upon the trial, there was testimony to the effect that the killing was accidental, the trial judge is not justified in refusing to charge the jury on the subject of accidental killing, and of negligence or non-negligence connected therewith, upon the ground that he did not believe the evidence. *State v. Tucker*, 88 La. Ann. 536, reaffirmed.

(*Syllabus by the Court.*)

Appeal from criminal district court, parish of Orleans; ALFRED ROMAN, Judge.

Prosecution by the state of Louisiana against George C. Wright for murder. Defendant appeals from a sentence of 10 years' imprisonment at hard labor upon a conviction of manslaughter.

W. L. Evans, for appellant. M. J. Cunningham, Atty. Gen., for the State.

TODD, J. The defendant appeals from a sentence of 10 years' imprisonment at hard labor, imposed after conviction of manslaughter on an indictment for murder. The grounds upon which he rests his appeal are presented by several bills of exception found in the record:

1. The first exception was taken to the ruling of the court permitting the attorney general to interrogate a witness for the defense, on his cross-examination, touching a matter about which he had not been asked nor testified in his direct examination. We gather from the bill of exceptions, and the rea-

sons assigned by the trial judge, the following facts connected with the ruling complained of: The witness, Mrs. Dehon, had testified on her direct examination that on the day the homicide occurred she was employed as a servant in the house wherein the killing took place. That in the house there was a bar-room; in the rear of the bar-room, a hall; and in the rear of the hall, a dining-room. That she was standing at the door leading from the hall into the bar-room. That she saw the deceased open that door, and cross the hall, knock three times at the dining-room door, which was opened to him by his sister, the wife of the accused. That harsh words passed between the deceased and his sister. He abused her, and told her he had come for some pictures. That the accused, who was at breakfast, rose from his seat, asked the accused to be more guarded in his language towards his (accused's) wife, and sharp words were then exchanged between them. That the wife of the accused then said to the deceased: "Stop that fuss, and I will get the pictures." That she left the dining-room, and went upstairs, leaving the parties in the dining-room. From there she passed into the yard, and on her return to the hall she saw the accused going to the bar-room with a pistol in his hands. There the direct examination stopped. On the cross-examination she was asked substantially to state what occurred then in the bar-room between the accused and the deceased; whether she heard the report of a pistol, and who fired it. Thereupon counsel for the accused objected to the questions; his objection being: "That the state attorney has no right to cross-examine any witness for the defendant except as to facts and circumstances connected with the matters stated in the direct examination." The objection was overruled, and the answers of the witness admitted, for the reasons assigned by the judge, to the effect that the questions and answers of the witness were clearly connected with the facts stated in her direct examination; and, "further, that the ends of justice would be subserved by allowing the witness to state fully all she knew in relation to the case." It is an elementary principle of the criminal law—one often recognized in our jurisprudence—that a witness can only be cross-examined on the subject-matter of his examination in chief, or on something closely connected therewith, or, as stated by Greenleaf: "The rule is now considered by the supreme court of the United States to be well established that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination." This *dictum*, though not now applicable to civil cases, still rules in criminal cases. *Rosc. Crim. Ev.* 173; *Archb. Crim. Pl.* 157; *State v. Lacombe*, 12 La. Ann. 195; *State v. Denis*, 19 La. Ann. 119; *State v. Swayze*, 30 La. Ann. 1923. One of the reasons assigned by the trial judge for his ruling admitting the evidence was (quoting) "that the ends of justice could be best subserved by allowing the witness to state fully all she knew in relation to the case before us." An apt reply to this is to be found in the decision cited above, 19 La. Ann. 119, from which we quote: "The discretion which is claimed for courts to relax, to change, or to utterly disregard the rules of criminal evidence which the legislature has declared obligatory, would effectually make the law a dead letter. Cases might occur wherein a relaxation of the rule might serve to advance the course of justice; but this is no reason why the general rule of evidence should not be observed, and until the law of evidence in criminal proceedings is changed, our courts are not justified in disregarding rules of evidence. It was well said by Lord KENYON that rules of evidence are of vast importance to all orders and degrees of men, and that our lives, our liberty, and our property are concerned in support of them." The only remaining question on this point is whether the questions to the witness allowed by the judge are obnoxious to this rule; in other words, were they "closely connected with the facts stated" in the direct examination? which is the test of their admissibility under the rule quoted. We note that the witness in the direct examination testified exclusively to what occurred,

before the killing, in the hall and dining-room: That the deceased came from the bar-room into the hall; passed through the hall, knocked at the door of the dining-room; abused his sister, who opened the door for him; was remonstrated with by the accused; and, after sharp words had passed, and after she had left the hall a moment, returned to it, and saw the accused going with a pistol into the bar-room. Not a word was she asked as to what passed in this bar-room, or about any conflict or struggle between the parties, or about the firing of a pistol, or anything, in short, about the killing. The vital points in the prosecution were, of course, the fact of the shooting and killing, and the person who did it. These vital facts, upon which the witness and the defendant's attorney had been wholly silent, the state's counsel attempted to prove by her; *i. e.*, to establish the crime charged against the prisoner by cross-examination of his own witness, who had not uttered a word about the commission of the deed. This was utterly unwarranted. It was giving a latitude to a cross-examination which the law does not tolerate.

2. The accused, sworn as a witness in his own behalf, was asked what his intention was at the time he entered the bar-room where the killing took place. The question was objected to, substantially, on the ground that it was not competent for the accused to show his intention at that time, and that he had stated his intention, or the intention actuating him, at the moment the firing took place. The objection was sustained, and the witness not permitted to answer. It had been shown by the testimony of a previous witness that the accused had crossed the hall, and entered the door of the bar-room, with a pistol in his hands. Of course, therefore, inquiry as to intention actuating the accused when he entered that room where the shot was fired and the killing done, was a vital one. In truth, the intent is the very essence of the offense. Before an accused was made a competent witness, the intent was left to be inferred from acts committed and proved; but the intent—the actual intent—with which an act is done, is no less a fact than the act itself; but he alone who commits it knows and can tell the intent with which it was committed. When an accused was made a competent witness, his competency was as unrestricted as that of any other witness, and we know of no law or legal principle that would debar an accused from testifying to his intent or motive where such intent or motive was material, and altogether a proper subject of inquiry. It frequently becomes important, in criminal trials, to ascertain the state of feeling—the partiality or prejudice—of a witness; and the usual way of ascertaining this is by direct inquiry to the witness, and his answer to such inquiry. This course is just as free from objection when applied to the accused as a witness. The judge, therefore, was in error in refusing to permit the question to be answered. *Whart. Crim. Ev. (8th Ed.) § 451.*

3. The counsel for the accused asked the court to give the jury several special charges concerning the right of self-defense. This the court refused to do; one of the reasons for such refusal being that, in his written charge to the jury, he had already charged the jury substantially to the same effect as asked in the special charges requested. From an examination of the record we are satisfied the reason of the judge's refusal to give the special charges requested was well founded.

4. Another charge was asked, couched in the words following: "A person who, unintentionally and non-negligently, when doing a lawful act, kills another, is to be acquitted." This is a correct enunciation of the law. *Whart. Hom. § 470.* The trial judge, however, refused to give it because it was inapplicable under the real facts of the case. In the assigning the reasons for his refusal to so charge, he states that there was evidence adduced at the trial that the accused "had not discharged the pistol at the deceased, but that it had gone off by accident and unintentionally," but that he (judge) did not believe it. If there was such evidence, and whether the judge believed it or not, under

the rule laid down by the present court in the case of *State v. Tucker*, 38 La. Ann. 536-542, the refusal to give the charge was error.

These conclusions reached upon the several questions above presented compel us to remand the case. It is therefore ordered, adjudged, and decreed that the verdict of the jury, and the sentence thereon appealed from, be annulled and set aside, and the case be remanded to the lower court to be proceeded with according to law.

(40 La. Ann. 558)

### SULLY v. SPEARING.

(*Supreme Court of Louisiana. May 22, 1888.*)

#### 1. LIBEL AND SLANDER—SLANDER OF TITLE—PLEADING AND PROOF.

In this action, for slander of title, defendant, by setting up title in himself, converts it into a petitory action, in which he must be treated as plaintiff, carrying the burden of clearly establishing his claim.

#### 2. JUDICIAL SALE—RIGHT OF PURCHASER TO POSSESSION—PROOF OF TITLE.

Plaintiff, showing a title derived from the undisputed owner in 1851, cannot be ousted by a defendant, who claims under a judicial sale made in a proceeding *in rem* in 1852, without clearly proving that the sale and proceeding were of a character to operate a valid divestiture of the property, particularly when the judicial sale was not followed by possession, and when the property had never been assessed or taxed in his name or those of his authors, but had for a long period been assessed in the names of plaintiff's authors, and had been possessed and valuably improved by plaintiff without notice of defendant's claim.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; A. VOORHIES, Judge.

This is a suit for slander of title instituted by Thomas Sully against Joseph H. Spearing. From a judgment recognizing plaintiff's title, defendant appeals.

*J. Zach. Spearing*, for appellant. *Henry P. Dart*, for appellee.

FENNER, J. This is a jactitation suit brought by plaintiff in possession of the immovable in controversy against the defendant, who slanders his title. Defendant answers, setting up title in himself, and thereby converts the action into a petitory one, in which he must be treated as plaintiff. *Dalton v. Wickliffe*, 35 La. Ann. 356. Both parties present recorded chains of title running back to the same author, Charles Pitts. Sully's title is derived from a sale by Charles Pitts to M. A. Fortier, passed June 1, 1851. Spearing's title flows from a sheriff's sale of the same property, made in a certain proceeding in a justice's court of the city of Jefferson, entitled "*Mayor, Aldermen, and Inhabitants of the City of Jefferson v. Two Lots, Nos. 10 and 11, in Square No. 61, in Faubourg East Bouligny*," assessed in the name of Charles Pitts," which sale was made on October 4, 1852, more than a year after Pitts had sold to Fortier. In order to avail against the prior conveyance to Fortier, it was of course absolutely essential for defendant to show that the sheriff's sale, and the proceeding in which it was made, were of a character to operate a valid translation of the property, irrespective of the prior transfer. This he has failed to do. The record of the suit in which the sale was made is lost, and we have no knowledge of its nature or validity, except such as is derived from its mere title, as given in the sheriff's deed. This is clearly insufficient, under the circumstances of this case, where defendant does not show that he or his authors have ever exercised ownership over the property, have ever occupied it, or reduced it to possession, or had it assessed in their names, or paid any taxes on it; and where it appears that both he and his immediate author acquired under an express exclusion of warranty. On the other hand, plaintiff was in actual possession, and had made valuable improvements on the lots, before defendant or his immediate author acquired their unwarranted title. When plaintiff bought he had no notice of defendant's pretension, and an examination of the records carried his chain of title back to 1851. beyond

the longest term of prescription. He further showed that the property had been assessed in the names of his authors at least since 1870, and the taxes paid presumably by them. We consider that defendant has failed to establish a title *causa idonea ad transferendum dominium*, which he was bound to do clearly and beyond question in order to recover against plaintiff, who is not a mere trespasser, but a possessor in good faith, under deeds on their face translative of property. *Peck v. Bemiss*, 10 La. Ann. 160; *Coucy v. Cummings*, 12 La. Ann. 748; *Bedford v. Urquhart*, 8 La. 239. We consider, however, that the case presents no ground for the damages claimed by plaintiff. Judgment affirmed.

(40 La. Ann. 553)

GOMILA *et al.* v. HIBERNIA INS. CO.

(Supreme Court of Louisiana. May 22, 1888.)

1. MARINE INSURANCE—ACTION ON OPEN MARINE POLICY—BURDEN OF PROOF.

In a suit on a marine insurance contract, predicated on an open marine policy, proved and admitted to have existed between the insured and the company, the burden is on the company to prove its contention that the open marine policy had been canceled and rescinded before the date of the contract of insurance sued on.

2. SAME—POLICY—PAROL EVIDENCE TO VARY.

Parol testimony is incompetent and inadmissible to vary, alter, or modify the stipulations of a written contract of insurance; and hence it will not be admitted to support the contention of the insurer that the insurance was for total loss only, if the instrument evidences a different agreement.

3. SAME—PARTIAL LOSS—SELLING CARGO AT AUCTION.

A sale at public auction, in accordance with the laws of a sea-port at which a disabled vessel puts in after a storm or other distress, is the best mode of disposing of a cargo shown to be too seriously damaged for reshipment.

4. SAME—TOTAL LOSS—NOTICE OF ABANDONMENT.

An insured cannot recover for a total loss, in the absence of proof of abandonment, and of notice of the same on the insured.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

This is a controversy between Gomila & Co. and the Hibernia Insurance Company, growing out of a contract of marine insurance on certain perishable goods. Defendant appeals from an adverse judgment.

O. B. Sansum and J. C. Gilmore, for appellant. Braughn, Buck, Dinkel-spiel & Hart and J. Ward Gurley, Jr., for appellee.

POCHE, J. This litigation grows out of a contract of insurance of a cargo of coffee and cigars shipped from Vera Cruz to Matamoros, Mexico, the amount covered by the insurance being \$9,300, and the same is herein claimed by plaintiff on an alleged total loss of the cargo. As no regular policy of insurance was issued, plaintiffs declare on two separate applications made by them, and accepted by the defendant, one for \$4,500, and the other for \$4,800, on an open marine policy, which they then carried on with the defendant, both applications having been made and accepted on October 30, 1880. They aver that the schooner *Veloze Maria*, on which the goods were shipped, sailed from Vera Cruz, in a staunch and sea-worthy condition, on the 6th of November, 1880; but the vessel, having met with a storm, was so damaged that she was compelled to put in on the 22d of the month at Alvarado, a small sea-port on the Mexican coast, where she was forced, by her disabled condition, to land her cargo, herself in a very damaged condition, and there the voyage was abandoned. They further aver that after due proceedings by the proper authorities, showing that the goods were too seriously damaged for reshipment, the same were sold at public auction, realizing the sum of \$2,510, with net proceeds, after deduction of the necessary costs, in the sum of \$2,322.26, which sum was deposited in Vera Cruz to the credit of whom it may concern.

Hence they claim as in case of total loss and abandonment. It appears that, after the institution of this suit, the names of Francisco Armandaez and Marcelino Rougier, of Mexico, the alleged co-owners and consignees of the cargo, were substituted as plaintiffs in the case. The defense is, substantially: (1) That the open marine insurance policy at one time existing between Gomila & Co. and the defendant had been canceled and rescinded previous to the date of the contract of insurance sued on. (2) That said contract was against total loss only, and the denial that a total loss was sustained in the venture. (3) That Gordon & Co., or Gordon & Gomila, had no insurable interest in the goods in question. (4) A denial that the damage occasioned to the goods was caused by the perils of the sea, and a denial of the existence of any condition of things to justify the abandonment of the voyage or the sale of the goods. The judgment below was in favor of plaintiffs for a partial loss, in the sum of \$6,800; whereof \$3,400 was in favor of Francisco Armandaez, and \$3,400 in favor of Marcelino Rougier. Defendant appeals, and plaintiffs seek, by answer to the appeal, to recover the full amount of their claim, \$9,300. On appeal defendant makes the point that F. Armandaez and M. Rougier are not the insured in the contract sued on, and have therefore no standing in court as plaintiffs. But the record contains a summary answer to that contention, in the shape of a petition for removal of the cause from the state to the federal courts, filed by the defendant company some time previous to the motion suggesting Rougier and Armandaez as the proper plaintiffs in the cause, in which petition it was alleged that "F. Armandaez and M. Rougier were the real plaintiffs in said suit." That judicial declaration is manifestly a complete estoppel to a contrary assertion on the part of the defendant.

1. Our examination of the record, and of the conflicting testimony which it contains, has satisfied us that all the material facts alleged and relied on by plaintiffs are sustained by the preponderance of the evidence. Hence we find and we hold that the open marine policy between Gomila & Co. and the defendant had not yet been canceled or rescinded at the date on which the insurance contract sued on was entered into. It is true that the book which contains the agreement was not produced on the trial, but its existence and its loss were satisfactorily accounted for. The burden was on the defendant, which acknowledged the previous existence of the contract, to prove its alleged cancellation. But in this the company entirely failed, its witnesses being unable to give the precise date of such cancellation, which is stated to have been between the 1st and 31st of October, 1880, or to give the date of the notice of Gomila & Co. of the alleged cancellation, if in fact such notice had ever been given. The effect of that testimony, in itself weak and unsatisfactory, is effectively counteracted by the fact that the two applications of October 30, 1880, made by Gordon & Gomila, and accepted by the insurance company, both refer to the open marine policy existing at the time, and by the additional fact that both were entered into the "Open Marine Risks Book" of the company.

2. The conclusions thus reached by us dispose of the contention touching the absence of interest in Gomila & Co. to bring this suit. The open marine policy contains the stipulation that the insurance was made "for account of whom it may concern," and it throws the burden on the company to prove that the contract was for total loss only.

3. In support of that contention, the company relied on parol testimony; but that kind of evidence was clearly inadmissible under the contract as proved by plaintiff, and, like the district judge, we must decline to give it any consideration or effect. Civil Code, arts. 2235, 2238, 2276; *Bell v. Insurance Co.*, 5 Rob. (La.) 423; *Courtney v. Insurance Co.*, 12 La. 233; *Packet Co. v. Brown*, 86 La. Ann. 188.

4. Defendant's denial that the damage resulted from the perils of the sea is not supported by the record. The preponderance of evidence is overwhelm-

ing in the proof of the contrary. It shows that, owing to the violence of the storm, the vessel was blown entirely out of her course, and that she put in out a port, situated south-west of the point of departure, her course being north-west of that point; that she arrived at Alvarado quite disabled, and taking water very rapidly and dangerously; and that, in consequence of her condition, the voyage was abandoned, the vessel remaining four months at that place, whence she was towed to Vera Cruz, where she was subsequently converted into and is now used as a port-lighter. We also find that the cargo was too badly damaged for reshipment, and that the best disposition was made of it which the nature of the surrounding circumstance would admit of. On that point the testimony is simply destructive of all the defendant's contentions and theories on the subject.

Hence we must hold the company liable under the contract, but not for a total loss. The record contains no evidence of an abandonment of the venture by the insured, and *a fortiori* no proof of a notice of the same on the insurer. In the absence of such proof, it is elementary that the insured cannot successfully claim as in case of a total loss. The amount deposited in Vera Cruz to the credit of whom it may concern, added to the amount allowed in the judgment, will very nearly cover the full amount of the insurance on the cargo. Our review of the case has convinced us that the district judge has done full justice to all parties in the cause. Judgment affirmed.

#### ON REHEARING.

FENNER, J. Appellees call our attention to the omission in the judgment of any allowance of interest, and to their prayer for an amendment in this respect. As they failed to refer to this matter in their briefs, it escaped our notice. They are, however, so clearly entitled to interest, at least from judicial demand in this suit, that the matter cannot admit of controversy, and we may amend our judgment to that extent without a rehearing. *Southworth v. Flanders*, 33 La. Ann. 190. It is therefore ordered that our former decree herein be amended by amending the judgment appealed from in so far as to grant legal interest on the amounts allowed therein from judicial demand, viz., July 16, 1883, and that otherwise it remain undisturbed, and that the rehearing applied for by appellant be refused.

(40 La. Ann. 579)

#### MAGUIRE v. MAGUIRE.

(*Supreme Court of Louisiana. May 22, 1883.*)

##### 1. HUSBAND AND WIFE—PURCHASE BY HUSBAND FOR WIFE—ESTOPPEL TO DENY.

A husband who signs an act of sale of property to his wife, containing the declaration that she purchases with her own separate paraphernal funds and for herself, is estopped from contesting the admission.

##### 2. SAME—COMMUNITY PROPERTY—RIGHTS OF WIFE.

A wife is entitled to recover from her husband, in a suit for the settlement of the community, the proceeds of property belonging to her, used for purposes of the community.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; W. T. HOUSTON, Judge. Suit by Maria Maguire against Patrick J. Maguire for separation from bed and board, for a settlement of the community, and for the recovery of \$14,000. Defendant appeals from a judgment recognizing plaintiff as entitled to the ownership of certain real estate, and allowing her \$1,000.

*Chas. Louque and Henry L. Lazarus*, for appellant. *J. Timony*, for appellee.

BERMUDEZ, C. J. This is a suit for a separation from bed and board, for a settlement of the community, and for the recovery of a sum of \$14,000 claimed by the plaintiff to be due her. The answer is a general denial. There was

judgment for the separation, with which both parties declare themselves satisfied, and which neither proposes to disturb. The judgment further recognizes title to the plaintiff to certain real estate, and her right to \$1,000. From this judgment the defendant appeals. The act of sale of the real estate was made by one Davey, in the name of the plaintiff, assisted by the defendant, her husband. It contains the formal declaration that the Mrs. Maguire was purchasing with her own private and separate funds, as her paraphernal property, for herself, her heirs and assigns. The sale purports to have been made for \$3,000; \$500 cash, and the rest in two notes of \$1,250 each. On the trial the plaintiff exhibited the two notes, and the defendant undertook to introduce evidence having a tendency to show title to the property in the community. On objection of plaintiff's counsel, the court received the testimony to show collection of certain rents by the plaintiff, with a view, no doubt, to hold her accountable for the same in some way. We find in the record an admission that the sale of Davey to Mrs. Maguire declares that she paid \$500 of her separate and paraphernal property; that the admission is made, under the advice of counsel, because the defendant signed the act, and is estopped from questioning it as between himself and his wife. Still, in the argument and in the brief on behalf of the defendant, it is contended that the property belongs to the community. It therefore becomes necessary to pass upon the question of title asserted by both parties. In the case of *Kerwin v. Insurance Co.*, 35 La. Ann. 33, the question of estoppel was fully examined, and the ruling was that under the circumstances, which are similar to those in the present, the husband could not go behind his formal attestation. In *Re Succession of Dejan*, ante, 89, and *Gaudet v. Gauthreaux*, 3 South. Rep. 645, (recently decided,) this construction of the law was sanctioned and acted upon. It therefore follows that the defendant cannot be permitted to assert title in the community to the property claimed by the plaintiff as her own. The testimony adduced to show the collection of rents or moneys by the plaintiff has failed to satisfy the district judge, as it does us, that she has received any for which she can be held liable. In fact, the defendant specifies no amount, and asks no particular relief under that feature of the case. The only matter remaining for consideration is that portion of the judgment which allows the plaintiff to recover \$1,000 from the defendant. It appears that this sum is the price at which certain property standing in the name of one Coyle, but owned by plaintiff, was sold to one Fletcher. The lower judge, who heard the testimony which we have reviewed, was satisfied that the amount had been used for purposes of the community, which was, to that extent, benefited by it. There exists no reasonable doubt that it was not so, and we do not feel authorized to disturb his findings. Judgment affirmed.

FENNER, J., (*concurring*.) Considering that there is no suggestion of any interest of community creditors or of forced heirs involved in this controversy, and that the judgment herein would not be binding on such heirs or creditors, who are not parties; considering, further, that the \$500 paid in cash, admitted to be the paraphernal funds of the wife, was the whole price actually paid for the property, and that there is no question of any payment made or of liability incurred by the husband or the community on account of any credit portion of the price; and considering, therefore, that the property bought by Mrs. Maguire from Davey was actually bought and paid for in full with paraphernal funds,—I can see no reason why the defendant should be permitted to contradict his positive admissions in the authentic act that the property was the separate paraphernal property of his wife. Under repeated adjudications, his simple heirs would be estopped from contradicting such authentic admissions made by him, and *a fortiori* does the same estoppel apply to him. *Kerwin v. Insurance Co.*, 35 La. Ann. 33; *Brown v. Stroud*, 84 La. Ann. 374; *Compton's Heirs v. Maxwell*, 38 La. Ann. 633; *Drumm v. Kleinman*, 81 La.

Ann. 124; *Stewart v. Mix*, 30 La. Ann. 1036; *Armorer v. Cass*, 9 La. Ann. 242. For these reasons I concur.

POCHE, J. I concur in the additional reasons given by Mr. Justice FENNER.

(40 La. Ann. 512)

SCHULHOFER v. CITY OF NEW ORLEANS.

(*Supreme Court of Louisiana. May 22, 1888.*)

1. JUDGMENT—CONCLUSIVE EFFECT.

A judgment is a fiat of a court settling the rights of the parties, and however unjust, erroneous, or illegal the settlement may be, the parties can only claim under it that which, by its terms, the judgment awards.

2. SAME.

Hence the holder of a judgment against the city of New Orleans, which allows him interest from April 27, 1887, and who seeks to have his judgment funded into bonds under act 67 of 1884, cannot claim or be allowed bonds bearing interest from June 1, 1884.

3. SAME.

No more interest can be allowed than fixed by the judgment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; A. L. TISSOT, Judge.

The plaintiff, Gustave Schulhofer, recovered judgment against the city of New Orleans for \$3,005, with interest from April 27, 1887, on certificates of appropriation, but claims that he is entitled to interest from June 1, 1884. From a judgment allowing plaintiff's demand, the board of liquidation of the city debt appeals.

*Henry C. Miller*, for appellant. *White & Saunders*, for appellee.

POCHE, J. As the holder of certificates of indebtedness of the city of New Orleans for the current expenses of the city in the years 1874 to 1878, aggregating in amount \$3,005, plaintiff brought suit thereon, and obtained judgment against the city for the full amount with interest of 5 per cent. per annum from judicial demand, the 27th of April, 1887. That judgment became final on January 24, 1888. In March, 1888, he instituted proceedings to compel the board of liquidation of the city debt of New Orleans to fund his judgment into bonds in accordance with the provisions of act No. 67 of the legislature of 1884, said bonds to be equal in amount to the principal of his judgment, and to bear interest of 5 per cent. per annum from June 1, 1884, as contemplated by that statute. From a judgment in favor of plaintiff, and in accordance with that prayer, the city appeals, and her contention is that interest should have been made to run only from April 27, 1887, according to the very terms of the judgment sought to be funded. The point is well taken, and it must prevail. Conceding, for the sake of the argument, that there was error in the judgment of January 24, 1888, in determining the date at which interest should begin to run, and that to comply with the provisions of act No. 67 of 1884 the judgment should have allowed interest, as claimed by plaintiff in his first petition, to begin to run from the 1st of June, 1884, the record shows that the judgment became final on January 24, 1888, and in proceedings looking to its execution the court was powerless to enlarge its scope, or to otherwise annul or alter its effect, which is irrevocably fixed by its own terms. That proposition is self-evident under our laws, flowing from the very essence of all final judgments. A motion for a new trial or an appeal was the only remedy which the law tendered to plaintiff for the correction of the alleged error in the original judgment, and it is too late to attempt such a remedy on execution. The question is not new in our jurisprudence, and the rule, already sanctioned by law and reason, finds additional support in authority. In the matter of *Succession of Anderson*, 33 La. Ann. 581, this court refused to allow interests to a creditor

whose judgment was silent on the subject, even though the nature of his claim might have entitled him to interests. The court said: "A judgment has been defined to be the decision or sentence of the law, pronounced by a court of competent jurisdiction upon the matter contained in the record." "It is a fiat of a court settling the rights of the parties, and, however unjust, erroneous, or illegal the settlement may be, the parties can only claim under it that which, by its terms, the judgment awards." If the plaintiff in rule is holder of a judgment which unjustly denies to and withholds from him his legal right, it is a misfortune which might have been repaired before that judgment became final, but which is now past remedy." The conclusions of the court rested on and were completely justified by several previous adjudications enforcing similar views. *Saul v. His Creditors*, 7 Mart. (N. S.) 437; *Cochrane v. Murphy*, 4 La. Ann. 6; *Succession of Regan*, 12 La. Ann. 116. See, also, *Villars v. Favore*, 86 La. Ann. 398. In the instant case, the special and sole relief sought by plaintiff is the funding of his judgment of January 24, 1888. By that judgment it was settled that his interest should run only from April 27, 1887, and he cannot now be heard, in his present proceedings, to claim more. It is therefore ordered that the judgment appealed from be annulled, so as to fix the 27th of April, 1887, as the date from which interest is to run on the bonds to be issued to plaintiff, and that, as thus amended, said judgment be affirmed. Costs of appeal to be taxed against plaintiff and appellee.

(40 La. Ann. 553)

**STATE *ex rel.* MASPEREAU v. BATT *et al.***

(*Supreme Court of Louisiana. May 23, 1888.*)

**1. TAXATION—TAX DEED—MANDAMUS.**

A *mandamus* will not lie to compel the registrar of conveyances for the parish of Orleans to erase from the records of his office a tax deed, in the absence of a final judgment of a competent court declaring the nullity of the tax sale. Not even if the purchaser at such tax sale is made party to the proceeding.

**2. JUDGMENT—EFFECT—PARTIES.**

A previous judgment, declaring the assessment under which such tax sale was made absolutely void, is not binding on the purchaser at such sale, if not a party to the suit in which the judgment was rendered.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

*Mandamus* proceeding by Mrs. Seraphine Maspereau against Joseph Batt, registrar of conveyances for the parish of Orleans, to compel respondent to erase from his records the inscription of a tax sale of certain property sold to one L. P. Hakenjos. From a judgment sustaining relatrix's action respondents appeal.

*Jos. H. & J. Zach. Spearing*, for appellants. *Farrar & Kruttschnitt*, for appellee.

TODD, J. This is a *mandamus* proceeding directed against the register of conveyances of the parish of Orleans to compel him to cancel from the records of his office a tax deed to certain immovable property, claimed by the relatrix to have been illegally sold to one Hakenjos, who is also cited as a party to the proceeding. From a judgment making the *mandamus* peremptory, the defendants have appealed. The defendants excepted to the proceeding in the lower court on many grounds, which, summarized, were substantially, in effect, that a *mandamus* would not lie in such a case and for the purpose declared in the petition. The exception was overruled, and a long answer to the merits was filed, attesting the validity of the tax sale, and a legal title acquired thereby by the purchaser at such sale. A bare statement of the object of the suit, and of the nature of the pleadings, is, in itself, al-

most, if not quite, sufficient to show that the remedy resorted to in this instance was not the proper one. The tax sale in question was made in 1884. Article 210 of the state constitution declares: "All deeds of sale made, or that may be made, by collectors of taxes, shall be received by the courts in evidence as *prima facie* valid sales." The same article further provides that "no sale of property for taxes shall be annulled for any informality in the proceedings, until the price paid, with ten per cent. interest, be tendered to the purchaser." With these mandatory provisions in the constitution, it cannot readily be conceded that this officer—the registrar of conveyances—can, in the discharge of a mere ministerial duty, erase from the records of his office a deed which is declared by the constitution *prima facie* valid, or, if not valid, one that cannot be annulled for any informality until the price, with interest, is tendered to the purchaser. Had the relatrix presented to this officer a final judgment of a competent court, contradictorily rendered against the purchaser at the tax-sale declaring the sale void, then he might have been compelled by *mandamus* to perform the ministerial duty of cancelling the deed, in case he had refused to do so.

Nor could such judgment be rendered in a *mandamus* proceeding. The issues that are presented by the pleadings in the instant case are a complete demonstration of this fact. The defendant, or the party holding the tax title assailed, is entitled to have these issues tried and determined in a regular suit, by ordinary proceeding, and with the right, if he desires to claim it, to submit these issues to a trial by jury. This is a constitutional right which this extraordinary proceeding is calculated to deprive him of. It is, however, urged by the counsel of the relatrix, that in the cases of *Maspereau v. New Orleans*, 38 La. Ann. 401, it was decided by this court on appeal that the assessment of the property under which this sale was made was absolutely void. In answer to that, it is sufficient to say that neither the register of conveyances, nor Hakenjos, the present defendants before us, were parties to that suit, and therefore as to them it was as if it never existed. The law has expressly provided for relief by *mandamus*; but this proceeding does not come within the scope of any of the provisions pertaining to this remedy. Code Proc. art. 829 *et seq.*; *Fla v. Herron*, 29 La. Ann. 850.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, and that the *mandamus* be refused, at the costs of the relatrix.

(40 La. Ann. 618)

## STATE v. CLOUD.

*(Supreme Court of Louisiana. June 12, 1888.)*

## APPEAL—DISMISSAL—APPEAL RETURNABLE AT IMPROPER PLACE.

An appeal made returnable, on the suggestion of the appellant, at an improper place, and at an improper time, will be dismissed.

*(Syllabus by the Court.)*

Appeal from district court, parish of Calcasieu.

J. C. Gibbs, Dist. Atty., for the State. A. L. Belden, for appellant.

TODD, J. The defendant appeals from a sentence of nine months' imprisonment at hard labor, having been convicted for inflicting a wound less than mayhem upon one Narcisse Hulin. There is a motion on the part of the state to dismiss the appeal on the ground "that the appeal was not made returnable within the time nor to the place required by law." The order granting the appeal was rendered on the 15th of May, 1888, and the appeal made returnable to Monroe on the first Monday in June,—and at the suggestion of the defendant's counsel. The law prescribes, (quoting:) "All appeals shall be made returnable to the supreme court within ten days after granting the order of appeal, whenever the said court may be in session, on the return-day." Section 4, act 90, Laws 1878. At the date of said order of appeal, and more than 10 days thereafter, this court was in session in the city of New Orleans. The order was therefore rendered in contravention of law. *Wooten v. Le Blanc*, 32 La. Ann. 692; *State v. Jenkins*, 36 La. Ann. 865; *State v. Joseph*, 38 La. Ann. 38. It is therefore ordered that the appeal be dismissed.

(40 La. Ann. 262)

## QUEYROUZE v. CAPMARTIN.

*(Supreme Court of Louisiana. March 5, 1888.)*

## 1. HUSBAND AND WIFE—WIFE'S POWER TO CONTRACT—PUBLIC MERCHANT, WHEN.

To bind the wife as a public merchant, two things are essential; 1. *a.*, that the business be conducted in her name; and (2) that it be separate from that of her husband.

## 2. SAME.

Where the business is conducted in a name which is neither that of husband nor wife, and when the plaintiff, in his business correspondence, addresses his letters, in such name, with the prefix of "*Monsieur*," he cannot claim that he supposed the name to designate the wife.

## 3. SAME—MANAGEMENT OF BUSINESS BY HUSBAND—LIABILITY OF WIFE.

When the husband appears as the head of the business, and mainly conducts it, when the licenses are taken out and the contracts executed in his name, and when he is regarded in the community as its head and master, no participation therein by the wife will make her liable.

*(Syllabus by the Court.)*

Appeal from district court, parish of Natchitoches; D. PIERSON, Judge.

This is a suit instituted by Leon Queyrouze against A. S. Capmartin, in which it is sought to hold a married woman liable, as a public merchant, for a fraud committed by her husband. Plaintiff appeals from a judgment rejecting his demand.

J. M. Tucker and F. Michinard, for appellant. J. E. Breda, for appellee.

FENNER, J. The object of this suit is to hold a wife liable for a mercantile account contracted by a concern which did business, in the town of Natchitoches, under the name of "A. S. Capmartin," on the ground that she contracted said debt as a public merchant. The name in which the business was conducted, is not the name of either the husband or the wife. The husband's name is A. Salleres. The wife's maiden name was Anna Capmartin, and her married name might be Anna Capmartin Salleres, but certainly not Anna

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Salleres Capmartin, or A. S. Capmartin. The business was managed by the husband and wife jointly, but mainly by the husband, who did most of the trading, and conducted nearly the whole of the correspondence. The account was kept, the goods invoiced, and everything conducted by plaintiff in the name of A. S. Capmartin. Whom did the plaintiff consider to be A. S. Capmartin? A significant circumstance, which explanation and hardly any evidence could overcome, is that plaintiff's correspondence is almost universally addressed, "*Monseigneur* A. S. Capmartin," and begins, "*Mon Cher Monseigneur*," while the husband's letters were often signed A. Salleres as well as A. S. Capmartin. *Monseigneur* A. S. Capmartin means necessarily *monseigneur le mari*; not *madame la femme*. The Code provides: "She [the wife] is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband." Article 131. Marcadé, commenting on like article 220 of the French Code, says: "The wife is not considered as a public merchant when she merely retails goods engaged in the husband's commerce." "Then it is not she who trades, but the husband, and she is simply his mandatory. Whenever the business is not conducted in the name of the wife, the husband is the master, and she only buys and sells for his account, binding him only, and not herself." 1 Marcadé, 561. And Demolombe gives the meaning of the Code to be this: "When the husband himself trades, and is personally at the head of the business, the wife's personality disappears. And if she assists her husband, if she stands behind the counter, and sells, if even she signs notes or bills, in all this she is held to act merely as mandatory of her husband, without binding herself." 4 Demolombe, 236. And the French courts so interpret it: "A married woman, whatever part she may take in the business of her husband, cannot, on that account, be held as a public merchant. She is a public merchant only when she conducts a separate business." Journ. du Pal. (1841,) I., 219. To the same effect is our own jurisprudence. *Chauviere v. Fliege*, 6 La. Ann. 56; *Sarran v. Regouffre*, 12 La. Ann. 350; *Christensen v. Stumpf*, 16 La. Ann. 50. All the above cases presented features similar to this, and, in some particulars, stronger against the wife. The business here was not conducted in the name of the wife, and the correspondence shows conclusively that the name used, although not the name of the husband, was understood to designate the husband. The business was not separate from that of the husband in the sense of the law; but he himself conducted it, and appeared at its head. The state and parish licenses were taken out in his name, and the evidence shows that the community in which it was carried on regarded and treated him as the merchant. All the contracts for furnishing supplies to farmers or laborers, which was the chief business, were made in the name of A. Salleres. We have carefully considered the evidence touching the conduct and representations of the wife in her dealings in this city, but we think the whole conduct and management of the business too clearly indicated to plaintiff the participation in and control of the business by the husband, and that their correspondence too clearly shows that the A. S. Capmartin with whom they dealt was a "*monseigneur*," and not a "*madame*," to justify us in holding the wife for a fraud, the commission of which, or intent to commit it, is denied by her under oath. If plaintiff was deceived, it was in the face of facts and circumstances which should have enlightened him, and prevented the possibility of deception. Judgment affirmed.

(40 La. Ann. 453)

#### KERNS v. COLLINS.

(Supreme Court of Louisiana. May 7, 1888.)

#### 1. TAXATION—SALE FOR TAXES—ASSESSMENT IN NAME OF DECEASED PERSON.

A tax sale, under an assessment for taxes of 1868, in the name of a deceased person, to whom the property did not belong at the time, is without effect, and no judg-

ment subsequently rendered, on monition, can impart any validity to such sale. The law in force then required the assessment to be made in the name of the actual owner.

**2. SAME—ACTIONS TO SET ASIDE TAX SALES—LIMITATION.**

Prescription by which tax sales may be validated, or which debars from action to avoid such sales, does not run against incapacitated persons.

*(Syllabus by the Court.)*

Appeal from civil district court, parish of Orleans; W. T. Houston, Judge.

This is a petitory action brought by George W. Kerns, curator of an interdict, against Mrs. Amos S. Collins, in which he seeks to be declared owner of certain immovable property. This appeal is prosecuted from a judgment decreeing plaintiff to be owner of the property in suit.

*George L. Bright*, for appellant. *Jas. B. Guthrie*, for appellee.

**BERMUDEZ, C. J.** This is a petitory action. The plaintiff, as curator of the widow of Joseph Allen, interdicted in January, 1867, claims the ownership of certain real estate once situated in Jefferson City, and now in New Orleans. He alleges that it was donated to her by her husband in 1856, anterior to their marriage; the act being recorded the next day. He avers that the property has never been alienated by her, and is in the possession of the defendant, who pretends to be the owner of it. The defense is that the defendant purchased the property in 1884, at the probate sale of her husband's estate, and that he had a valid title to it, for having acquired it, in 1872, from Collins, who had bought it at a tax sale made in May, 1870. In support of her title, the defendant urges that the sale was made, in the manner directed, by the charter of Jefferson City, to enforce the payment of taxes; that the sale was validated by act No. 101 of 1873; that the assessment, made in the name of Ann May, was legal; that, if it was informal, the irregularity was cured by a monition duly homologated; that the action is barred by the prescription of ten, three, five, and two years; that, should the plaintiff recover, the defendant is entitled to the reimbursement of taxes paid since on the property. From a judgment in favor of plaintiff, and allowing only a fraction of the taxes claimed, defendant appeals. The record shows that Joseph Allen, who had purchased the property from Kohn in 1849, donated it to Ann Hewitt May in 1851, previous to their marriage, under the condition that, should either die without issue of the marriage, the survivor would own the property. The act of donation was properly and duly recorded, in the conveyance office of the parish of Jefferson, shortly after its execution, and the parties married. In May, 1855, Ann H. May, wife of Joseph Allen, departed this life. Her succession was opened, and, on proof that she had died, and had left no issue of her marriage with her husband, he was recognized as the owner of the property, and was put in possession. In November, 1856, Joseph Allen, being about to marry Widow Chazotte, born Clavie, donated to her the property now in dispute, with the stipulation that, were she to die without issue of their marriage, the property would revert to him. The act of donation was recorded in the conveyance book of the recorder's office of Jefferson parish, in November, 1856, and the parties married. In 1860, Joseph Allen died without issue. In January, 1867, his widow was interdicted, and placed in an insane institution, and the plaintiff was appointed her curator. It appears that the lots in question were not assessed in the name of Ann H. May until a year after her death, and that the assessment for the taxes of 1868 was made in the name of Ann May, and was changed only after the sale to Collins. The only matters to be considered, in order to determine the question of ownership, are: (1) Whether the assessment of the property for the taxes of 1868, in the name of Ann May, was such as could justify a divestiture by a sale to pay those taxes; (2) whether defects in the assessment, or proceedings for the sale, were cured by

prescription or monition; and (3) whether the action to recover is barred by time.

It is proper to recall that Ann H. May, afterwards Mrs. Allen, died in 1855; that the property then reverted to her husband and donor; that in 1856 title to it was made by him to Widow Chazotte, who next became his wife; that the act of donation was duly and seasonably recorded; that in 1867 the second Mrs. Allen, then a widow, was interdicted, and that when the property was assessed, in 1868, in the name of May, the latter was dead, and had no title to it; that the title of Widow Chazotte, to whom it then belonged, had been on the public records or archives for some 13 years. The laws in force at the time of the assessment, it is not denied, required real estate to be assessed in the name of its owner. In a number of cases, tax sales have been annulled when the property had not been thus assessed, and had been sold to pay the taxes levied on it. This was done on the principle, well recognized and indisputable, that the validity of tax sales is to be tested under the laws in force at the time. In *Stafford's Case*, 33 La. Ann. 526, the court held that, when an assessment was void, the sale was a nullity. The doctrine was followed in other cases, reported in *Lagus v. Boagnt*, 32 La. Ann. 912; *Guidry v. Broussard*, Id. 925; *Le Blanc v. Blodgett*, 34 La. Ann. 108; *Maspereau v. New Orleans*, 38 La. Ann. 400; *Desormeaux v. Moylan*, 26 La. Ann. 780; *Hickman v. Dawson*, 35 La. Ann. 1086; *Fitz v. Succession of Dierker*, 30 La. Ann. 175; *Kline v. Parish*, 28 La. Ann. 538. See authorities in opinions. The ruling in *Kent v. Brown*, 38 La. Ann. 802, cannot be invoked successfully. There exists no parity between the facts involved in the two cases, and the propositions of law are dissimilar. The decision stands on the exceptional circumstances of the case. It is therefore apparent, as Ann H. May died in 1856, and her title then passed to Allen, as the title to the property, made in 1856, by the latter in favor of Widow Chazotte, was on the public records from 1856 and upwards, the assessment in 1868, in the name of Ann May, is illegal, and the sale of the property is an absolute nullity. The various prescriptions pleaded cannot avail, as, previous to and at the time of the sale, Widow Chazotte, next Widow Allen, was interdicted, and that such prescriptions do not run against incapacitated persons. *Barrow v. Wilson*, 38 La. Ann. 209, 39 La. Ann. 409, and 2 South. Rep. 809. The homologation of the monition obtained with a view to cure defects in the tax-sale proceedings cannot avail the defendant, where the irregularity is radical. In *Fitz v. Dierker*, 30 La. Ann. 175, it was held that a tax sale under an assessment, in the name of a deceased person, to whom the property did not belong actually, is without effect, and that no judgment, subsequently rendered on monition, can impart any validity to such sale. The court adhered to the rule that, where there is no assessment or judgment against the true owner, there can be no valid divestiture. The defect is fundamental, and is not curable by monition. See, also, *Woolfolk v. Fonbene*, 15 La. Ann. 15; *Roberts v. Zansler*, 34 La. Ann. 205; *Dodeman v. Barrow*, 10 La. Ann. 193. Neither can the defendant find relief by invoking the late ruling of this court in *Re Lake*, 3 South. Rep. 479, for the plain reason that the pretended sale, in the instant case, was made in 1870, and the law on which the ruling was based was passed in 1884, and refers only to sales made under its provisions. Under the circumstances of this case, we therefore hold that the title made to Collins and his vendor is a nullity, and that the property claimed belongs to the interdicted Widow Allen, represented herein by Kerns, her curator. The only matter remaining for consideration is the claim for reimbursement of taxes which the defendant claims to have paid on the property. There is no evidence to show that she paid all the taxes. The certainty, as the bills show on their face, is that they were paid by her husband or his estate. Nothing establishes that she represents either, and that payment to her would discharge the debt. The district court, however, condemned the plaintiff to pay \$77.52

for city and state taxes, proved to have been paid by the defendant. The allowance is proper. Judgment affirmed.

Rehearing refused.

(40 La. Ann. 609)

PASLEY v. McCONNELL.

McCONNELL v. PASLEY.

(Supreme Court of Louisiana. May 24, 1883.)

ON MOTION TO DISMISS.

1. APPEAL—DISMISSAL—CLERICAL ERRORS IN APPELLATE PROCEEDINGS.

Inaccuracies, in a motion of appeal, in the bond and in the certificate of the clerk, amounting at most to clerical errors, are not sufficient to justify the dismissal of an appeal if the proceedings are otherwise sufficient to identify the appeal with the judgment complained of with legal certainty.

2. SAME.

The rights of litigants cannot be jeopardized by slight inaccuracies of their counsel or the incompetency of clerks.

ON THE MERITS.

1. PLEADING—AMENDMENT—AFTER APPEAL.

In furtherance of the ends of justice, a case will be remanded to enable a plaintiff to amend so as to set forth more explicitly his cause of action.

2. JUDGMENT—EFFECT—RES ADJUDICATA.

A judgment in a case in which a cause of action was not set forth, because it had then no existence, cannot constitute *res adjudicata*.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; F. A. MONROE, Judge.

Controversy between John Pasley and Ann McConnell, involving the ownership of certain real estate. From a judgment sustaining exceptions of no cause of action and *res adjudicata* Pasley appeals. Cases consolidated. For appeal from judgment in former case of *Pasley v. McConnell*, see 3 South. Rep. 485.

W. S. Benedict, D. B. H. Chaffe, and H. C. Cage, for appellant. J. Magi-oni and J. Timony, for appellee.

ON MOTION TO DISMISS.

(December 19, 1887.)

POCHE, J. The grounds of the motion will be better understood by a reference to the proceedings which preceded and led up to the judgment appealed from. Pending a devolutive appeal to this court from a large moneyed judgment rendered against the defendant in the suit entitled *Ann McConnell v. John Pasley*, execution was issued, and plaintiff became the adjudicatee of considerable property seized in said execution. On trial of the appeal, the final judgment of this court reduced very materially the amount of the judgment appealed from; in fact, to a sum less than one-half of the price of adjudication of the property of the seized debtor to the seizing creditor. John Pasley then brought a suit for the nullity of the sale in execution of his property, as hereinabove stated, but he was defeated. 38 La. Ann. 470. He then had recourse to another action with the object of enjoining Mrs. McConnell, as purchaser, and her transferees of the property in question, from interfering with said property, which he therein claimed as his own, and from taking possession thereof. This is the suit hereinabove entitled *John Pasley v. Ann McConnell*, No. 18,001, Div. B., to which it had been allotted as an original suit. In that court the cause was, on an exception to the jurisdiction of the court,

transferred to Division C, where the original suit was pending, and of which the present action was held to have been an incident; a proceeding to regulate the execution of the judgment. In the latter court it was cumulated with the original suit, and it was dismissed on an exception of *res adjudicata*. The present appeal was taken from that judgment.

1. In drawing their motion of appeal, counsel for appellant headed it with the title of the suit entitled and numbered *John Pasley v. Ann McConnell*, No. 18,001, only; and that incident furnished the first ground of appellee's motion to dismiss. It would unquestionably have been safer and more regular for counsel to have adopted the identical title which headed the judgment appealed from, and which heads this opinion; but that irregularity is not sufficient to vitiate the motion or order of appeal, as both leave no doubt as to the precise judgment from which the appeal was intended. Both titles appear defective and illogical. Either the new proceeding was a part or an incident of the main or original suit, or it was an independent original action. If the former, then the new title should have been dropped, or merged in the original suit; if the latter, then the cumulation, as it is called, was erroneous. But neither error could in justice be attributed to appellant. His motion conveys all the information necessary to identify his appeal with the judgment complained of.

2. From appellant's petition it appears that there were several defendants in his proceeding, and hence in some parts of the record his action is entitled *John Pasley v. Ann McConnell et als.*, whereas, in his motion, he omitted the words "*et als.*" That is the subject of the second ground of the motion to dismiss, whence it is argued that all the defendants have not been cited. But the motion was made in open court, and therefore no citation was needed, and all parties to the proceeding who were not appellants became appellees, if there was an appeal at all, and we have already shown that the motion was substantially sufficient to bring up the appeal. It cannot be destroyed by a clerical error.

3. It is next contended that the appeal-bond is radically defective, because it recites that the appeal is taken from the judgment in the suit of *John Pasley v. Ann McConnell*, No. 2,452, an entirely different suit from that described in the motion and in the order of appeal. In this assertion appellees are mistaken. The recital is as follows: "Whereas, the above bounden John Pasley has this day filed a motion of appeal from a final judgment rendered against him in the suit of *John Pasley v. Ann McConnell et als.*, No. 2,452, civil district court, cumulated with No. 18,001 of the civil district court for the parish of Orleans, on the 30th day of May, 1887, and signed on the 3d day of June, 1887." Hence it appears that the only error of the recital consists in transposing the numbers of the two proceedings. But otherwise the bond is fully identified with the motion of appeal and with the judgment appealed from. The irregularity is not of such gravity as to defeat appellees in an action on the bond.

4. The fourth and last ground of the motion rests on a complaint leveled at the clerk's certificate, in which he erroneously makes John McConnell defendant in the suit in which Ann McConnell is plaintiff; but the certificate recites that the transcript refers to a judgment rendered in matters numbered respectively Nos. 18,001 and 2,452. That is sufficient to show that there was merely a clerical error in one of the titles, expressly as one of the suits is correctly described. The whole record is a bungle, in which one error is ingrafted on another, but none sufficient to justify the dismissal of the appeal. Courts can and must deplore such careless and inartistic work emanating from officers whose labors should be characterized by neatness and precision; but they are forbidden, by a sense of justice, to deny the rights of an appellant on account of the inaccuracies of his counsel, or of the unpardonable negligence or ignorance of a ministerial officer. *Eschert v. Harrison*, 29 La. Ann. 860;

*Granger v. Reid*, 36 La. Ann. 845. It is therefore ordered that the motion to dismiss this appeal be overruled, at the costs of appellees.

TODD, J., absent.

ON THE MERITS.

BERMUDEZ, C. J. The only question to be decided in this controversy is whether the adjudication made by the sheriff to Mrs. McConnell of certain property, in the name of John Pasley, in 1883, shall or not be rescinded on account of non-payment of the price, \$9,500. Mrs. McConnell contends that John Pasley's petition discloses no cause of action, and that his right to ask the nullity of the sale was finally adjudicated adversely to him, and that the matter is forever finally set at rest. From a judgment sustaining those defenses Pasley has appealed.

It is unnecessary to state the nature of the differences of the parties. They are of long standing, and may be gathered from the opinions of this court to be found in 36 La. Ann. 703, 986; 37 La. Ann. 552; and in 39 La. Ann. —, 3 South. Rep. 484, 485. For the purposes of the present litigation it will suffice to make the following statement: In 1882, while Mrs. McConnell held a judgment of \$14,660.59 against Pasley, and while the case was pending in this court on a devolutive appeal, Mrs. McConnell caused property of Pasley to be seized and offered for sale, and became the adjudicatee thereof for \$9,500. Subsequently the judgment, to satisfy which the sale had been made, was reduced to \$2,980 by this court. Taking advantage of the word "reversed" found in the decretal part of the judgment making the reduction, and acting on the theory that by the reversal of the judgment for \$14,660.59 the adjudication made in execution of it was a nullity, Pasley brought suit to have that adjudication annulled, but failed in his attempt. This court maintained the adjudication, but recognized Pasley's right to recover eventually the excess of the price over the amount of Mrs. McConnell's reduced judgment. The concluding portion of the opinion reads: "As this action presents no feature of a claim for the price, or of the resolutive action for its non-payment, but seeks solely the nullity of the adjudication, we have no occasion to discuss such question now, or the rights of Mrs. McConnell's transferees. We simply determine that the present action cannot be maintained." 38 La. Ann. 476. In the course of other controversy between the same parties this court subsequently said, alluding to the decision just mentioned: "There was no express reservation to plaintiff [Pasley] of the right to sue for the rescission of the sale for non-payment of the price of adjudication of the property, or for the surplus of the proceeds of sale; but there is, in our opinion, a clear intention to the effect that suit of either character might be brought." 39 La. Ann. —, 3 South. Rep. 487. Grounding himself upon what had thus been said, Pasley brought the present proceeding for the rescission of the sale for the non-payment of the price of adjudication. He has joined as parties to the suit certain persons, the children of Mrs. McConnell, to whom he alleges that, for the purpose of preventing him from recovering the property, Mrs. McConnell has made a simulated title. It is to this action that Mrs. McConnell and her co-defendants have set up the exceptions of no cause of action and of *res adjudicata*.

1. There is no doubt that the petition does not set forth expressly, so as to repel any misconception, what is really the cause upon which the relief sought is demanded; but, from the circumstance that the plaintiff has averred the judgment invoked as *res adjudicata*, and has annexed a copy of it to his petition, it may be inferred that the cause of action is that the plaintiff has called upon the defendant for the payment of the excess of the price of adjudication, and that the defendant has refused to pay it. Under the opinion and decree in the case alluded to this was the only relief left the plaintiff.

2. The suit resting on such a cause of action, it is clear that, as this cause

had not previously been averred, it could not be and was not passed upon by the judgment invoked to constitute *res judicata*. Under the circumstances, we think that, in furtherance of the ends of justice, the case ought to be remanded to enable the plaintiff to state specifically that payment of the excess of the price of adjudication has been demanded and declined. It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that the exceptions be overruled, and that this case be remanded, with leave to plaintiff to amend his petition in accordance with the views herein expressed, and to be further proceeded with according to law. Appellees to pay costs from the filing of the exceptions, including those of appeal. Future costs to abide the final determination of the suit.

Rehearing refused, May 31, 1888.

(40 La. Ann. 463)

STATE v. LIVERPOOL, L. & G. INS. CO.

(Supreme Court of Louisiana. May 7, 1888.)

1. CONSTITUTIONAL LAW—TAXATION—UNIFORMITY—CONST. LA. ART. 206.

The very object of article 206 of the constitution was to remove license taxation from the operation of article 203, requiring all taxation to be equal and uniform, and to authorize and require license taxation to be graduated.

2. SAME—TAXATION OF INSURANCE COMPANIES.

The charge that smaller companies pay a larger tax, in proportion to their premiums, than larger companies, may impugn the justice, but not the constitutionality of the law; the constitution not declaring that the graduation shall be in exact proportion to the business done.

3. TAXATION—"GRADUATION" OF TAXES—HOW EFFECTED.

The constitution, simply requiring the general assembly to graduate license taxes, without indicating any particular method or standard of graduation, has devolved on the assembly the function of determining what method shall be adopted.

4. SAME.

The term "graduate" is a word of elastic meaning, involving infinite variety in the methods and standards of graduation which may be adopted.

5. SAME—GRADUATION—CLASSIFICATION OF INSURANCE COMPANIES.

A law which divides insurance companies into several classes according to the amount of premiums received, and imposes on each class a different license tax, greater upon those receiving a larger amount of premiums than on those receiving less, complies with the requirement of graduation.

ON REHEARING.

CORPORATIONS—FOREIGN CORPORATIONS—LICENSE TAX.

A foreign corporation is not required by the constitution to be licensed by a different mode from that provided for home companies. The constitution is not imperative, but simply permissive of such mode. Such corporation cannot complain that the license claimed, is based on the system adopted for home organizations.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

This is an action, brought by the state of Louisiana against the Liverpool & London & Globe Insurance Company, to enforce the payment of a license for carrying on business for the year 1887, which is resisted by defendant on the ground of unconstitutionality. This appeal is prosecuted from a judgment favorable to the state.

E. W. Huntington and Horace L. Dufour, for appellant. John McEnery and W. B. Somerville, for appellee.

FENNER, J. The defendant resists the claim of the state to the license tax due under the act No. 101 of 1886, on the ground that said act is unconstitutional because the license taxes thereby imposed are not equal and uniform, and because they are not graduated in the manner directed and required by the constitution of 1879. Article 203 of the constitution provides that "taxation shall be equal and uniform," etc. Article 206 provides; "The general assembly may levy a license tax, and, in such case, shall graduate the amount

of such tax to be collected from the persons pursuing the several trades, professions, and callings."

1. It is very certain that the license taxes imposed by the act of 1886 are not "equal and uniform." If they were, they would clearly be unconstitutional. The meaning of the requirements of equality and uniformity, as applied to license taxation, was settled by numerous decisions under the constitution of 1868, from one of which we quote: "The constitution [of 1868] requires that a license tax, as well as a tax on property, shall be equal and uniform. To be equal and uniform, the tax imposed must be the same on all who engage in the particular profession or calling taxed, without reference to the abilities, fortunes, or successes of those engaging therein." *City of New Orleans v. Insurance Co.*, 23 La. Ann. 449; *State v. Endom*, Id. 663; *Parish v. Gurth*, 26 La. Ann. 140; *Cullinan v. City*, 28 La. Ann. 102. The utterance above quoted was made in a case involving a license tax upon insurance companies very similar to that contained in the act of 1886; the companies being divided into classes according to the amount of premiums received, and a different rate of tax being required from each class. This and the other kindred decisions above cited furnished the controlling motive which prompted the adoption of article 206 of the present constitution, by which license taxation is exempted from the requirement of equality and uniformity, and is not only authorized, but required, to be graduated.

2. The next defense is that the license taxes imposed by the act of 1886 are not "graduated in the manner directed and required by the constitution of 1879." The natural inquiry arises, what manner of graduation is required and directed by the constitution? There is no provision or direction whatever. The simple requirement is that "the general assembly shall graduate the amount of such tax to be collected," etc. The word "graduate," philosophically considered, is one of elastic import, having various meanings. Of the definitions given in the dictionaries, the one most applicable is the following: "To regulate by degrees; to proportion; to adjust; as to graduate punishments." Worcester. Dict. The standards and methods of regulation, proportion, and adjustment are susceptible of infinite variation. If the framers of the constitution had seen fit to require some particular method or standard, they might have indicated and defined it, and they have not done so. Who, then, is to determine what method of graduation shall be adopted? The constitution has expressly and distinctly confided this function to the general assembly. The general assembly has exercised it in the law before us. It has divided the companies and persons pursuing the business of insurance into several classes, according to the amount of premiums collected. It has levied upon each class a different license tax, greater upon those receiving a larger amount of premiums than upon those receiving a less. This is certainly a graduation of the tax—a proportioning regulation and adjustment of the tax—between the different classes according to the amount of business done. The complaint is that the smaller companies, though paying a substantially less tax than the larger ones, pay a larger amount in proportion to the business done. This may be an objection to the propriety and justice of the law, but, unless defendant can point out some provision of the constitution requiring that the tax shall be graduated in exact proportion to the amount of business done, it is of no avail as an attack upon the constitutionality of the law. The constitution has laid down no such rule, and it is not in our power to do so. Such a rule would prevent all classification whatever, and would convert the license taxation into a simple income tax, which was certainly never intended. The method of graduation here presented was the one attempted by the general assembly under the constitution of 1868, the judicial condemnation of which was the evil intended to be remedied by the article 206 of the present constitution. It has been one of the methods pursued in all the license laws adopted under the latter constitution, and everything indicates

that it was the one contemplated by that instrument. We have had occasion heretofore to consider the nature of the power conferred on the general assembly by article 206, and have reached conclusions analogous to those now announced. *State v. Chapman*, 35 La. Ann. 76; *State v. O'Hara*, 36 La. Ann. 94; *State v. Schonhausen*, 37 La. Ann. 42; *Police Jury v. Marrero*, 38 La. Ann. 397. The case is one eminently requiring the application of the principle recently announced by us: "That the judiciary, recognizing the right and duty of the legislature to construe and determine primarily its own power under the constitution, will never overrule that determination unless clearly convinced of such radical inconsistency between the law and the constitution that the two cannot be reconciled." *Planting Co. v. Tax Collector*, 39 La. Ann. 465, 1 South. Rep. 873. Judgment affirmed.

#### ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. Counsel for the company now rely for the first time on article 217 of the constitution to show that the constitution requires equality and uniformity in license taxation. Although made late, it will be considered. The article is not imperative, but merely permissive. It does not require that corporations, companies, or associations organized or domiciled out of this state, and doing business therein, be licensed by a mode different from that provided for home companies or corporations. It simply provides that such organizations may be licensed, and, when they are licensed, the different mode of license shall be uniform, upon a graduated system, as to all such corporations, companies, or associations that transact the same kind of business. There is nothing to show that the license demanded is claimed under a mode different from that established for home corporations or companies. On the contrary, it appears that the license is the same that would have been demanded from the defendant company if it were a home corporation. This would suffice to shut out the defendant from all complaint, for it cannot pretend that, because it was not treated as a foreign organization, it is entitled to privileges or favors or protection which cannot be extended to home institutions. Moreover, whatever has been said in the opinion touching the mode of license, when different, the uniformity, and a graduated system, stands in refutation of the new proposition advanced. Rehearing refused.

#### BELTRAM v. VILLERÉ et al.

(Supreme Court of Louisiana. May 24, 1883.)

##### 1. MORTGAGES—DUTY OF MORTGAGOR TO PAY TAXES.

It is the duty of the mortgagor to pay the taxes on the mortgaged property, and thus prevent its sale. If he has not the means available, he should notify the mortgagee, so that he may pay them.

##### 2. SAME—FRAUD.

The mortgagee's rights cannot be imperiled by a collusive combination of the mortgagor with others to interpose an obstacle in the enforcement of his rights.

##### 3. SAME—TAX TITLES.

The mortgagor, remaining in possession of the land, cannot allow the taxes to become delinquent, and then discharge them by a purchase which would at the same time cut off the mortgage.

##### 4. TAXATION—TAX TITLES—STATUTE OF LIMITATION—ILLEGAL SALE.

The prescription of three years, under section 5 of act No. 105 of 1874, cannot be sustained as a bar to an action to annul a tax title which is absolutely null on account of its being founded on an illegal assessment and sale.

##### 5. SAME—RIGHTS OF MORTGAGEE.

Notwithstanding the waiver and renunciation, on the part of the proprietors of the property sold, of all the illegalities and nullities in the tax assessment and sale, the rights of the special mortgagee thereon cannot be thereby impaired.

## 6. SAME—ACTION TO SET ASIDE—TENDER.

A mortgage creditor who seeks to remove a cloud from the title of mortgaged property, in aid of a future proceeding for its foreclosure, is not bound to make a previous tender.

(*Syllabus by the Court.*)

Appeal from district court, parish of Plaquemines; A. E. LIVAUDAIS, Judge. The plaintiff, Raphael Beltram, an alleged mortgage creditor for \$6,000, institutes this action against Charles J. Villeré and others to avoid three tax sales on a certain plantation. From a judgment favorable to plaintiff, and annulling the tax sales, defendants appeal.

*Sambola & Ducros*, for appellants. *James Wilkinson*, for appellee.

WATKINS, J. This is an action instituted by a special mortgage creditor of the defendants, Charles J. Villeré, Henry T. Beauregard, René T. Beauregard, and Laura T. Beauregard, in their own right, and as the unconditional heirs of Mrs. Widow Jules Villeré, deceased, against Charles A. Larendon, late husband of Laura, and natural tutor of their minor children, for the annulment of a series of tax sales made during the years 1883, 1884, and 1885, whereby the Magnolia sugar plantation in its entirety was conveyed to him. We do not regard this, as contended by the defendants' counsel, as either an hypothecary or revocatory action, notwithstanding there are some averments in the petition that are appropriate to either. Eliminating the surplusage of allegation, we have the substantial averment that the three several tax titles under which Larendon claims the property, free of plaintiff's mortgage, are absolutely null and void, on the following grounds, viz.: (1) That same are simulated, having been consented to by the joint proprietors thereof, and his solidary debtors, with the view and for the purpose of disincumbering it of his special mortgage. (2) That Larendon, being the natural tutor of the children of Laura, who was one of the joint proprietors and co-debtors, occupied such relation to the property as to preclude him from becoming a purchaser; that it was his duty to have paid the taxes. (3) That the tax sales were made under illegal and void assessments; the same being of the entire plantation as the property of O. J. Villeré, individually and in his own right, when, in point of fact, he was only an owner of an undivided share or interest therein, other shares and interests therein being then and now owned by other defendants, whose names do not appear in any of the tax proceedings or sales. *In limine*, the plaintiff was met with a variety of dilatory and other exceptions, only one or two of which need be mentioned, viz.: (a) That the petition contains inconsistent and conflicting demands, which cannot stand together; (b) that by reason of the disclaimer, by all the defendants except Larendon, of all personal and pecuniary interest in the property, and their waiver of whatever right of complaint or cause of action they may have had, growing out of any nullities and informalities in said tax proceedings and sales, the plaintiff cannot maintain this suit. These having been overruled, all the defendants join in one answer, in which are set out the following defenses, viz.: (1) That the tax sales are not simulations. (2) That they contain neither defects nor nullities of any kind. (3) That plaintiff had full knowledge of the sales when made. (4) That plaintiff did not purchase the mortgage note of Marchand, but paid it, and there is no mortgage on the property. (5) If, in point of fact, he did become the purchaser, it was paid and extinguished by the application thereto of the proceeds of the crop of 1878, in pursuance of a stipulation and contract of pledge contained in the mortgage. (6) That, as C. J. Villeré acted individually and personally in effecting a compromise and extension of the mortgage note, in March, 1884, his co-proprietors and co-debtors were not bound thereby. (7) That there was a compromise and full settlement made of the note, but from which the plaintiff subsequently and unwarrantably receded. (8) That plaintiff is with-

out any standing in court because he has not tendered Larendon the amount of the purchase money, and 20 per cent. damages, 10 per cent. interest, and taxes subsequently expended on the property. (9) The prescription of one, two, and three years in bar of plaintiff's demands. (10) In the alternative, Larendon pleads, in warranty against the tax collector, and in reconvention against the plaintiff, the sum of \$1,589.68 for expenditures.

1. The following facts are disclosed by the record, viz.: In February, 1878, Widow Jules Villeré, C. J. Villeré, Henry T. Beauregard, René T. Beauregard, and Laura T. Beauregard executed a special mortgage on the Magnolia plantation, jointly owned by them, in indivision, to secure the payment of a note for \$6,000 for money borrowed of Alfred Marchand. This note was executed by them *in solido*, payable to their own order, and by them indorsed in blank. It was payable on the 1st of January, 1879, and bore interest from maturity. The mortgaged property was owned by the defendants in the following proportions, viz.: C. J. Villeré, eighteen twenty-fourth parts; H. T. Beauregard, two twenty-fourth parts; R. T. Beauregard, two twenty-fourth parts; Laura T. Beauregard, two twenty-fourth parts, — equaling twenty-four twenty-fourths. Their titles are duly recorded, and evidence the same; and that fact was admitted on the trial. Subsequently to the execution of the act of mortgage Laura died, and Charles A. Larendon qualified as the natural tutor of their minor children, and has continued to be until the present time. In 1882, 1883, and 1884, the entire property was assessed in the individual name of C. J. Villeré, — at \$15,500 for the first two years, and at \$10,850 for the last. On the 21st of April, 1883, a portion of this property was pointed out by C. J. Villeré to the tax collector for sale, and was sold for the amount of \$274.83, taxes of 1882, and same was adjudicated to C. A. Larendon. On the 5th of April, 1884, another portion was so pointed out, sold, and adjudicated to C. A. Larendon for the sum of \$394.59, taxes of 1883. On the 18th of April, 1885, the remainder was thus pointed out, sold, and adjudicated to Larendon for the sum of \$286.11½, taxes of 1884. The advertisements corresponded with the assessments and sales in every particular. On the 13th of March, 1884, the plaintiff acknowledged in writing the receipt of \$2,000 in full payment of interest on the note to that date, and in payment of the balance of the plantation account; and he agreed to take no steps to foreclose his mortgage for the space of three years, interest on the mortgage note of \$6,000 to be paid yearly, on the 1st of January of each year. In pursuance of that agreement the interest was regularly paid for two years, but default was made when the third installment became due. It is reasonably certain that the plaintiff, who resided in New Orleans, was not advised of these tax sales, one of which occurred previous to the agreement, and the other two subsequently. Had he been advised of them, he certainly would not have granted three years' indulgence, and deferred action on his mortgage until Larendon had purchased all the property. He certainly would not have been so neglectful of his own interest. Mr. Villeré failing to pay the interest due on the 1st of January, 1887, plaintiff demanded it, and to his letter the former wrote the following reply, viz.: "I have now reached the crisis of my affairs. I am powerless. Yours, CH. J. VILLERÉ." Upon the plaintiff writing him that he did not understand, and inviting him to call at his office, he wrote him as follows, viz.: "DEAR SIR: A call at your office, to which you are pleased to invite me, would be of no avail. I expressed, in my last note, my meaning, concisely, yet plainly. Truly yours, CH. J. VILLERÉ." This last bears date January 20, 1887. The absence of any mention of the tax sales, all of which had then taken place, is quite significant. The plaintiff's counsel testifies that, after he was employed in this matter, he interviewed the parties, and for the first time ascertained that the property had been sold for taxes, and informed the plaintiff of it. Mr. Villeré resided on the plantation before and since the sale. At that time, and before, Henry T. Beauregard resided with him, and assisted him in the culti-

vation and management. This appears to be conceded by all. After the plaintiff granted the extension, he discontinued advances to the plantation, and Mr. Larendon commenced to furnish them. As a witness, the latter states, in his direct examination, that his inducement to purchase the property at tax sale was to secure "a large amount of money due [him] me by the plantation, for which I had security of no kind; the plantation being otherwise heavily incumbered by mortgages and prior debts. I reflected that self-protection was the first law of nature, and bought it." On the same subject Mr. René T. Beauregard says, as a witness for defendants, viz.: "My brother-in-law told me that he was going to buy it at tax sale, and asked me what I thought about it. I told him the law was conflicting about tax sales, and it was risky. He told me that Mr. C. J. Villeré told him that he might secure himself, and that the purchase would be good."

2. Under this evidence, all the defenses of the various defendants fall. Argument is quite unnecessary to demonstrate that these were purely and simply consent proceedings that had for their object the divestiture of plaintiff's special mortgage on the property, and the investiture of Larendon with security for his unsecured demands. In *Austin v. Bank*, 30 La. Ann. 691, our immediate predecessors said of a tax sale that was made under very similar circumstances: "The purchase by Moss was nothing more than a purchase by Mrs. Austin, the debtor and mortgagor, through her son, the plaintiff. The money paid as the price of the tax sale was only what she, as owner of the property, owed the state, and what she honestly and in good conscience ought to have paid without, and before, and to prevent a sale. If she could not pay it, the debt being *exigant*, and of so high a rank, she should have acquainted her creditor and mortgagee with its imminence, instead of observing the suspicious reticence which characterizes her conduct. The creditor's rights, as mortgagee and vendor, cannot be imperiled by the mortgagor's collusive combination with others to interpose an apparent, but fraudulent, obstacle in his way in enforcing those rights." The principle of that case is applicable here, and the sales under consideration are of no more force or validity. And such is the only effect we can give to the transactions of Mr. Larendon. The rights of the creditor as mortgagee cannot be thereby impaired.

3. The prescription of three years, that is pleaded under section 5 of act 105 of 1874, is untenable. In construing that statute, we said in *Barrow v. Wilson*, 39 La. Ann. 403, 2 South. Rep. 809, viz.: "In the case of *Lague v. Boagni*, 32 La. Ann. 912, we refused to apply this prescription to the particular case therein mentioned, which was one where the property of Lague had been assessed in the name of Nunez, when Lague's title was spread upon the public records of the parish, and when the purchasers were shown to have known of these defects." For a much stronger reason, that prescription should not be applied to the case stated here, because the property of several different persons, held in indivision, was assessed and sold as the exclusive property of only one of them; two of the joint owners excluded were minors; and the purchaser was their father and natural tutor at the time. Such an assessment has frequently been held void, and the nullity is patent on the face of the titles. See particularly our opinion in *Hayes v. Viator*, 33 La. Ann. 1162. The plea of two years' prescription is unavailing. *Lague v. Boagni*, 32 La. Ann. 912.

4. Instead of the waiver and renunciation, by the mortgage debtors and tax delinquents, of all the informalities and illegalities propounded in these tax assessments and sales, proving of any avail to them and the purchaser, whom they join in resisting the enforcement of plaintiff's demands, they only give force and emphasis to them. In *Bank v. Lannes*, 30 La. Ann. 875, our predecessors said: "The sale on the 4th of August, 1873, was a nullity. It is to no purpose to say that Blaise Lannes, the owner, did not complain. His creditors have rights of which he cannot deprive them; and, when a title adverse to the claim set up by them is interposed, they may oppose the absolute nulli-

ties of that title, even if he should prefer to waive them in favor of his brother." And by how much the more is this doctrine true of a creditor holding a special mortgage on the property which is sought to be subverted by such waiver and renunciation. Viewing these transactions as evidencing a payment of the taxes on the plantation, the exception of the want of tender is of no significance. His payment was necessarily for the account of the co-proprietors, who alone can be called to account. Their mortgage creditor is due none. Larendon has had the use of the revenues since his attempted purchase, and has disposed of some of the machinery, from which he has the opportunity of reimbursing himself.

The judgment appealed from must be amended so as to reject plaintiff's demand for the seizure and sale of the mortgaged property, because of the want of a sufficient allegation or prayer to that effect. It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to reject and disallow the seizure and sale of the mortgaged property, and that, as thus amended, same be affirmed, with costs of appeal taxed against the plaintiff and appellee; his rights being reserved in another action.

(40 La. Ann. 259)

**COTTAM *et al.* v. MECHANICS' & TRADERS' INS. CO.**

(*Supreme Court of Louisiana. March 26, 1888.*)

**1. INSURANCE—TERM AND SCOPE OF RISK.**

Where goods, while on the wharf of a steam-ship company, awaiting shipment on one of the vessels of the company, are burned, the owners of the goods cannot recover for their loss upon a policy of insurance wherein the goods insured or to be insured are referred to (quoting) "as goods laden or to be laden on board the good ship \_\_\_\_\_," when the policy contained the further expression, (quoting,) "beginning the adventure upon said goods and merchandise from and immediately following the lading thereof on board said ship."

**2. SAME—CONSTRUCTION OF POLICY.**

This last expression will control as to the time the risk began. The former may be regarded as descriptive of or as designating the stock of goods or merchandise intended to be insured.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; W. T. HOUSTON, Judge. Suit by H. T. Cottam & Co. against the Mechanics' & Traders' Insurance Company to recover a loss from fire under a policy of insurance. From a judgment in favor of defendant, plaintiff prosecutes this appeal.

*Braughn, Buck, Dinkelspiel & Hart*, for appellant. *Percy Roberts*, for appellee.

TODD, J. This is an action to recover a loss from fire under a policy of insurance. The cause of action is set forth in the petition as follows: "That on the 18th day of September, 1883, petitioners entered into an agreement or contract with said insurance company by which it issued to them what is known as an 'Open Marine Policy,' a copy of which is hereto annexed as part of this petition, which said policy was extended from time to time, and was in full force and effect on the 29th of January, 1887; that on the \_\_\_\_\_ day of January, 1887, petitioners made application to said company to insure, under said open policy, certain goods, described in the annexed bill of lading, which application was made on the blanks of the company provided for that purpose, one of which is hereto annexed as part of this petition. Now your petitioners further represent that after said bill of lading had been signed by the agents of the steam-ship Louisiana, in the city of New York, and while said goods were in the possession of said steam-ship, for the purpose of being laden thereon, and while on the wharf of the steam-ship company in the city of New York, they were totally destroyed by fire on the 29th of January, 1887; that said loss was within the terms of said policy, and therefore said company

is liable to petitioners for the full value of said property, the aforesaid sum of twenty-one hundred dollars; that the steam-ship *Louisiana*, upon which the goods were to be shipped, was to have left the city of New York on the ——— day of January, 1887, and said goods would have been taken thereon, for said voyage, if it had not been for the aforesaid fire." There was an exception of no cause of action filed and sustained, and there was judgment dismissing the suit, from which the plaintiff appeals.

The controversy turns on the construction of the policy. One clause of the policy reads as follows: "MARINE POLICY. The Mechanics' & Traders' Insurance Company of New Orleans, by this policy, do insure H. T. Cottam & Co., for account of whom it may concern, lost or not lost, subject to the rates of premium, rules, and conditions of the board of underwriters of New Orleans, existing at the time of shipment, upon all kinds of goods and merchandise laden or to be laden on board of the good ship ———." The contention of the plaintiff is that the words "laden or to be laden" embraced not only the goods actually on board the vessel, but likewise the goods in the custody of the carrier, though not on board the steamer. Did this clause stand alone, the matter would seem too clear for disputation, and the loss in the manner and under the circumstances stated in the petition would manifestly be covered by the terms of the policy. But there follows another clause, in these words: "Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of said vessel at ———." It is this last clause that makes room for controversy. The two clauses at first clash would seem to conflict. But is there a real conflict between them? Can they be reconciled? The last clause was evidently intended and used to define the precise time when the risk began. The words "beginning the adventure" are the equivalent of the expression "risk commencing;" and when does it so begin? In the language of the contract, "from and immediately following the loading thereof on board of the said vessel." If, from language so clear and explicit, the true intent of the parties would seem to be that by the undertaking of the company the risk did not commence until after the goods were on board, how are we to dispose of the language in the first part of the policy above quoted, to the effect that the company insures all lawful goods "laden or to be laden on board the ship?" The goods intended to be insured were at that time purchased. Some of them were already on board of the ship when the policy was signed; some were to be put on board after the signing. These goods already on board and those to be sent on board are the goods of the insured. This language does not necessarily indicate when the policy was to go into effect, nor the exact time when the risk was to begin; but it may reasonably be inferred, especially when we consider the subsequent expression relative to the beginning of the undertaking or risk, that the words "laden or to be laden on board" were used to designate the things or stock of goods to be insured; that is, used in a descriptive sense. The sole vital question in the case for the determination of the court is, when did this policy become operative? When did the risk begin? We think the policy answers that question explicitly, free of all ambiguity, in the words, "following the loading of the goods on board the vessel," i. e., after the goods were on board the ship.

Our conclusion on this point is supported by several adjudications. Notably among others is that of *Gordon v. Insurance Co.*, 4 Denio, 360, substantially a paralleled case, as will appear from the following quotation from the decision: "Declaration on a policy dated October 7, 1841, whereby the plaintiffs were insured, lost or not lost, at and from Canton to a port of discharge in the United States, upon the freight of all kinds of lawful goods and merchandise laden or to be laden, on board the good ship *America*, whereof ——— is master, etc. Beginning the adventure upon the said freight from and immediately following the loading thereof on board of said vessel at ——— as afore-

said," etc. "They did not take upon themselves any risk until the goods should be on board the ship; and as there is no averment that they were put on board, the plaintiff cannot recover." See, also, *Murray v. Insurance Co.*, 4 Johns. 449; *Smith v. Insurance Co.*, 30 Ala. 167. The plaintiff's counsel cite, as opposed to the authority of the above cases: *Barrett v. Salter*, 10 Rob. (La.) 434; *Insurance Co. v. Babbitt*, 7 Allen, 235; *Insurance Co. v. Transportation Co.*, 17 Fed. Rep. 920; *Reed v. Insurance Co.*, 95 U. S. 30. All of these cases we have examined, and none of them, save the last, directly involve the liability of the insurance companies on the construction of insurance policies, but refer to the responsibilities of common carriers to the shippers under the bills of lading. In the last case, *Reed v. Insurance Co.*, 95 U. S. 30, the main point decided was that "although a written agreement cannot be varied by proof of the circumstances out of which it grew, the circumstances may be resorted to for the purpose of ascertaining the subject-matter of the agreement and the stand-point of the parties in relation thereto." As, for instance, to show that when the policy of insurance contained a clause, (quoting,) "the risk is to be suspended while the vessel is at Baker's island, loading." The true meaning of the clause, in the light of the surrounding circumstances, was that the risk was to be suspended while the vessel was at the place designated, for the purpose of being loaded. That case is not relevant, because in the instant case no circumstances exist, or are suggested, calculated to elucidate the contract as to the intent of the parties; and the language of contract, in our estimation, is clear and explicit, and free from all obscurity. For these reasons we do not feel authorized to disturb the conclusion reached by the judge of the first instance. Judgment affirmed.

(40 La. Ann. 587)

**CITY OF NEW ORLEANS v. NEW ORLEANS C. & L. R. Co.**

(*Supreme Court of Louisiana. May 23, 1893.*)

**1. HORSE AND STREET RAILROADS—TAXATION—LICENSE TAX.**

Operating a street railroad by horse or steam is a business, within the meaning of the law, which can be subjected to the payment of a license, under act 101 of 1886 and city ordinance No. 2035.

**2. SAME—GRANT OF FRANCHISE—ENFORCEMENT OF LICENSE.**

A contract conferring the right to lay rails to operate a street railway, without dispensing with the payment of a license, is not impaired by the exaction of such license.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

This is a proceeding by rule taken by the city of New Orleans against the New Orleans City & Lake Railroad Company, to enforce the collection of a license tax for the year 1888 for pursuing the occupation of street railroad. From a judgment making the rule absolute the defendant appeals.

*Braughn, Buck, Dinkelspiel & Hart*, for appellant. *Francis B. Lee*, Asst. City Atty., for appellee.

BERMUDEZ, C. J. Plaintiff sues to recover \$2,500, and interest, from the defendant, as a license for the year 1887, for carrying on, within city limits, the business of operating and running a horse and steam railway for the transportation of passengers. The defenses are: (1) That act No. 101 of 1886, which authorizes the city to levy the license tax, is unconstitutional, because the license is unequal, and not graduated, as is required by article 206 of the constitution, as it provides a different grade for cities, according to their population. (2) That, if this defence is not well founded, then that the license tax cannot be recovered, because the business is not a trade, profession, avocation, or calling in the sense of the law, but is simply the exercise of a privilege accorded for consideration to use the streets and highways

of the city for street-railroad purposes; that the enforcement of the ordinance under which the license is claimed, will impair the obligations of the contract entered into in 1879 between the city and the company; and that this impairment violates both the federal and state constitutions.

1. The first defense is formally abandoned by the company on consideration of the ruling in *State v. O'Hara*, 86 La. Ann. 94, as settling the question.

2. In relation to the second defense, it may suffice to observe—*First*, that the act of 1886 expressly recognizes and declares that carrying on, operating, or running any horse or steam railroad, or both, for the transportation of passengers, within the limits of any city, is a business, and that, after so saying, the act proceeds to graduate the license; *second*, that the privilege conceded by the city by the contract of 1879 to the company was intended merely to confer the right to lay rails, and do all necessary work, on the streets designated, to enable the grantee to exercise the right of way to operate a street railway. From the language of the act it is clear, and it follows, that the operating of a street railroad is a business, and, as such, chargeable with a license. The privilege of the right of way is what is termed a franchise, which, when granted, becomes property, susceptible of incumbrance and conveyance. *Board v. New Orleans*, 82 La. Ann. 915; *Railroad Co. v. Delaware*, 84 La. Ann. 1228, and 114 U. S. 505, 5 Sup. Ct. Rep. 1009. It is therefore well distinguishable from the privilege of enjoying that right, which is vivified only on the payment of the proper license to the city, under the terms of act 101 of 1886, p. 175, (ninth and following class,) on which ordinance 2035, C. S., sued under, is made to rest. It is further clear that, as the contract of 1879 does not grant the privilege of using or exercising the right of way free from any license, the exaction of one does not impair the obligation of the contract. The district judge ruled correctly. Judgment affirmed.

(40 La. Ann. 484)

#### Succession of SPARROW.

(*Supreme Court of Louisiana*. May 7, 1883.)

#### 1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT AND ACCOUNTING—DISBURSEMENTS.

An administrator is entitled to credit for moneys paid out for the repairs or preservation of plantation buildings and machinery; also for insurance on gin-house, though the policy issued in the name of the factor or commission merchant for the estate.

#### 2. SAME—RENT—LAND IN POSSESSION OF HEIR.

A daughter of the intestate, who occupies, with her minor children, a plantation dwelling-house, should not be charged rent, where she has not contracted to pay it, and where the building is not needed for the administrator or a tenant, and is not required for the cultivation of the plantation.

#### 3. SAME—AGREEMENT WITH HEIRS AS TO MANAGEMENT OF ESTATE.

When an administrator has conducted planting operations and a mercantile business on account of the succession, and two of the three legal heirs have agreed that their shares in the succession shall be responsible for the debts contracted by the administrator for this unauthorized cultivation of the succession plantation, they do not bind themselves personally for the debt, nor are their shares liable for more than a third of the debt. Nor are the heirs committed, by such agreement, to correctness of the account, and estopped from disputing it. Nor will a judgment decreeing the liability of such shares for the debt be held as *res adjudicata* against their right to dispute it, or show its payment or extinguishment.

#### 4. SAME—ATTORNEY FEES.

Where the administrator has employed competent and experienced attorneys, who are fully capable alone to perform every service required of them pertaining to the regular and usual administration of the succession, he is not authorized to employ, at the expense of the succession, other attorneys, whose services are directed mainly to the enforcement of a large claim against the succession in favor of a firm of which the administrator is a member. Their fee is not a proper charge against the succession.

#### 5. SAME—COMMISSIONS OF ADMINISTRATOR.

The entire commissions of an administrator of a large succession are not properly exigible before the administration is terminated. Prior to this, his commissions to

sums received and distributed should be paid, and his rights as to the residue reserved for his final account. He is entitled to commissions on the rentals of the plantation, though leased by himself.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Carroll; E. J. DELONEY, Judge. This case was before this court last year, and was remanded to the lower court for further proceedings, as set forth in the decree therein rendered. 2 South. Rep. 501. There was judgment below homologating the tableaux, with slight amendments; ordering the debts set down in the tableaux as due by the whole succession to be first paid, and those set down as due out of the respective shares of the heirs to be then paid out of the residue. The pleas of estoppel and *res adjudicata*, filed by John Chaffe & Sons, were sustained. The applications of the heirs to be put into possession were rejected, except that, after payment of the debts due by the succession as a whole, they were allowed to be put into possession of their respective shares. From this judgment, the heirs, and D. B. H. Chaffe, whose claim as a creditor of the succession was rejected, appeal.

W. G. Wyly, F. F. Montgomery, and E. D. Farrar, for appellants. Montgomery & Ransdell, J. M. Kennedy, and T. J. Senames & Legendre, for appellees.

TODD, J., (*after stating the facts as above.*) To understand fully the issues involved in these cases, a brief reference is necessary to a case which was before this court last year, entitled *Succession of Sparrow*, and reported in 39 La. Ann. 696, 2 South. Rep. 501. From the decree then rendered we quote as follows: "It is ordered, adjudged, and decreed that the two provisional accounts of administration herein rendered and filed by Chris. Chaffe, Jr., admr., and tableaux of debts charged against said succession, also presented by said administrator, be, and the same are hereby, each and all annulled, canceled, and rejected, under and subject to the rights heretofore reserved in favor of said administrator and the firm of John Chaffe & Sons, touching their claims against the two heirs of age for moneys advanced, and for expenses of cultivating the succession plantations, and in favor of the administrator for moneys advanced for the maintenance of the minor heirs, Mary and Kate Decker. It is further ordered that Chris. Chaffe, Jr., admr., be required to present forthwith the provisional account of administration and tableaux of debts which may be due by said succession, from which he shall exclude, as debts due by said succession, all expenses incurred in the cultivation of succession plantations, either by himself or Edward Sparrow, former admr. of said successions, and all items of indebtedness due to John Chaffe & Sons, either by A. M. Ashbridge or by Edward Sparrow personally." To understand fully the nature of the reservation made in this decree, it appears from the report of that case that, in the account filed by the administrator, a large indebtedness was charged against the succession of Mrs. Sparrow in favor of John Chaffe & Sons, incurred in the cultivation of a number of succession plantations by Edward Sparrow, the surviving husband of the decedent, and former administrator of her succession, and by Chaffe, the present administrator, which was decided to have been irregular and unauthorized. It was claimed, however, that two of the heirs, of age, of the said deceased, (Mrs. Foster and Mrs. Ashbridge,) had, by a written agreement, made themselves responsible of this large debt, to the extent of their interests in the succession. This fact is referred to in the body of our former decree, and the reservation further explained, in the following language: "We therefore deem it our duty to reserve the right of John Chaffe & Sons, and of the present administrator, to enforce their respective claims against the two heirs of age, on account of the latter's liability for expenses incurred in the culti-

vation of the plantation of the succession, by proper proceedings in due course of administration."

After the case was remanded under this decree, the heirs of Mrs. Sparrow filed a petition to be recognized as her heirs at law, and to be put in possession of her succession, and that Chaffee, administrator, be ordered to render an account of his administration. In this proceeding for recognition, and to be put in possession, John Chaffe & Sons intervened, and opposed the major heirs, Mrs. Foster and Mrs. Ashbridge, going into possession of the estate, unless they first paid his claim against them, or, in the alternative, gave security for its payment. The filing of this intervention was excepted to on the ground that, John Chaffe & Sons not being creditors for the succession of Mrs. Sparrow, they were without interest to intervene in this proceeding, or any other relating to her succession. The exception was overruled, and the intervention allowed. On the 5th of August, 1887, Chaffe, administrator, filed an account, and subsequently a supplemental account and two tableaux: one tableau purporting to represent or show the debts against the succession as a legal entity; and the other the debt referred to in the reservation made in the previous decree, for which the heirs of age, or, rather, their shares in the succession, were claimed to be liable. This item is mentioned and described in the tableau, thus: "Claim of John Chaffe & Sons for expenses incurred in the cultivation of the succession plantations by Edward Sparrow, former administrator, as set forth and ordered in said decree, one-half thereof to be paid out of the share of the said Mrs. Foster and said Mrs. Ashbridge, respectively, viz., \$21,000.00, out of each of said shares, equal to \$42,000.00." In the accounts the administrator charged himself for rent of plantations from 1883 to 1887, inclusive, and a few debts collected, amounting to \$19,008.28. He credits himself with payments made on account of repairs, taxes, attorneys' fees, costs, commissions, etc., amounting to \$12,227.53, leaving a balance in his hands of \$6,780 for distribution among the heirs. This sum he proposes to divide into three equal parts, and to credit the portion thereof of the minors to account of advances made to them by the administrator for their maintenance, and those of the major heirs, Mrs. Foster and Mrs. Ashbridge, to the plantation account in favor of John Chaffe & Sons, under their agreement subjecting their shares in the estate as security for the debt. These accounts and tableau of the administrator were opposed by the major heirs, and the tutor of the minors; the opposition extending to the entire accounts, save as to certain items admitted to be correct. The opponents further charge maladministration and mismanagement on the part of the administrator. They aver, in substance, that the succession owed no debts when it was opened, but that, after seven years of administration, the administrator reports the debts of the succession of the heirs at \$51,831.13; that the gross revenues since August, 1883, when the present administrator took charge, aggregate only \$14,564.84, against expenses, as alleged, of \$20,254.84. It is further charged that the standing crops on the succession plantations, on the 5th of August, 1883, when the administrator went into possession, were inventoried and appraised at \$16,780.50, and a stock of goods in the Midland store was inventoried at \$1,379.65, of which the administrator makes no account whatever. Mrs. Foster and Mrs. Ashbridge made special opposition to the claim or charge of John Chaffe & Sons directed against their shares in the succession, on the ground that such a claim was improperly included in the administrator's account; that it was in the nature of a demand, and against them as heirs, and not against the succession, and one which it had been decreed the succession did not owe, and therefore could not be legally urged in the probate proceedings, nor enter into an administrator's account; that the alleged indebtedness is charged *in globo*, whereas they were entitled to be informed, by proper pleadings, of the precise nature of the demand, and to have oyer of the account on which it was based; and, further, entitled to plead, answer, or demur after having been regularly

used, and ought not to be condemned without a hearing and without trial in a court of ordinary jurisdiction. Subject to this exception, they answered, denying the existence of the debt, and charging that "the claim was false and fraudulent throughout." It was also charged by them that certain writings designated as "X," "Y," and "Z," on which the liability of their interests in the succession to John Chaffe & Sons purports to be founded, were signed by them in error,—an error induced by the false and fraudulent representations of Chaffe, administrator, and one of his attorneys; that they were made to believe, by these representations, that the succession of their mother, Mrs. Minerva Sparrow, was largely indebted to the firm of John Chaffe & Sons, and that their only hope or chance of realizing anything from the succession was by executing these agreements, purporting to bind their said interests, as surety for advances and supplies made to the plantations by the firm of John Chaffe & Sons. Mrs. Foster, in her own behalf, further represented, in substance, that she was induced, by like false and fraudulent representations by the same parties, to consent to the preparation and filing of an intervention in the proceedings relating to the provisional account and tableau filed by Chaffe, administrator, in 1885, by which it is sought to establish the liability aforesaid for the acts and gestion of her father, Edward Sparrow, during his irregular administration of her mother's succession, and his illegal cultivation of the plantations of the estate. She avers that owing to said misrepresentations and deceptions practiced upon her, that she is in no way bound by said pretended intervention. Pleas of *res judicata* and estoppel were filed against the major heirs, under which it was contended that they were debarred from disputing the correctness of the claim urged against them, or the mode of its prosecution. These pleas were sustained. The proceeding of the heirs to be put in possession, and their opposition to the account and tableaux, were consolidated and tried together, and judgment rendered substantially as follows: The accounts and tableaux were approved and homologated, except as to certain charges of insurance and expenses growing out of the planting operations, amounting in all to \$466.36; and the tableau was amended by rejecting the claim of D. B. H. Chaffe for attorney's fees, reducing the fee of Montgomery & Ransdell from \$4,117.50 to \$2,862.75, and the commissions of the administrator from \$2,134.42 to \$1,680.40; and in all other respects the account, as relates to the succession, was approved and homologated. The pleas of *res adjudicata* and estoppel and prescription were sustained. Mrs. Foster and Mrs. Ashbridge were each condemned to pay \$21,000 to John Chaffe & Sons, and said amounts were made a charge against their respective shares in the estate of Mrs. Minerva Sparrow, to be paid after the settlement of the debts of the succession, and the administrator ordered to retain the amounts owing them, and also the amounts due by the minor heirs, and advanced for their maintenance. The demand of the heirs to be put in possession of the estate was rejected, except on condition of their giving bond to secure the debts recognized against their respective shares. From this judgment the heirs of Mrs. Sparrow appealed, and also D. B. H. Chaffe, whose claim for an attorney's fee was rejected. In this court, Chris. Chaffe, administrator, in answer to the appeal, prays the amendment of the judgment by allowing the items of his account rejected by the lower court, being for \$414.80 for insurance in gin-house, \$750 charged by the administrator against Mrs. Ashbridge for rent of a plantation dwelling-house.

1. Account of administrator filed 5th August, 1887, and oppositions thereto, and supplemental account. The administrator charges himself with \$19,008.29, being almost exclusively for rents of plantation from July 5, 1883, to and including the year 1887, at \$4,000 per annum; the rental fixed by our former decree. He credits himself, for payments made on account of the succession, with \$12,227.53, leaving a balance in his hands of \$6,780.76, which he proposes to apply towards the payment of the debts of the heirs. Of these

credits, the opponents admit the correctness of \$6,090.86, leaving in dispute \$6,137.17. The main items opposed are those for repairs, attorneys' fees, and commissions of administrator.

(a) The contention of the opponents is that none of the credits claimed for repairs and improvements should be allowed, for the reason that, by the terms of the decree of the court, the credits of the administrator were restricted to taxes paid and commissions; the language of the decree being "that he shall charge himself, as rent for the plantations and their appurtenances during the whole time he cultivated them, at the rate of \$4,000 per annum for the whole, subject to deduction of taxes and administrator's commissions." It is proved to our satisfaction that all the repairs made and paid for, which composed the items objected to, were such repairs as, in our opinion, were necessary for the preservation of the plantation buildings and machinery. Independently of the decree referred to, it was the duty of the administrator to preserve the property, and defray the expenses for such preservation. To find in the decree any prohibition of an expenditure for such an essential purpose would be giving too narrow a construction to its language. The judge *a quo* rejected the opposition to this item, and we shall not disturb his ruling on this point. The credit claimed for insurance on the gin-house was of a like character as those for necessary repairs; but the judge rejected this charge, and there is a prayer for an amendment in this respect. It is objected to on the ground that the policies issued in favor of John Chaffe & Sons; but the evidence makes it certain that, though thus issued, the property covered by the insurance was the gin-house on one of the succession plantations, and the succession should pay it; and the amendment is allowed. The amount of the item is \$414.80.

(b) The attorneys' fees charged are as follows:

Montgomery & Ransdell, . . . . .	\$5,017 05
Less amt. paid, . . . . .	900 00
Balance claimed, . . . . .	\$4,117 05
Bayne & Denegre, . . . . .	250 00
D. B. H. Chaffe . . . . .	250 00
Total, . . . . .	\$4,617 05

The fee of Montgomery & Ransdell was reduced to \$2,862, and, adding the \$900 already paid, made it \$3,762.75. A great deal of the litigation attending the settlement of this succession has been caused by the attempt to enforce against the succession the personal debt of Gen. Sparrow, contracted during and on account of his unauthorized cultivation of the succession plantations, and which debt was rejected by our former decree as a charge against the succession of Mrs. Sparrow. Therefore the professional services of these attorneys, in this respect at least, cannot be regarded as inuring to the benefit of the succession. We have carefully examined the record, and considered the proceedings, with special reference to making a just estimate of the services rendered by these gentlemen, and we think they should be allowed a fee of \$3,250, and, deducting the \$900 received by them, would leave a balance due them of \$2,350; this to include services rendered and to be rendered in the settlement of the succession; and the judgment appealed from must be amended conformably to this conclusion. The fee of D. B. H. Chaffe was properly rejected. His services were directed towards supporting the claim of John Chaffe & Sons, and there was no need of his help in any way relating to the usual and required services of attorneys attending the administration of successions. The regular attorneys of the succession were able, skillful, and fully competent of themselves to discharge the duties and responsibilities pertaining to their employment. For a like reason, the fee of Messrs. Bayne & Denegre should have been rejected, and the judgment which allowed it must in this respect be amended.

(c) The commissions charged by the administrator amount to \$5,017.05. The administration is not yet closed, and we do not think that the succession should now be taxed with the entire commissions. These are properly exigible upon a final settlement and in the final account. Without, therefore, determining whether this charge is correct or not as to the amount claimed, we think it proper that the commissions at present be confined to the sums that have been received by the administrator from or on account of the succession since he took charge of the estate. The sums so received he reports at \$14,964.10, upon which he properly charges a commission of \$374, which is approved, and the right reserved to the administrator for the residue of his commissions, to be settled in his final account.

2. The account of John Chaffe & Sons, which was rejected by our decree in the former appeal as a charge against the succession of Mrs. Minerva Sparrow, was properly placed on the administrator's account. This became proper, and even necessary, from the terms of the former decree. It is too late to question the correctness or propriety of that decree in this regard. While rejecting the claim as a charge against Mrs. Sparrow's succession, we held substantially that the major heirs of Mrs. Sparrow, or at least their shares or interests in their mother's succession, were surety for the debt to be paid, if acquired in due course of administration. That necessarily implied that their shares in the estate should be ascertained and fixed by the final settlement of the succession under administration; and until a partition could be made, of course, the entire assets of the succession, including the shares of these heirs, would remain in the hands of the administrator, who, by the terms of the decree, was authorized to apply them, as far as might be necessary, to the payment of the account of John Chaffe & Sons. The judge *a quo*, however, seemed to consider that the respective shares or interests of these heirs were liable each for one-half that debt. This was a mistake. These heirs are not personally bound for any part of the debt. Only their shares in the succession are made subject to it under their engagement or contract. Had they been personally liable as heirs, they could only have been bound to the extent of their virile shares; and such shares, each being one-third of the estate, there being in all three heirs, are each bound only for one-third of the debt. The plea of *res adjudicata* presented by the accountant was properly sustained, at least to this extent: that this claim of John Chaffe & Sons should be placed on the account, and settled contradictorily with these heirs in due course of administration, and their respective shares in the succession to be liable for the debt under their guaranty in favor of these creditors. At that time, Mrs. Foster, one of the heirs, acquiesced in this view of the matter, but since the decree was rendered she has shifted her position, and seeks now to be relieved from her obligation of guaranty or suretyship on the grounds of fraud and error of a similar character urged by Mrs. Ashbridge in the previous appeal. In that case we passed on the grounds of error and fraud set up by Mrs. Ashbridge, and ruled that they were insufficient to relieve her from her agreement. So, in like manner, we have carefully considered, in the instant case, the fraud and error charged by Mrs. Foster against the obligation, as relates to herself, and have reached the same conclusion as we did in relation to Mrs. Ashbridge. The judge, however, erred in extending the scope of the plea beyond this. There was nothing, however, in our former decree that adjudged these opponents, or their interests in their mother's succession, to be liable for the claim or account of John Chaffe & Sons, as presented and reported in the account, or any portion of it. The correctness of the account, as against any one, was not determined. In that case it was prosecuted as a just claim against Mrs. Sparrow's succession exclusively. As such, it was rejected by the court, with the right reserved to the creditors to prosecute it against her major heirs in the manner now being done, to the extent of their interests in the succession. The question as to the correctness of this account,

as relates to these opponents, is still an open one; and the judge *a quo* was therefore in error in excluding all evidence in opposition to the claim, or going to show its extinguishment by payment or otherwise. This refers especially to that feature in the opposition wherein it was sought to charge the administrator with the proceeds of the cotton crops growing on the succession plantations when the accountant entered on his administration, and took possession of the estate. The cotton crop was alleged to have been sold for \$36,000; and, besides, there was a stock of goods and other things, for which an account was sought from the administrator. True, these crops, etc., did not belong to the succession of Mrs. Sparrow, for which reason, mainly, an inquiry about them was suppressed; but it was for this very reason that they did not belong to Mrs. Sparrow's succession, and consequently must have belonged to Gen. Sparrow's succession, that this inquiry sought should have been permitted. These major heirs, or their succession interests, are not sought to be held liable for this indebtedness by reason of their heirship of their mother, but solely on account of their father's acts and administration. The only matter to be determined upon this branch of the case was, how much did Gen. Sparrow or his estate owe John Chaffe & Sons for advances and supplies furnished him during his illegal administration of the succession, and for the cultivation of its plantations, and for which these heirs had bound their interests to the extent stated? The only way to ascertain this indebtedness was to credit Chaffe & Sons with all they had supplied or advanced to these plantations, or to Gen. Sparrow for their cultivation, and to debit them with all they received in cotton or other things from the plantations, or from Gen. Sparrow, or the present administrator. It was only by liquidating this indebtedness between these creditors and Gen. Sparrow that it was possible to ascertain or fix the amount, if any, for which the share of these heirs in the succession of their mother could be made responsible, and ascertain the precise sum that the administrator was authorized, under our previous decrees, of applying to his firm's claim. It was certainly not the intention of this court, while extending to John Chaffe & Sons the right to prosecute their claim against these heirs in this probate proceeding,—and, but for the peculiar exigencies of the case, a very irregular proceeding,—at the same time to deny these parties the privilege of a full inquiry into the merits of the claim, and at the same time shut them off from any and all defenses they would otherwise be authorized to make against it. No; in remitting the parties to this mode of proceeding, it was with a full reservation of their respective rights as plaintiffs and defendants, creditors and debtors.

8. We think the plea of prescription urged by the major heirs against the claim or account of John Chaffe & Sons was properly overruled. So far as the proceeding against them to make liable their shares in the estate to the payment of the debt is concerned, it was not subject to the terms of prescription pleaded against it. Besides, we consider that prescription was interrupted by the present and past proceedings taken by the creditors looking to the enforcement and realization of their claim.

4. The judgment of the lower court rejected the demand of the heirs to be put in possession of the estate, except on the conditions mentioned, *i. e.*, that the major heirs should first pay, or give bond to secure, the claim of John Chaffe to the extent of their engagement, and the minors should pay or secure the advances made to them by the administrator since the opening of the succession. The right is given by positive law to the heirs of a deceased person to take possession of his estate, though under administration, upon paying the debts of the estate; or giving the prescribed security therefor. This right the heirs, in this instance, would be entitled to demand, except for the obstacle interposed, growing out of their agreement respecting the indebtedness of their father to John Chaffe & Sons, and the former decree of this court prescribing the mode by which that agreement was to be enforced,

The shares of the heirs in the succession of Mrs. Sparrow were to be ascertained in the final settlement of her succession, and those shares, in due course of administration, were to be applied, if required, to the payment of the debt in question. To permit them to take possession of the estate before these conditions were fulfilled, or they discharged therefrom, would be virtually to annul this former decree. So, as to the major heirs, we think the conclusion of the judge was, in this regard, wise and conservative, and it will not be disturbed. As to the minor heirs, however, their right to go into possession of the estate, to the extent of their interest therein, is burdened with no such obstacle. They are in no manner bound to John Chaffe & Sons for this debt. All the debts of Mrs. Sparrow's succession have been discharged, or there are funds to do so. The minors may be indebted to the succession or the administrator for advances made to them for their maintenance; but this does not debar them from the exercise of this clear legal right. Besides, even if the law did not provide adequate process to enforce any claim the administrator might have against the minor heirs, it is evident that the administrator already has in his hands funds that can be applied to the satisfaction of any demands against them. As to the minor heirs, therefore, the judgment must be reversed, and they be put in possession of the succession, or their undivided interests therein, subject to the condition only that they be charged with one-third of the commissions of the administrator upon the entire succession. This completes the review of all the questions and issues embraced in this appeal; and from the conclusions announced above respecting some of them, it will be seen that it necessitates the remanding of the cause for the determination at least of some of the matters in controversy.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be amended in the following particulars, to-wit: (1) That the administrator be allowed credit on his account for the sum of \$466.86, being for insurance and repairs on plantation buildings, which charge is now approved; (2) that the credit claimed for the fee of Bayne & Denegre be rejected; (3) that the fee of Montgomery & Ransdell be fixed at \$3,250, subject to a credit of \$900 already paid, leaving balance of \$2,350 due; (4) that the commissions of the administrator now exigible be reduced to \$374, with the right reserved to recover the residue to which they may be entitled at the final settlement of the succession; (5) that the accounts of the administrator and tableau of debts, so far as relates exclusively to his administration of the succession of Mrs. Minerva Sparrow as thus amended, be approved and homologated, and the judgment of the lower court as thus amended be affirmed; (6) that the judgment overruling the plea of prescription filed by the major heirs be affirmed; (7) that the judgment, so far as it rejects the demand of the major heirs to be put in possession of the estate, except upon the terms and conditions therein imposed, be also affirmed, but that, in so far as it rejects the demands of the minor heirs, or their tutor, to be put in possession of their interests therein, or to the extent of their interests, that it be reserved, and that the said minors, through their tutor, be put in possession, subject only to the charge of being liable for one-third of the commissions of the administrator on the entire succession, to be paid out of their fund in the hands of the administrator; (8) that the pleas of *res adjudicata* estoppel against the major heirs be overruled, and the judgment therein amended, to the extent expressed, and indicated in the body of the opinion; (9) that in all other respects the judgment be annulled, avoided, and reversed, and the cause be remanded to the lower court for the sole purpose of determining the amount, if any, that the shares or interests of the major heirs of Mrs. Minerva Sparrow, deceased, Mrs. Foster and Mrs. Ashbridge, are liable for to John Chaffe & Sons, growing out of their written agreement touching the cultivation of the plantations of the succession by Edward Sparrow and Chris.

Chaffee, administrators, and the advances made and supplies furnished by said firm for the purpose of said cultivation, and also for adjusting any indebtedness of all the heirs for advances made them by the succession or by Chris. Chaffe, administrator, reserving to all parties the right of full inquiry relating to said indebtedness claimed by John Chaffe & Sons, and the benefit of all legal pleas and defenses germane thereto, except such as may have been passed on and determined by this court, and as fully as the same would be permissible under the ordinary jurisdiction and practice of the courts. The costs of both courts, as relates to the accounts and tableau pertaining exclusively to the succession, and its administration as an entirety, must be paid by the succession; and all other costs to abide the final determination of the controversy still left open by this decree.

(84 Ala. 410)

## SEAMS v. STATE.

(Supreme Court of Alabama. June 12, 1888.)

## 1. CRIMINAL LAW—CHANGE OF VENUE—PUBLIC PREJUDICE.

On an indictment for murder, when it appears from the affidavits in support of defendant's motion for a change of venue that deceased was popular, well respected, and widely known; that accused is a poor negro, without friends or influence; that the killing was committed under circumstances calculated to arouse public indignation, and that great excitement followed; that the danger of lynching was apparently so great that it was deemed necessary to order out the militia to protect the accused before and during his preliminary examination, and to remove him to another county immediately thereafter; and it is stated that some of the jurors regularly summoned had threatened to "put an end to shooting, and make short work of the murderer,"—the trial court should grant the motion, when the trial occurs only two and one-half months after these occurrences, although the state files counter-affidavits of many citizens that, in their opinion, defendant can have as fair and impartial trial in the county in which the indictment is laid as in any other county in the state, but not denying the allegations of the other affidavits.

## 2. HOMICIDE—MURDER.

On a trial for murder, it is proper to charge that "murder in the first degree is the willful, deliberate, malicious, and premeditated killing of a human being. All these qualities \* \* \* may be grouped under the phrase 'formed design'; and, if \* \* \* this 'formed design' \* \* \* existed in the mind of the defendant for but one moment before the homicide, that, in law, would be sufficient."

## 3. SAME—EVIDENCE—RES GESTA.

On a trial for murder, testimony that, immediately after shooting deceased, defendant turned upon witness, and attempted to shoot him, and, on his gun failing fire, clubbed it, and knocked witness down, is admissible as part of the *res gestæ*, and as showing defendant's *animus*.

## 4. SAME—TRIAL—DEFENDANT AS A WITNESS.

On a trial for murder, where defendant becomes a witness in his own behalf, he cannot be asked "why he shot" deceased; such a question calling for his motive, and not for facts from which motive can be inferred.

## 5. SAME—INSTRUCTIONS.

On a trial for murder, where it is undisputed that deceased was an officer of the law, with a right to make arrests, an instruction that deceased had no right to go to defendant's house, and take hold of defendant, saying that he arrested him; and that, if deceased did so, he committed an assault which defendant had a right to repulse,—is properly refused.

## 6. SAME.

On a trial for murder, a charge that, "if the jury believe the evidence, they should not convict the defendant of murder in the first degree," is properly refused; the question of degree being for the jury.

Appeal from circuit court, Tuscaloosa county; S. H. SPROTT, Judge.

Indictment for murder. Defendant, Seams, was convicted of murder in the first degree, and sentenced to be hanged. The state introduced a witness, Arthur Carpenter, and proved by him the circumstances of the killing; that while the deceased, who was the deputy-sheriff for the county of Tuscaloosa, was trying to arrest the defendant, but without any force, the defendant shot him with a gun, which wound caused his death. The witness testified that, "immediately after the shooting of the deceased, the defendant turned upon the

witness, and snapped the other barrel of his gun at him; that it failed to fire, and the defendant then clubbed the gun, and knocked witness down, and broke the gun by the lick; that the defendant took the barrel of the gun, and aimed another lick at the witness," but was prevented from striking him by the blow being thrown off. The defendant objected to the introduction of that part of the testimony of the witness Carpenter which referred to the defendant trying to shoot, and striking, and trying to strike, the witness; but the court overruled the defendant's objection, and the defendant thereupon excepted. Among other things, the court charged the jury as follows: "That murder in the first degree is the willful, deliberate, malicious, and premeditated killing of a human being. All these qualities must co-exist to make the killing murder in the first degree. The law has declared no length of time these wicked elements shall be shown to have existed, and they may all be grouped under the phrase 'formed design;' and if the jury believe from the evidence that this 'formed design,' as above explained, existed in the mind of the defendant for but one moment before the homicide, that, in law, would be sufficient." To the giving of this part of the charge by the court the defendant excepted. The defendant then asked the following charges: (1) "That Awtrey, under the evidence under which you must try the defendant, had no right to go to the defendant's house, and take hold of the defendant, and tell him that he had come for him, or that he arrested him; and, if the evidence convinces you that he did so, he committed an assault and battery on the defendant; that defendant had a right to defend his person, and to repulse an assault with force sufficient for his own protection; that he was not compelled to retreat from his own house; and that he had the right to shoot if the surroundings reasonably indicated that his life was in present danger in his own house, without fault on his part." (2) "If the jury believe the evidence, they should not convict the defendant of murder in the first degree." The court refused to give each of these charges, and the defendant separately excepted to the court's refusal. The other facts and rulings are shown by the opinion.

*W. C. Fitts* and *S. A. M. Wood*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

SOMERVILLE, J. The defendant was tried and convicted of the crime of murder in the first degree for the killing of one James Awtrey, and was sentenced to be hung, in accordance with the verdict of the jury found in the case. An application was made to the trial court for a change of venue, which, after consideration, was refused, and formally overruled. This application conforms to the statute, by setting forth specifically and under oath the reason why the defendant could not have a fair and impartial trial in the county of Tuscaloosa, where the indictment was found, and was supported, in its averments of facts, by the affidavits of several disinterested witnesses. Counter-affidavits were offered, as made by a large number of citizens, who, without denying the facts stated in the application, gave their opinion that the accused could have "as fair and impartial trial in Tuscaloosa county as he could in any other county in the state." The statute provides that the refusal of such an application, after final judgment rendered by the trial court, may be reviewed and revised by this court on appeal. Code 1886, § 4435. The principles upon which the appellate court is to act, in a case of this character, like those which should guide the trial court, are very simple. As said in *Posey v. State*, 73 Ala. 490: "If it be shown to the reasonable satisfaction of the court that an impartial trial and an unbiased verdict cannot be reasonably expected, the venue ought to be changed." And, in arriving at a conclusion on this subject, the court is to be governed more by the facts of the case, as proved or admitted, and legitimate inferences from them, than by mere opinions of witnesses which are unsupported by facts. *Johnson v. Com.*, 82 Ky. 116; 1 Bish. Crim. Proc. (3d Ed.) § 71. To allow facts, and necessary inferences flowing

from them, to be overturned by the mere opinions of witnesses, expressing their belief that the defendant could obtain a fair and impartial trial in the county where the indictment was found, as observed by Chief Justice PECK in *Birdsong v. State*, 47 Ala. 68, would be "to make a precedent by which this great right and privilege of accused persons may be rendered almost worthless; for it will seldom happen that persons may not be found who will, and honestly too, believe, whatever may be the excitement in any given case, that, notwithstanding, the party against whom it may exist can have a fair and impartial trial." 5 Crim. Law Mag. 1884, p. 797. Such is the view of the matter which the law takes of it. It observes every precaution to cast the fullest protection around the sacred right of trial by jury,—a privilege which Sir William Blackstone has emphasized by his familiar declaration that "the liberties of England could not but subsist so long as this palladium remains sacred and inviolate." The constitution of Alabama, like that probably of every other American state, following the rule of the common law as far back as it can be traced, not only guarantees the right of trial by jury, but, as if to guard against all possible misapprehension, guarantees such trial by "an impartial jury" of the county or district in which the offense was committed, and further declares that the right "shall remain inviolate." The statute law seals this by its promise of "a fair and impartial trial," and is jealous in its details, fully provided for securing this end. Code 1886, §§ 4485, 4486 *et seq.* These provisions have in view, not only the object of securing a just verdict, but a just mode of procedure in obtaining it. There is probably no citizen who would not feel grievously wronged, and whose respect for the law would not be diminished, if a judge should sit in his case, and render judgment against him, however just the judgment might be, or should a merited fine be imposed upon him, even for an admitted violation of the law, by a jury composed of those related to the prosecutor by consanguinity or affinity within the prohibited degrees of relationship. A prejudice or bias created by other causes may be just as fatal to the attainment of justice. We repeat that the trial must be just, as well as the verdict reached through its appliances. This cannot be done as long as the minds of the jury are liable to be influenced by a prevailing public prejudice against the prisoner. When excitement runs high, and a public sentiment generally or widely prevails, which justify or tolerate a dealing with the prisoner by the culpable modes of mob violence, which is the enemy of all law and good government, it is difficult to keep the infection of such prejudice from finding its way into the jury-box, however honest in purpose the jury may be, or however enlightened may be the community from which they come. The duress of public opinion is often insidious and potent, and the best of men sometimes become its victims without being aware of it, or without the courage to resist the dominion of its influence.

The evidence presented on the application for a change of venue in the present case has been carefully reviewed by each member of this court, in order that a just conclusion may be reached,—one just alike to the state and to the defendant. Our unanimous conclusion is that the petitioner's application should have been granted, and the circuit court erred in refusing it. It is made to appear from the affidavits filed in behalf of the prisoner, and not denied by those filed on the part of the state, that the deceased was a respected officer of the law, being the jailer and deputy-sheriff of the county, and was well and widely known, and popular in all parts of the county. The prisoner is a negro, apparently without influence or friends. The killing appears to have been attended with circumstances justly calculated to arouse popular indignation, and accordingly great excitement followed in the public mind. The accused fled from justice, and was pursued and hunted for days by bodies of armed men, on horseback and on foot, from different parts of the county. The two newspapers published in the city of Tuscaloosa each gave a sensational account of the killing, denouncing the accused as the murderer of the

deputy-sheriff, Awtre, otherwise commenting on the facts of the case disparagingly, and expressing opinions as to the certainty of his being hung. Great excitement prevailed upon the occasion of his capture, and threats of lynching him were frequently heard. Large crowds gathered from town and country, and the danger was so impending that the sheriff induced the governor of the state to order out a military company for the protection of the prisoner from mob violence; and addresses were made to the populace by prominent citizens with the view of dissuading them from the execution of their threats, and for the preservation of law and order. The gravity of the situation induced the mayor of the city to repair to the jail where the accused was thus protected, and to spend the night there, in order, as he himself says, "to keep back the mob in case any should come, as threatened." Upon the occasion of the preliminary trial before a justice of the peace, it was deemed necessary for the prisoner to be escorted to the court-house under the protection of the military, and, immediately after the trial, that he should be removed to the jail of Jefferson county. It is a fair inference from the surrounding circumstances, as detailed in the record before us, that the prisoner, without the presence of the military to protect him, would have been taken by force from the custody of the sheriff, and lynched, by an indignant and excited people. This was in the early part of February, 1888. The trial occurred in the middle of April following,—about two months and a half after these occurrences. It is asserted that, after the removal of the prisoner, a number of citizens expressed the opinion that if the venue was changed, or the case continued by the defendant, he would be taken out of the jail and lynched; and this was said even in the presence of the justice who held the preliminary trial. It is further stated, without denial, that some of the jurors regularly summoned in the cause had threatened to "put an end to shooting, and make short work of the murderer." Under these circumstances, we repeat that, so far as we can judge from the facts before us, it is shown to our reasonable satisfaction that the excitement in the community was so great as to justify the inference that the accused could not probably select a jury, in the mode provided by law, who should be so free from the prevailing public prejudice as to give him a fair and impartial trial, in the sense in which the law uses that term. The law is no respecter of persons. It must and will protect the constitutional right of the humblest and poorest citizen equally with those of the highest and noblest in the land. It accords a fair trial, by a fair and unbiassed jury, to the most wicked violator of the law, whose feet have been swift to shed blood, equally with him who had justifiably stricken in the defense of himself, his family, or his home. It is of small importance, in this connection, that the execution of justice by a great state should be delayed for a season, compared with the danger of violating those sacred principles and safeguards of liberty by which that justice is to be lawfully administered. It may be but just to the presiding judge for us to remark that he, no doubt, acted upon the opinions of many reputable citizens, as expressed in the affidavits on file, who asserted their belief that the prisoner could get a fair trial in the county where the indictment was found. We have stated why this practice would be dangerous, and the reasons for declining to base our judgment upon such opinions when they are not supported by facts. For this error of the court, the judgment of conviction must be set aside and vacated, and the cause will be remanded, that an order may be made removing the trial from Tuscaloosa county to the nearest county free from exception.

We discover no other error in the rulings of the court. The testimony of the witness Carpenter, which refers to the alleged attempt of the defendant to shoot him, and to strike him with his gun, immediately after the killing of Awtre, was obviously a part of the *res gesta* accompanying the act of homicide itself, and admissible to explain and throw light upon the *animus* of the perpetrator.

The question propounded to the defendant, when he was introduced as a witness in his own behalf, asking him "why he shot Mr. Awtrety," was properly excluded. It calls for the secret and uncommunicated motive or intention of the witness, and not for facts from which such mental *status* could be inferred. This was not permissible. *Stewart v. State*, 78 Ala. 436; *Ball v. Farley*, 81 Ala. 288, 1 South. Rep. 253.

The first charge requested by the defendant, to say nothing of the other defects in it, ignores the undisputed fact that the deceased was an officer of the law, with the right to make arrests of persons under warrant or other lawful process. If the accused shot and killed Awtrety in order to escape a lawful arrest by him, the killing would be without excuse or palliation. *Floyd v. State*, 82 Ala. 16, 2 South. Rep. 683. Whether defendant was guilty of murder in the first degree, or of any lower grade of homicide, was a question for the determination of the jury. The second charge requested by the defendant erroneously sought to take this inquiry from the jury, and relegate it to the court, and was, for this reason, properly refused. The charge given by the court was free from error. *Mitchell v. State*, 60 Ala. 26.

The judgment is reversed for the error of the court in refusing to grant the prisoner's application for a change of venue, and the cause is remanded. In the meanwhile the prisoner will be retained in custody until discharged by due process of law.

(24 Fla. 203)

SAULS *et al.* v. FREEMAN, County Com'r, *et al.*

(Supreme Court of Florida. May 29, 1888.)

1. JUDGE—DISQUALIFICATION—INTEREST.

The interest which, under the statute of 1862, (section 28, p. 337, McCl. Dig.) disqualifies a judge from sitting in a cause, is a property interest in the action, or in its result. The interest which he may have in common with other citizens in a public matter does not disqualify him.

2. SAME.

The fact that a circuit judge signed, with other registered voters of the county, a petition addressed to the county commissioners, asking for a change of the county-site, did not disqualify him, on the ground of interest, to sit in a *mandamus* proceeding instituted by some of the petitioners to compel the commissioners to call an election on the question of changing the county-site, as it is made their duty to do by the statute.

3. JUDGMENT—RES ADJUDICATA—ADMISSIONS IN PLEADINGS.

A judgment on the merits is an absolute bar to a subsequent action on the same claim, and concludes the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim, but also as to any other admissible matter that might have been offered for either purpose. The admission, by the pleadings, of material facts, does not constitute an exception to the rule.

4. SAME—AGAINST COUNTY.

A judgment against a county, or its legal representatives, as such, in a matter of general interest to all the people thereof, is, in the absence of fraud between such officials and the opposing parties, binding upon all the citizens of the county.

5. SAME—MANDAMUS—CHANGE OF COUNTY-SITE.

A judgment in *mandamus* commanding the county commissioners to call an election on the question of changing the location of the county-site is a bar to a bill in equity instituted by registered voters, other than those who were relators in the *mandamus*, to restrain the commissioners from moving the county records to the place chosen as the county-site at such election; the matters alleged in the bill being such as could have been set up by the commissioners in the *mandamus* proceeding.

6. EQUITY—FRACTION—DISMISSAL OF BILL ON APPLICATION FOR INJUNCTION.

Where it is apparent on the face of a bill for an injunction that the complainants cannot be entitled to any relief, the bill may be dismissed at the hearing of the application for a preliminary injunction.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; JOHN D. BROOM, Judge.

This is a bill in chancery, filed by John Sauls and J. H. Bodine against the county commissioners and the clerk of the circuit court of Volusia county, praying an injunction against the removal of the public offices and records of the county from Enterprise to De Land as the county-site of the county.

The allegations not set out in the opinion are substantially, in so far as they need be stated, as follows:

That on February 7, 1888, a petition purporting to contain the names of one-third of the registered voters of said county was presented to, or attempted to be presented to, the county commissioners, asking them to order an election for the change of location of the county-site of the county. That the petition was not examined by the county commissioners, but the matter was postponed till next meeting.

That, on the 20th day of the same month, the commissioners, in obedience to a peremptory writ of *mandamus* issued by Judge BROOME, of the Seventh circuit, met, and ordered an election.

That, at the meeting at which the county commissioners called the election, the petition was not before them, and they made no personal examination of the same, but relied upon a certificate of Faulkner, the clerk of the circuit court, to the effect that he had made a careful examination and comparison of the signatures and names annexed to the petition praying for a change of location of the county-site with the registration lists of the voters on file in his office, and found that the petition contained the names of 825 registered voters of the county, and that the registration list contains the names of 2,272 voters; and that such "petition contains the names of more than one-third of the registered voters of said county, as appears of record in his office." This certificate is alleged to have been made by the clerk of his own motion, and that no order was made by the board for the clerk to examine the petition. That he examined it in the presence of the attorney of the city of De Land, who presented the petition with the certificate to the commissioners, and such examination and comparison were not in the presence of the board of commissioners, or by its direction.

That no proper or legal examination of the petition was ever made by the commissioners. As a part of the bill, is annexed an affidavit of Dennis Freeman, chairman of the board of county commissioners. It states that deponent was such chairman on the 7th day of February, 1888, and that, at the meeting of that day, the petition was presented to the board, but that it was not examined by the board, nor did they compare any names thereon with the registration list of the said county, but the consideration of the petition was postponed until the next meeting, viz., the first Monday in March, 1888.

That at the subsequent meeting it was not exhibited or shown to or seen by the board, nor were such lists produced or exhibited to the board at any of the meetings thereof, but the board depended on the certificate of the clerk of the circuit court as to such lists, and that they had no personal knowledge as to whether there were one-third of the voters legally registered in said county on the petition.

That John B. Sauls, with W. R. Fitts, deputy-clerk of the county, has compared the petition with the registration books in the office of the clerk, and finds that over 130 names, viz., 137, do not appear on the registration books, as he can find. A list of names are attached to the bill, marked "Exhibit B." That he finds on the petition 156 petitioners who registered at the election held in accordance with article 19, (the local option article,) and under chapter 3700, Laws 1887, which 156 names he declares are not legally registered voters, in that they did not take and subscribe the oath prescribed by the constitution of this state, but another oath, viz., to "protect and defend the constitution and government of the United States, and the constitution and government of the state of Florida, against all enemies, foreign and domestic," and to "bear true faith, loyalty, and allegiance to the same, any ordi-

nance or resolution of any state convention or legislature to the contrary notwithstanding." The names of those who registered at said election, and the dates of their registration, are attached to the bill. They registered in October and November, 1887.

The proceedings of the commissioners canvassing the vote cast at the election, and ascertaining that De Land was chosen to be the county-site, are set out *in extenso*, but need not be detailed here.

That Ichabod Dougherty and E. M. Snow signed said petition twice.

That the county commissioners are about to remove the county offices, records, furniture, and property of the county to De Land, and the clerk is about to remove the records of his office from Enterprise to said city, etc.

The other facts are stated in the opinion.

*Foster & Gunby* and *John W. Price*, for appellants. *Hamlin & Stewart* and *C. P. & J. C. Cooper*, for appellees.

RANEY, J., (*after stating the facts as above.*) 1. Judge BROOME, of the Seventh circuit, on the presentation of the bill to him, on the 6th day of April of the present year, made an order enjoining, until the further order of the court, the defendants (appellees) from moving the county records from Enterprise, the old county-site. Three days afterwards, he dissolved the injunction, and dismissed the bill. From the latter order complainants appealed to the June term. In view of the public interests involved, and by consent of parties, we consented to hear the case at the present term.

2. The first question to be disposed of is that of Judge BROOME's legal qualification to entertain the *mandamus* proceedings set up in the bill. He, according to the allegations of the bill, signed the petition to the county commissioners for an election on the question of changing the location of the county-site. It is claimed that, from the fact of being one of such petitioners for an election, he was so interested as to disqualify him to sit in the *mandamus* proceedings.

The statute of 1862, (section 28, p. 337, McClell. Dig.) provides that no judge of any court or justice of the peace shall sit or preside in any cause in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried by a competent tribunal. Section 28, McClell's Dig. The act 1870 (section 30 of the Digest) declares that no justice, judge, or juror shall be disqualified from sitting in the trial of any suit in which any county or municipal corporation is a party by reason that such justice, judge, or juror is a resident or tax-payer within such county or municipal corporation.

The statute of 1862 is cited by counsel for appellants, and it is argued by them that no signer of the petition would have been a competent juror had an issue of fact in the *mandamus* been sent to a jury. Issues of fact in *mandamus* are tried, in this state, by the judge or court, and not by a jury, (*State v. Commissioners*, 21 Fla. 1;) but it is yet true that the same interest that would disqualify persons as jurors, were they triers of facts in *mandamus* proceedings, will disqualify a judge.

The first section of our statute regulating the change of county-sites is as follows: "The registered voters of any county in this state wishing to change the location of their county site shall present to the board of county commissioners of such county a petition signed by one-third of the registered voters praying for a change of the location of such county-site. The other sections make it the duty of the commissioners to order an election upon receiving such petition, and they provide for the canvass of the returns, and make other provisions not necessary to be noticed here.

The location of a county-site is a public question in which all the registered

voters and citizens of a county have a common interest. The fact that a person signs a petition "praying for a change of location" of the county-site is evidence that he desires a change, and that, in his opinion, the public convenience and welfare demand that an election shall be held at which the judgment of the registered voters of the county, as to whether there shall be a change, and to what place the change shall be made, shall be taken; but it is not evidence of what particular place he may desire the change to be made to, nor that his wish for a change is characterized by any motive other than the promotion of the public good and common convenience. It is not evidence that he has any pecuniary interest in any place that may be voted for as the county-site, nor is the issue in itself one of pecuniary interest, but it is a public question, in which each elector may express his judgment and desire, upon the question of calling an election, by signing or refusing to sign the petition, and, at the election, by voting for whatever place he may please, without thereby subjecting himself to the imputation of acting under the influence of improper motives or personal interest.

It is true that the same interest that would disqualify a juror will, under our statute, disqualify a judge, but the fact of having signed such a petition is not evidence of any interest within the meaning of the term as used in the statute. Whatever effect it may in its consequences lead to, as to such signers, would result, also, as to any other citizen similarly situated, though not a signer.

The interest meant by the statute is property interest. In *Inhabitants of Northampton v. Smith*, 11 Metc. 395, it is said that the interest must be a pecuniary or proprietary interest,—a relation by which, as debtor or creditor, as heir or legatee, or otherwise, the judge will gain or lose something by the result of the proceedings,—in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror. See, also, *Sjoberg v. Nordin*, 26 Minn., 501, 5 N. W. Rep. 677. If the nature of the suit is such that no individual property interest of the judge or juror is involved in it, there can be no disqualification, as to either, on the ground of interest. Such is clearly the nature of the *mandamus* proceeding. It was not brought to enforce any individual property rights of any one, but to compel the commissioners to perform a public duty. Any citizen of Volusia county could have instituted the *mandamus* proceedings, although not a signer of the petition presented to the county commissioners. High, Extr. Rem. §. 431.

In *Rogers v. Cypert*, decided by the supreme court of Arkansas in 1881, and cited and explained in *Foreman v. Town of Marianna*, 43 Ark. 331, there was an application for a *mandamus* to compel a circuit judge to entertain and act upon a petition for a writ of *certiorari* to bring up the record of proceedings had in the county court under a local option liquor law. The circuit judge answered the *mandamus* by stating that he had not refused the *certiorari* in the exercise of his sound discretion, but had refused to take any cognizance of the application for it, for the reason that "his wife and children had signed the original petition to the county court for the prohibition, and that he supposed he was thereby disqualified from acting in the case under that clause of the constitution which forbids a judge from presiding where either of the parties shall be connected with him by consanguinity or affinity within such degree as may be prescribed by law." The *mandamus* was granted; the view of the court being that although the wife and children of the judge were technically parties, as being among the petitioners, yet, inasmuch as the proceeding was not a personal one, and their interest was only a common interest with other citizens in the establishment of a wholesome police regulation affecting the whole community, they were not parties within the sense or within the spirit of the constitution.

In *Foreman v. Town of Marianna*, *supra*, it was held that a judge of a county court was not disqualified to act upon an application to annex terri-

tory to a municipal corporation by reason of being a resident of the corporation, and having voted for or against the annexation. EAKIN, J., speaking for the court, says: "The judicial ermine does not absolve the individual from the duty, nor deprive him of the right, to participate, with other citizens, in public movements for the public good which do not in any particular manner affect his private interests more than those of other citizens. How far he may do so in anticipation of the probability or chance that he may be called to decide upon the legality of such proceedings is with him a consideration of prudence or good taste, to be determined in his own breast. If he were thereby disqualified, he would be required to renounce all civic privileges. He could not even try a contested election case where he had voted for one of the contestants."

In *Webster v. County of Washington*, 26 Minn. 220, 2 N. W. Rep. 697, the conclusion reached is that an ownership of lands contiguous to the line of a proposed county highway, which may affect or enhance the value of such lands, is not such an interest as legally precludes the owner from acting, as a member of the board of county commissioners, upon a petition, signed by himself and others, for establishing the road. The road as proposed did not pass over this commissioner's land. His only interest was that of an adjacent proprietor of land indirectly benefited by the proximity of a new road, and the additional facilities it might give to trade and travel. "The benefit he might thus enjoy," say the court, "would be participated in, though, perhaps, in irregular degrees, by the proprietors of all lands accessible to the road, and, to a greater or less extent, by the whole public that might have occasion to use the road." His interest was held not to be such a direct and private one as, in the absence of a disqualifying statute, would make his acts void and illegal.

The supreme court of Missouri decided, in *Bowman's Case*, 67 Mo. 146, that a judge was not disqualified to sit in the trial of a case instituted by persons composing a committee of a corporation, by reason of the fact that he was an honorary member of the corporation.

In *Com. v. O'Neil*, 6 Gray, 343, it was held that members of an association to prosecute violations of the statutes prohibiting the manufacture and sale of intoxicating liquors, who have each, by subscribing a certain sum to the funds of the association, rendered themselves liable to pay, to the extent of their subscription, their proportion of expenses incurred in such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution commenced by the agent of the association, and carried on at its expense, if it does not appear but that they have paid their subscription before this prosecution was commenced. For aught that is shown, says this opinion, each of them may have paid, before this prosecution was commenced, the full sum he had subscribed. It therefore does not appear that either of the jurors had any, even the smallest, pecuniary interest in the event of the prosecution, and the court cannot presume, without evidence, that they had. They might have been interrogated on oath whether they had expressed or formed any opinion in the case, or were sensible of any bias or prejudice; and their answers might possibly have been such as to exclude them from the panel, but this was not done. The ruling in *State v. Wilson*, 8 Iowa, 407, and *Fleming v. State*, 11 Ind. 234, are in the same line, and showing that questions as to membership of such committees are admissible for the purpose of testing the juror's impartiality, and freedom from bias, instead of his interest in the cause.

There is nothing in the record indicating that Judge BROOME has advised, or in any manner encouraged, the institution of the *mandamus* proceeding. It is, of course, not pretended that the judge has any prejudice; nor has any action, under the statute, authorizing a challenge of a judge on such ground, been taken.

We do not think, if an issue of fact in the *mandamus* proceeding could have been sent to a jury for trial, that one of the signers of the petition would have been rendered incompetent as a juror, on the ground of interest, by the mere fact of being such signer. Whether, in his connection with the petition, a signer of it may have expressed or formed such an opinion as would disqualify him as a juror, or had, through such connection, become possessed of prejudice or bias, are questions to be decided when they are presented.

We conclude, upon the principles of law governing in such cases, that Judge BROOME was not disqualified, by reason of any interest, to sit in the *mandamus* case; yet we feel that he would not have signed the petition had it occurred to him, at the time of signing it, that his competency to sit in any litigation involving the election thereunder might, on that account, be challenged.

3. The next question to be disposed of is whether or not the complainants are concluded from asking relief upon their bill by the *mandamus* judgment.

The alternative writ of *mandamus*, set up in the chancery bill, recites that it has been suggested that Isaac A. Stewart, J. B. Jordan, J. J. Banta, G. A. Dreka, F. S. Goodrich, J. G. Owens, and Samuel Lowrie are registered voters of Volusia county, and that they, with other registered voters of the county, to the number of 825, (more than one-third of the registered voters of the county, there being only 2,272 registered voters in the county,) being desirous of changing the location of the county-site of the county, signed and presented a petition to the board of county commissioners of the county, and that the petition was received by such board, composed of D. Freeman, G. D. Bryan, J. G. Poppell, and J. D. Ross; said petition praying for a change of the location of the county-site, and for an election thereon; and that such petition was in due form of law, and was presented to the board when in session, on the 7th day of February, A. D. 1888, by Isaac A. Stewart, one of said petitioners, on behalf of himself and the other petitioners, with the request that an election be then ordered; and that the board refused to grant the prayer of the petition, or to order an election on the question of the change of the location of the county-site of the county, as asked. The command of the writ is that the said county commissioners forthwith assemble as such, and order an election on the question of a change of location of the county-site, or show cause why they should not, at the place and time stated in the writ.

Three of the commissioners, D. Freeman, J. G. Poppell, and J. D. Ross, answered, stating that said Isaac A. Stewart, J. B. Jordan, J. J. Banta, G. A. Dreka, F. S. Goodrich, J. G. Owens, and Samuel Lowrie, being registered voters of said county, with others, registered voters of Volusia county, to the number of 825, did sign and present a petition to the board of county commissioners of Volusia county on February 7, 1888, while said board was in session, and that the petition contained the names of more than one-third of the registered voters of the county,—there being 2,272 registered voters on the lists of registration, and that the petition was addressed to the board of county commissioners; and prayed for a change of the location of the county-site of the county.

That the only reason that an election was not ordered, on presentation of the petition, was that G. D. Bryan, one of the members of the board, said that he had information from an attorney that an election could not be ordered, and that another attorney advised him to the same effect. Both attorneys are designated.

That the said D. Freeman was chairman of the board, and said J. D. Ross made a motion to order an election; but the same was lost, and the said matter was postponed on the advice of an attorney.

That the commissioners all acted in good faith. That they have attempted to get a meeting of the board since the discovery of the error, caused by the

advising attorney and Bryau, but have failed to have a full meeting on account of Bryan disregarding the call of the chairman, and his promises to meet with them.

Judge BROOMS held the answer to be insufficient, and granted a peremptory writ, commanding the commissioners to meet, on a day to be specified by the chairman, for the purpose of ordering the election.

If there was any fatal deficiency in the petition filed before the county commissioners, or any other good reason in law why the election should not have been called, it could have been interposed as a defense to the alternative writ of *mandamus*, and it was the duty of the commissioners to do so. They are the representatives of the county in the matter of their duties under the statute; and, if they have failed to avail themselves of any legal defense to the writ, the complainants, and other people of the county, are precluded by the judgment thereon,—there being not only no charge of fraudulent collusion, between the commissioners and the petitioners, or between the former and the relators, but none of fraud of any kind against either the commissioners, the petitioners, or the relators.

A judgment against a county, or its legal representatives, in a matter of general interest to all the people thereof,—as one respecting the levy and collection of a tax,—is binding, not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name. *Clark v. Wolf*, 29 Iowa, 197; *Freem. Judgm.* § 178. In *Gaskill v. Dudley*, 6 Metc. 546, D. recovered judgment by default against a school-district in an action on a contract with the district to build a school-house, and levied his execution on the goods of G., a member of the district, and it was held that G. could not give evidence that D. had not performed his contract, and therefore ought not to have recovered judgment against the district; and in *Lane v. Inhabitants of School-Dist.*, 10 Metc. 462, the decision was that individual members of a school-district had no right to appear and be heard in defense of an action against the district.

If the judgment in *mandamus* was not as effectual, upon the principle of *res adjudicata*, against the inhabitants of the county as it is against the county commissioners, there would be no end to litigation in such cases, or in any cases against county officials as such. *Terry v. Town of Waterbury*, 35 Conn. 526, 534.

Every question suggested by the bill as to the validity of the petition, including those as to the names of some of the signers being on the registration lists, and those as to the legality of the registration of others, could, in so far as they were the subjects of judicial inquiry, have been raised by the commissioners in the *mandamus* proceeding. *County Commissioners v. Bryson*, 18 Fla. 281.

The award of the peremptory writ adjudicated the legality of the petition in all respects, and settled the question of the duty of the commissioners to call the election.

When they met pursuant to such call, the legality of the petition was in no wise open for their consideration; and nothing more than this need be said of the allegations of the bill as to what they did or did not do in the line of such consideration at their meetings subsequent to the award of peremptory writ.

This bill seeks to open again what had already been adjudicated. In *Cromwell v. County of Sac*, 94 U. S. 351, speaking of the effect of a former judgment on the same claim, it is said that it, "if rendered on the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Aurora City v. West*, 7 Wall. 82; *People v. Board*, 27 Cal. 655; *Durant v. Essex Co.*, 7 Wall. 109. Neither the fact of the

admissions in the return to the alternative writ, nor the absence of any issue of fact from the *mandamus* pleadings, constitute any exception to the rule; for it makes "no difference, in principle, whether the facts upon which the court proceeded were proved by deeds and witnesses, or whether they were admitted by parties." And an admission, by way of demurrer to a pleading in which the facts are alleged, must be just as available to the opposite party as though the admission had been made *ore tenus* before a jury. *Bouchaud v. Dias*, 3 Denio, 288, 244. The *mandamus* seems to have in effect been submitted as upon demurrer to the answer, (*People v. Board*, 27 Cal. 655,) and this involved an inquiry into the sufficiency of the alternative writ or declaration, which writ averred the entire legality of the petition and its presentation to the commissioners; and the commissioners and their privies are forever precluded, by the judgment rendered, from contesting such legality on any ground, whether of law or fact, in any other proceeding. *Block v. Commissioners*, 99 U. S. 686.

4. The only other ground of appeal requiring consideration at our hands is that as to the dismissal of the bill.

The only relief prayed is an injunction, and it is apparent on the face of the bill that there is no ground for such relief. It sets up the proceedings at law which preclude the complainants from the relief they seek. They can derive no benefit from having the defendants answer, and it would be both useless and a hardship to require the defendants to answer. 2 High, Inj. §§ 1580, 1706. Had the bill been filed to restrain the proceeding in *mandamus* pending such proceedings, it would have been dismissed, for reasons indicated above, as was done in *Commissioners v. Bryson*, 13 Fla. 281. Had this bill not been dismissed by the chancellor, it would be our duty to direct a dismissal, as, considering the whole of it, there is no equity in it. *Freeman v. Timanus*, 12 Fla. 393; 1 Daniell, Ch. Pr. \*557, note 4.

The order appealed from is affirmed, and it will be decreed accordingly.

(24 Fla. 177)

#### MARKS v. BOONE.

(Supreme Court of Florida. May 29, 1888.)

##### 1. BILL OF EXCEPTIONS—SETTLEMENT AND SIGNING—TIME.

An order made in term allowing "sixty days' additional time" for settling a bill of exceptions, gives 60 days after the adjournment of the term.

##### 2. NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR.

Where the holder of a promissory note and an indorser entitled to notice of its dishonor by the maker reside in the same place, the holder has until the expiration of the day following that of its dishonor to give the notice.

##### 3. SAME.

The rule laid down in *Sanderson's Adm'rs v. Sanderson*, 20 Fla. 292, as to notice when the parties reside in different places, and there is a mail on the day following the day of dishonor by the maker, approved.

##### 4. SAME—PROOF OF NOTICE.

The burden of proving that the notice was duly given is on the plaintiff, and he must show distinctly that it was given in the time required by law. Proof of the habitual promptness of the holder and his attorney in giving notice in such cases, and of the fact that the former put the note in the latter's hands for collection "in two or three days, or less time," after its dishonor, is not sufficient to fix the time at which notice was given in a particular case, and the liability of the indorser.

##### 5. SAME—ACTIONS—INSTRUCTIONS.

The charge of a judge as to the time within which notice of dishonor should be given to an indorser of a promissory note should state definitely the time allowed by the law, and should not leave it to the jury to determine what is prompt notice or reasonable diligence in giving notice, under the circumstances of the case.

##### 6. NEW TRIAL—WANT OF EVIDENCE TO SUPPORT VERDICT.

When the testimony does not support the verdict, a new trial will be granted.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

Action by C. A. Boone against M. B. Marks, the indorser of a promissory note. Judgment for plaintiff, and defendant appeals.

*E. R. Gunby*, for appellant. *J. H. Allen*, for appellee.

RANEY, J. 1. The court, by an order made in term, granted appellant "sixty days' additional time" for settling the bill of exceptions. This is, we think, to be construed as meaning 60 days in addition to the time allowed by the practice, in the absence of an order extending the time, or, in other words, 60 days after the adjournment of the term in which the order was made. Common Law Rule 97. The bill of exceptions was, under the above construction, settled in due time, and hence we have denied the motion to strike it from the transcript.

2. The appellant is sued as indorser of a promissory note, by appellee, who obtained it from appellant's indorsee. The verdict is for appellee.

The testimony upon the point of notice to appellant of dishonor by the maker is as follows: Appellee testified that he became the owner of the note by purchase from Hyer, who indorsed it to him without recourse; that at or about the time of its maturity he saw Randolph, the maker of the note, and asked him what he was going to do about it, and the maker shook his head, and walked away; that he is not positive whether this was before or after the maturity of the note, but thinks it was immediately after, as he would not be likely to present a note for payment before it was due; that he did not give appellant any written notice of the dishonor of the note, but had several conversations with him about it, some before and some after it became due; that he could not swear as to just when he notified appellant that it had not been paid, but as he (witness) was in the habit in his business of promptly giving such notices, he felt sure that he must have notified appellant; that he then put the note in his attorney's hands for collection, in two or three days after its dishonor, or less than that time.

The testimony of James D. Beggs, witness for plaintiff, is that he was the attorney for plaintiff, who brought the note in question to him for collection; that he (Beggs) had, at the time of testifying, no positive recollection of giving the defendant any notice at all, except that in his business he usually, upon receipt of a note for collection, at once wrote to the party to come up and pay, and if he sent defendant any notice it was such a one.

When the holder of the note and the party entitled to notice reside in the same place, the holder has until the expiration of the day following that of its dishonor to give the notice. 2 Daniel, Neg. Inst. § 1088. The rule laid down in *Sanderson's Adm'r's v. Sanderson*, 20 Fla. 292, is that where the indorser of a promissory note resides in a different place from the point at which it is payable, notice of the default of the maker must be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor of the note, provided the mail of that day be not closed at an unusually early hour, or before early and convenient business hours, in which case it must be sent by the next mail thereafter; and where the notice is not mailed until the second day after the dishonor of the note, and no circumstance which would extend the time is shown, it is not sufficient to bind the indorser.

The burden of proving that notice was duly given is on the plaintiff, and he must show distinctly that it was given on the proper day, or within the time required by law. 2 Daniel, Neg. Inst. §§ 1050, 1051. The proof must not rest on mere inference or light presumption, but must be of a stronger and more affirmative character. *Whitaker v. Morrison*, 1 Fla. 25.

In view of what the appellee says as to conversations with the appellant the only legitimate presumption to be drawn as to their residence is that they resided in the same place. Assuming that they did reside in the same place, it is clear that the testimony does not establish that notice was given the indorser before the expiration of the day following the maker's dishonor of the note. Proof of his and of his attorney's habitual promptness in such cases is not sufficient to fix the time at which notice was given, and consequently

liability upon an indorser, in a particular case. *Whitaker v. Harrison, supra*. The fact that plaintiff put the note in his attorney's hands for collection in two or three days, or less time, after its dishonor by the maker, and that this was after the conversation with defendant, does not establish that the conversation was not on the third day.

The testimony does not support the verdict, and for this reason a new trial should have been granted.

In view of the evidence adduced on the subject of notice to appellant, and what we have said above as to the law, we think it unnecessary to discuss either the charge given to the jury or the instruction asked by the appellant, but refused by the judge. We will, however, remark of the charge given that it contains no declaration of what time the law allowed appellee for giving appellant notice of the maker's default, but seems to have left it to the jury to determine what was "prompt" notice or "reasonable diligence" in giving it; and we will say as to the instruction refused that where the facts are that the parties reside in different places, and there is a mail on the day following the day of the dishonor of the note by the maker, the law as to such a case is, we think, properly laid down in *Sanderson's Adm'r's v. Sanderson, supra*. But, as intimated above, we have found nothing in the record indicating that plaintiff and defendant did not reside in the same place.

The judgment is reversed, and a new trial granted.

(24 Fla. 198)

JACKSON v. RELF et al.

(Supreme Court of Florida. May 20, 1883.)

1. APPEAL—PRACTICE—SUPERSEDEAS—BOND.

Where a *supersedeas* bond, in a chancery appeal, does not identify with certainty the decree appealed from, the *supersedeas* will be vacated by this court.

2. SAME.

A *supersedeas* bond which does not state the court, nor correctly name the county, in which the cause is pending, nor designate the decree appealed from, nor name with certainty the cause in which such decree was rendered, is not a proper *supersedeas* bond.

3. SAME.

*Supersedeas* vacated without prejudice to right of appellant to file a new bond and obtain a *supersedeas* according to the law and practice governing in such cases.

(Syllabus by the Court.)

Appeal from circuit court, St. Johns county; JAMES M. BAKER, Judge.

On motion to vacate order of *supersedeas*.

C. P. & J. C. Cooper, for the motion. John W. Price and D. S. Walker, Jr., contra.

RANEY, J. Appellees, who were complainants below, moved to vacate the *supersedeas* in this cause. The *supersedeas* bond fails to identify with certainty the decree appealed from. It not only does not identify the decree appealed from, but it also fails to identify with certainty the cause in which the decree was rendered. The decree, as set forth in the transcript before us, shows, both by the title of the case as stated and by the context of the decree, that John S. Relf is a complainant as administrator of the estate of Samuel H. Williams; yet, in the bond, he is not so represented, to the exclusion of the fact that the language used in it may be merely *descriptio personae*. The bond does not, moreover, correctly name the county in which it is filed, nor does it state what court the case is pending in. In *Forbes v. Porter*, 23 Fla. 47, 1 South. Rep. 336, (decided in January, 1887,) we held that the identification in the appeal-bond of the judgment appealed from is sufficient if certain, even though it be inartificial. In the case before us the identification falls short of that in that cause, and we do not think it right to push the doctrine any further. Appellees are entitled to have appeal and *supersedeas* bonds

designate, with certainty, in some way, the decree appealed from, so as to secure them against any question in the future as to what decrees the sureties are bound for. It is a fact, moreover, there being no fraudulent purpose imputed to appellant, that no harm can result to appellant from our action, as he will not be precluded by it from obtaining a *supersedeas* on filing a proper bond in compliance with the practice in such cases. *Johnson v. Polk Co.*, 3 South. Rep. 414, (decided at present term;) *Harris v. Ferris*, 18 Fla. 81; *Seward v. Corneau*, 102 U. S. 161; *Insurance Co. v. Albro Co.*, 112 U. S. 506, 5 Sup. Ct. Rep. 289.

An order will be entered vacating the *supersedeas*, but without prejudice to appellant filing a new bond, and obtaining a *supersedeas*, according to the law and practice governing in such cases.

(24 Fla. 206)

**TOWN OF ENTERPRISE et al. v. STATE ex rel. ATTORNEY GENERAL.**

(*Supreme Court of Florida. May 29, 1888.*)

**APPEAL—PRACTICE—FILING TRANSCRIPT.**

Where no attempt is made by appellant to show good cause for not filing a transcript of the record on the first day of the term to which the appeal is returnable, the appeal will be dismissed, although the transcript may have been filed before the entry of the motion to dismiss.

(*Syllabus by the Court.*)

Appeal from circuit court, Volusia county; JOHN D. BROOME, Judge.  
On motion to dismiss.

*Frank W. Pope*, for motion. *John W. Price*, contra.

RANEY, J. The motion to dismiss this appeal on account of the failure of appellants to file the transcript of the record, on the first day of the present term, to which term it was taken, is now renewed, on notice, under rule 17. *Ante*, 17, 24 Fla. —. The transcript was not filed till 18 days after the time appointed by the statute. No attempt is made to show "good cause" for the delay, and the appeal will consequently be dismissed. *Rain v. Thomas*, 12 Fla. 493.

(24 Fla. 162)

**JOHNSON v. STATE.**

(*Supreme Court of Florida. May 30, 1888.*)

**1. INDICTMENT—PRESENTMENT—RECORD—PRESUMPTION.**

The minutes of the circuit court should show, by formal entry to that effect, the fact of the presentment of an indictment by the grand jury, in open court. Where, however, the fact of such actual presentment is not controverted, and the motion in arrest of judgment is upon the ground of the absence of such entry, and there is in the transcript of the record evidence from which it may reasonably be presumed, in the absence of a direct issue as to such presentment, that such presentment was made, the motion should be denied.

**2. SAME—AMENDMENT OF RECORD.**

Where, upon such a motion, it is a fact that the indictment was regularly presented, the record should be amended *nunc pro tunc* so as to speak the truth upon the subject.

**3. HOMICIDE—MURDER.**

Murder in the second degree, as defined by our statute, discussed, and the testimony in this case held not to show a case coming within the offense as defined.

**4. SAME—EVIDENCE—MOTIVE.**

The illicit relation between the defendant and the wife of the deceased held admissible as evidencing the former's motive for killing the deceased.

**5. CRIMINAL LAW—APPEAL AND ERROR—WHAT REVIEWABLE.**

Whether or not a conviction of an offense of a minor grade has the effect to acquit the prisoner of the higher grade charged in the indictment, and bar a conviction of the higher grade, on a new trial, is a question upon which no opinion will be expressed until there shall be a case of such a conviction of the higher grade, on a new trial, presented.

(*Syllabus by the Court.*)

Error to circuit court, Polk county; H. L. MITCHELL, Judge.  
*C. C. Wilson, J. H. Humphreys, and Wall & Turman, for plaintiff in error. The Attorney General, for the State.*

MAXWELL, C. J. The plaintiff in error was indicted for murder at a special term of the circuit court for Polk county, in January, 1887, John C. Newcastle being the victim. On arraignment, at the succeeding May term, there was a plea of not guilty; then a trial and conviction of murder in the second degree. A motion for a new trial was made, which the court denied, and then a motion in arrest of judgment, which was also denied.

Before proceeding to other questions, we will dispose of that involved in the motion for arrest of judgment, the denial of which is assigned for error. This motion is based on the ground that there is not sufficient record evidence in the case that an indictment was found by the grand jury, and returned by them into court, to authorize the trial, the defect being that the minutes of the court do not show that the grand jury returned any indictment into court against the plaintiff in error. That is true as to the minutes; but what does appear in the case is an indictment in the usual form by grand jurors of the county of Polk, charging against plaintiff in error the murder of Newcastle, and signed by "George B. Sparkman, acting state attorney for the Sixth judicial circuit of the state of Florida, prosecuting for said state." On the indictment are these indorsements: "A true bill. JOHN C. BLOUNT, Foreman. Filed January 27, 1887 W. H. JOHNSON, Clerk." While the proceedings of the court show no other entry than this of the return of the indictment into open court, the record before us (the clerk speaking) recites that "on the 27th day of January, 1887, came \* \* \* the grand jurors, and filed in [said] circuit court a bill of indictment against the defendant," etc.; and then gives a copy of the same. But the record proper does show that Sparkman was duly appointed acting state attorney for the special term at which the indictment was found; that Blount was the foreman of the grand jury for that term; that Johnson was the clerk of the court; and that the court was in session January 27, 1887; and shows further that on that day the case was docketed and set for trial. The question presented is whether the facts as they thus appear constitute sufficient record evidence of the return of the indictment into court, or whether a formal entry in the minutes is necessary to show such return. There is nothing in our statutes that requires this formal entry. Section 3, McClel. Dig. p. 442, only directs that "all indictments shall be signed by the prosecuting attorney, and indorsed on the back, by the foreman of the grand jury, when so found, 'A true bill.'" That is done in this case. How the indictment gets into court, and gets on the files, is not provided for by any specific direction, but is left to the established practice of the courts for ages, which is by the appearance of the grand jurors before the court, their tender of the indictment to the court, and its reception by the clerk, the official of the court for that purpose, (all of which is presumed to have been observed in this case,) in the absence of any allegation or pretense to the contrary. The better practice would be that which is usually followed—to make a formal entry of the return of the indictment in the minutes; but all the authorities do not sustain the contention that this is absolutely necessary. In *Collins v. State*, 13 Fla. 651, Judge WESTCOTT reviewed the question at considerable length, citing authorities of great respectability to sustain the view that such record evidence is not essential; and though the precise question now before us, as raised in the lower court, has not been decided, the evident inclination manifested by our decisions is against the essentiality of such record evidence. *Bass v. State*, 17 Fla. 635, and citations. The motion here does not controvert the actual presentment of the indictment in open court by the grand jury, but merely avers the omission of the proper entry of such presentment. If the issue of

such presentment was squarely raised by the motion, we do not know but that we should arrest the judgment; but as it is not, our conclusion, in view of the evident tendency of our former decisions and the authorities cited in them, is to affirm the action of the circuit judge in denying the motion as made. Assuming, as we do, that the motion in arrest of judgment was denied for the reason that the indictment was formally presented in open court by the grand jury, our opinion is that the record should have been amended *nunc pro tunc* so as to show such fact. *State v Pearce*, 14 Ind. 426; *State v. Clark*, 18 Mo. 432; *Green v. State*, 19 Ark. 189; *Freem. Judgm.* §§ 71, 72.

We come now to the errors assigned as having been committed during the progress of the trial, the principal one of which is the action of the court in denying the motion for a new trial. The motion was based on the usual general grounds, with this addition: that "the evidence in the case did not warrant the jury in convicting the defendant of murder in the second degree." We find nothing in the record to lead us to pronounce the court in error on the other grounds. As to this, the evidence, so far as material, is that the plaintiff in error lived with Newcastle and his wife, and that on the night of the 9th of January, 1887, Newcastle was found dead in his bed. His death was caused by a gun-shot wound, penetrating the skull under the right eye, about an inch below the orbit, passing backwards to a point about two inches under the left ear. There were powder stains around the opening of the wound, where the face was badly burnt. How and by whom the wound was inflicted does not appear from any positive testimony of witnesses present. The evidence on the subject is that of a physician who was called about 11 o'clock that night to see Mrs. Newcastle. He says that the plaintiff in error came for him, and while at his house said he had shot Mr. Newcastle. Either then or soon afterwards the full statement of plaintiff in error was "that Newcastle was choking Mrs. Newcastle, and threatened to kill them both; when he heard him (plaintiff in error) coming down the stairs, which he did in answer to Mrs. Newcastle's calls. She called to him to know if he was going to stay up stairs and let Newcastle kill her. Then he got up and came down stairs, and Newcastle said that 'if you come down here I will kill you both;' and he (plaintiff in error) then picked the gun up, and shot him." This is all the evidence bearing on the question as to whether the jury were right in finding a verdict of murder in the second degree. Does it warrant that verdict? We think not. The statute of this state in regard to homicide makes seven degrees of the offense—three of murder and four of manslaughter. It is unnecessary to recite these in detail here, but it is not to be forgotten that every degree has its own distinguishing features, and that facts which bring a case within either must be met by a verdict of guilt in that special degree. The offense each degree marks out is a separate offense from that marked out by either of the other six, to be determined, as the statute prescribes, "according to the facts and circumstances of each case." In the present case the offense the jury found is defined in the statute thus: The killing of a human being, "when perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, \* \* \* shall be murder in the second degree." To understand what this means, let us consider it in connection with the other degrees of murder as defined in the statute. The killing of a human being, "when perpetrated from a premeditated design to effect the death of the person killed, or any human being, shall be murder in the first degree." "When perpetrated without any design to effect death, by a person engaged in the commission of any felony, it shall be murder in the third degree." The first evidently requires that the killing should be in pursuance of a premeditated design to effect the death of some human being, though the person killed was not the one intended. Comparing this with the second, one chief difference is that the element of premedi-

tation is essential in the former, but not in the latter, though, if it exists in the latter, it is not to be directed against any particular individual. Another difference is that the design in the first need not be directed against the person actually killed, but, nevertheless, must be against some particular individual; while in the second it is not only not necessary that the design should be aimed at any particular individual, but if the design be to kill, it must come from a general deadly intent, and it must be executed by an act imminently dangerous to others, evincing a depraved mind, regardless of human life. But in the second it is not required, in all cases, that there should be an intent to kill. For instance, if a man, out of enmity to the owner of a vessel, and desiring to do him injury, should use dynamite or other explosive to destroy the vessel while he knew passengers were aboard, and death should ensue to one or more of them, that would be a case of murder in this degree. Every element of the degree, the imminently dangerous act, and the depraved mind, regardless of human life, would be present, although the intent was to destroy property, not life. Without further analysis to distinguish these two degrees, we refer to *Darry v. People*, 10 N. Y. 120, for a full and exhaustive discussion of the subject. In that state these degrees are subdivisions of the first, but the marks of distinction are the same; and the reasoning and decision of that case sustains our conclusion in this. But it may be asked, if the second degree includes a case in which there may be no design to kill, how does such a case differ from one in the third degree, which is a killing, without any design to effect death, by a person engaged in any felony? For the purposes of this case, as it is presented here, it is not important to answer this question, and we will content ourselves with the general remark that the character of the act and the state of mind of the offender necessary to the second is excluded from the third, leaving the distinction to rest upon a felony in the latter that is not aggravated by imminent danger to others, and by depravity of mind, reckless of human life. In deciding that the evidence in this case does not warrant a verdict of murder in the second degree, we refrain from prejudging a future trial by any expression of opinion as to the degree of the offense of homicide that evidence does point to. In the discussion of this point, the attorney general dissents from what is said in *Potsdammer v. State*, 17 Fla. 896, 904, of the conviction of an offense of a minor grade having the effect of an acquittal of the higher grade charged in the indictment. When a case shall come before us in which, subsequent to a verdict of guilt of the lower grade, a new trial has been granted, and has been followed by a conviction of the higher grade of the offense, we will feel called upon to express an opinion. No such circumstances existed in *Potsdammer's Case*. As to other errors assigned, the first sets up objection to the admission of the testimony of the witness Griffin in regard to statements made by Mrs. Newcastle at the time of the arrest of the plaintiff in error. There is nothing of any consequence in those statements except as showing the affectionate relations between the two, and her distress on account of his being taken away. What she said, being in his presence and hearing, may be significant in connection with the question of motive for shooting Newcastle, and in that view was admissible. And the same may be said in regard to the third error assigned, which was the refusal of the court to strike out testimony of witnesses Hefford, Strong, and Osborne, intended to show improper relations between the plaintiff in error and Mrs. Newcastle. That was legitimate testimony towards discovering the motive of the plaintiff in error for shooting Newcastle. There was some looseness in it, but the object was not amiss. The remaining error assigned is in the admission of the testimony of a brother of Newcastle as to a letter or letters he had received from the deceased. The object was somewhat the same as in the admission of the other testimony, by showing complaint because of misconduct of the wife. But such testimony was clearly inadmissible. The letters themselves should have

been produced, or their non-production accounted for, if proper evidence at all. We think, though, they could not have been admitted, because, while the acts and conduct of the wife might be inquired into, for the reason we have already given, this cannot be done by statements of the husband to a third party, whether by letter or otherwise, not communicated to her, or shown to have had any part or influence in the subsequent tragedy. This method of getting at the acts and conduct of parties to find a motive for the deed is too remote and unreliable. *Weyrich v. People*, 89 Ill. 90. For the errors herein declared, the judgment is reversed, and the case remanded for a new trial.

(65 Miss. 459)

BERNHEIM *et al.* v. HAHN *et al.*

(*Supreme Court of Mississippi*. April 26, 1883.)

EVIDENCE—DECLARATIONS OF AGENT—WHEN BINDING ON HIS PRINCIPAL.

Claimant in attachment, to whom defendant was indebted, told defendant to turn over certain goods to a third person, who should ascertain the amount, and claimant would give defendant credit for it. The third person took possession accordingly. *Held*, that his subsequent statements as to the ownership of the property, made to the officer who attached the goods as the property of the defendant, not being within the scope of his agency, were inadmissible in evidence against claimant.

Appeal from circuit court, Lauderdale county; S. H. TERREL, Judge.

Hall Bros., who were retail liquor dealers, were indebted to appellants, Bernheim Bros. & Uri. Their license would soon expire, and Bernheim Bros. & Uri told Hall Bros. that when their license expired to turn over what whisky they had left on hand to one Danheiser, who was to ascertain the amount, and they would give Hall Bros. credit for it on the amount due to them by Hall Bros. The license expired, and Danheiser took possession. Appellees, Hahn & Pidal, sued out an attachment against Hall Bros. The officer to whom the writ was issued, went to Danheiser, and asked him to point out the whisky belonging to Hall Bros. Danheiser replied, "Three of the barrels of whisky belong to Bernheim, but the other three he supposed belonged to Hall Bros.," whereupon the three barrels, which were supposed to be the property of Hall Bros., were levied on and attached. Bernheim made claimants' affidavit to the whisky seized, executed bond, and an issue was made which resulted in a judgment in favor of Hahn & Pidal. Bernheim Bros. & Uri appealed.

*E. Watkins*, for appellants. *Cochran & Cochran*, for appellees.

COOPER, C. J. What was said by Danheiser, the agent of the appellants, at the time of the levy of the attachment, in reference to the ownership of the whisky levied on, should not have been admitted in evidence as an admission by his principals. The whisky had before that time passed from the possession of the defendants to that of Danheiser, and according to the contract, as testified to by defendants, appellants were to take all that should remain in stock when defendants' license expired. If this be true, there was a contract of sale for the whole executed by the delivery to Danheiser, who had no power thereafter to vary the rights of the parties by any refusal on his part to measure it up and deliver receipts to the seller. What was to be done by him was not in execution of the contract, but as a mere means of determining the extent of the credit to which the seller was entitled. *Jordan v. Harris*, 81 Miss. 257. The declaration of the agent that the property levied on was not the property of his principals, but was the property of the defendants in execution, was not one made in the scope of his agency, nor in reference to anything being done by him as agent. It is only where the agent could bind his principal by his act that a declaration or admission made by him is admissible in evidence either for or against the principal. The declaration or admission

must be of a character to illustrate or characterize some act being done and connected with it, as a part of the *res gesta*, to make it admissible in evidence. 2 Whart. Ev. § 1173; 1 Tayl. Ev. 518; 1 Greenl. Ev. § 113. If Danheiser had any duty to perform, under the facts shown in evidence, it was to keep possession for his principal of the property which had been delivered to him. The effect of the declaration admitted was that as to the whisky seized by the officer he was not the agent for appellants. If this be true, he had no authority to bind appellants, because he was not as to this particular property their agent. Appellees' contention for the admissibility of this evidence reduces itself to this. The property seized was never the property of appellants, because Danheiser never held it for them, and his declaration that it was not their property, is competent evidence against appellants, because he did hold it as their agent. It is impossible that this can be a sound proposition. The judgment must be reversed, and cause remanded.

(95 Miss. 433)

## POLK v. STATE.

(Supreme Court of Mississippi. April 23, 1883.)

## 1. CHATTEL MORTGAGES—REMOVAL OF MORTGAGED PROPERTY—CRIMINAL LIABILITY.

The offense of removing from the county property subject to a lien, without immediately discharging the same, as defined by Code Miss. § 2909, is not committed by a mere sale to one who afterwards removes the property from the county.

## 2. SAME.

Under Code Miss. § 2909, defining the offense of removing from the county property subject to an incumbrance, without immediately discharging the same, an affidavit which fails to state that defendant did not immediately discharge the lien charges no offense.

Appeal from circuit court, Yazoo county; T. J. WHARTON, Judge.

Polk was prosecuted under section 2909 of the Code of 1880. He removed from leased premises cotton which was subject to a deed of trust for indebtedness, and sold it to another creditor in the county where it was raised, and this creditor afterwards shipped it out of the county. Affidavit was made against him before a justice of the peace, but the affidavit failed to state that Polk did not immediately discharge the debt for which the deed of trust was given. He was adjudged guilty by the justice of the peace, and appealed to the circuit court, where he was convicted, and judgment rendered against him, from which he appealed.

Calhoon & Green, for appellant. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, J. A motion to quash, or in arrest of judgment, if it had been made, would have been sustained, as no offense is charged. The offense created by section 2909 of the Code is removing property subject to an incumbrance or lien as specified from the county in which it may be without immediately discharging such incumbrance or lien. Removal or secreting, and failing promptly to discharge the claim on the property, together constitute the offense; and to constitute the offense of removal it must be completed by the act of the party, or he must cause it to be done directly, and not remotely, as a mere consequence of removing and selling in the county. Therefore, the sale of the cotton in the county, without more, did not constitute the offense, although subsequently as an incident of trade, it was transported from the county. That was not the act of the defendant. It was not the proximate result of his act, which was completely ended with his sale. A new agency supervened quite distinct from his act of removal. The sequence was broken, and he was not guilty. Reversed and remanded.

## POOL v. ELLIS.

(Supreme Court of Mississippi. May 7, 1888.)

**EXECUTORS AND ADMINISTRATORS—SALES OF LAND—PURCHASER IN GOOD FAITH.**

Where an heir assigns his interest in the estate to the administrator, who sells land of the estate to one who buys in good faith, and pays therefor, and the sale is set aside as to the heirs, the purchaser is entitled to the share of the purchase price assigned to the administrator by such heir.

Appeal from chancery court, Clay county; F. A. CRITZ, Chancellor.

Allen Ellis transferred his interest in his father's estate to his brother T. S. Ellis, for a valuable consideration. T. S. Ellis was the administrator of the estate, and he made an illegal sale of the land, and Pool bought in good faith, and paid therefor. The administrator squandered the money. Another sale was ordered, and Pool again bought the land, and as Pool held probated claims against the estate, it was agreed between him and the administrator that these claims, with the purchase money he had paid at the first sale, should be taken as payment in full of the land bought at second sale. The second sale was reported, but never confirmed. Not being able to get confirmation, Pool allowed the land to be sold for taxes, and bought the tax title. The Ellis heirs filed a bill to vacate the tax title of Pool, alleging that the administrator's sale had never been confirmed, and that the administrator had wasted the purchase money paid in by Pool. The chancellor held that all the sales were invalid, and decreed that, as to the portion of the purchase money used to pay debts of the estate, Pool should be subrogated to the rights of the creditor. This decree was affirmed by this court. See *Pool v. Ellis*, 1 South. Rep. 725. Pool petitioned the chancery court to have the share of Allen Ellis paid to him, since, as against the administrator, he was entitled to be repaid so much of the purchase money as said administrator had received. The chancellor denied the petition, and Pool appealed.

*Barry & Beckett*, for appellant. *Beale & Pope*, for appellee.

COOPER, C. J. The chancellor should have ordered the fund in controversy paid to Pool, instead of directing it to be paid to Allen Ellis. Ellis was examined as a witness, and testified that he had assigned his interest in the estate to his brother, the administrator. The administrator sold the land to Pool, and received the purchase price. Though the sale was for invalidity set aside as to the heirs at law, Pool was, as against the administrator, and all his interest in the land, entitled to be repaid so much of the purchase money as he had received, or to have the proceeds of the sale to the extent of such interest. The decree will be reversed, and a decree made here directing the money to be paid to Pool or to his attorney of record.

(65 Miss. 342)

CUMMINGS *et ux.* v. JOHNSON.

(Supreme Court of Mississippi. February 27, 1888.)

**1. EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S LAND—TITLE.**

The purchaser, under an order of sale of the real estate of an intestate, takes the title the administrator had power to sell, and although the land is subject to a homestead in favor of the widow, such homestead, being a paramount title, constitutes no defense to an action for the purchase money.

**2. APPEAL—REVIEW—MATTER NOT APPARENT ON RECORD.**

Where there is no bill of exceptions on appeal, showing whether an order of sale of the real estate of an intestate was entered upon the minutes of the court, and duly approved, or written upon a separate paper, and filed among the papers of the administration, it must be presumed that the entry upon the record was duly made.

Appeal from chancery court, Pontotoc county; B. T. KIMBROUGH, Chancellor.

Joseph Betts died in possession of the lands in controversy, leaving a widow. His administrator obtained a decree for the sale of land. The land was sold and bought in by William Cummings, the son-in-law of the administrator, who gave his note for the amount of his bid, and the administrator reported to the court that the purchase price had been paid in full. The administrator of Joseph Betts died, and his administrator filed a bill to fix a charge upon the land for the purchase price, the note never having been paid. A decree was rendered in favor of the administrator, from which Cummings and wife, M. J. Cummings, appealed.

*J. A. Blair*, for appellants. *Fontaine & Mitchell*, for appellee.

COOPER, C. J. The bill in this cause is exhibited by the administrator of James Betts, who was administrator of Joseph Betts, and is against William Cummings, the purchaser at the administrator's sale of the lands of Joseph Betts and Martha J., his wife, to whom he has conveyed the lands so purchased. It charges that though James Betts reported to the court that Cummings had paid the purchase money in full, the truth is that no part thereof had been paid, and there is filed with the bill a note executed by the purchaser at the time of the sale, for the amount of his bid. The purpose of the bill is to fix upon the lands in the hands of Mrs. Cummings (who is a volunteer) a lien for the purchase money, in favor of the estate of James Betts, he having accounted to the estate of Joseph Betts therefor. The defendants answer and defend the suit upon the following grounds: "(1) That the sale of the lands was void, and conferred no title. (2) That James Betts, the administrator, intended the purchase price of the land as an advancement to his daughter, the defendant Mrs. M. J. Cummings, and took the note of her husband, Wm. Cummings, the purchaser, as a mere memorandum of the amount so advanced, and not as an evidence of debt. (3) An offset is interposed, consisting of a claim against James Betts for care and attention bestowed by the defendants on the *non compos mentis*, Minnie Betts, widow of Joseph Betts, at the request of James Betts."

We dispose of the second and third defenses by the simple statement that the evidence is insufficient to support them. The sale of the land is said to have been invalid (1) because there was no valid order of sale; and (2) because the homestead of the intestate, Joseph Betts, was sold under the order, when the same had descended to his widow, Minnie, and was not subject to administration. It is asserted by counsel for appellants that the order of the clerk for the sale of the lands was not entered upon the minutes of the court, but is evidenced only by a paper found in the files of the administration in the form of a decree signed by the clerk in vacation; and it is insisted that such an order is insufficient to uphold the sale. We decline to pass upon the question of the sufficiency of an order of sale evidenced, as it is asserted this order is. We do not know from the record whether the order was spread upon the minutes of the court, and signed there by the clerk, in vacation, and approved by the court at its succeeding term, or was written upon a separate paper, and filed among the papers. The note of evidence does not show what parts of the record are from the minutes of the court and what from the files of the papers in the administration. There is no bill of exceptions giving us any information on the subject, and in the absence thereof we must, in support of the decree, assume that such proceedings, in the course of the administration, as were proper to be entered of record, were so entered. The defense that the notes given for the purchase money cannot be enforced, because the sale was made of the whole tract of land, including the homestead, cannot avail. If the court, proceeding in administration, had jurisdiction to determine whether the widow was entitled to the homestead, and, consequently, whether the whole tract should be sold, or only so much of it as remained after the allotment of the homestead, then its decree is conclusive against the

right of the widow to claim the homestead right, on the familiar principle that a decree is conclusive not only of those things which actually were decided by it, but also of all things which, under the pleadings, might have been decided. If, on the other hand, the court had no jurisdiction to pass upon the homestead claim, the defect in the title of the purchaser would not be in reference to any part of the estate which the administrator had power to sell under the law, and the rule of *caveat emptor* would apply and preclude the defense. The purchaser at an administrator's sale cannot defend against the payment of the purchase money, upon the ground that a paramount title is outstanding in another, by reason of which his purchase will be ineffectual. It is only where he fails to get the title which is proposed to be sold, that he may defend against the purchase price; and a sale by an administrator only purports to be of so much of the estate as by law is made assets for the payment of debts. If by the sale, therefore, the homestead right of the widow was defeated, the purchaser must pay the purchase price, because he gets the land. If the sale was ineffectual to convey the homestead right, he is liable for the full amount of his bid, because the homestead right is in the nature of a paramount outstanding title, of which he should have taken notice at his peril. The decree is affirmed.

ELBERT *et al.* v. PICARD *et al.*

(Supreme Court of Mississippi. March 19, 1883.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RECORDING.

In an action between assignees of personal property and attaching creditors of the assignors, it is error to instruct the jury that the assignment was not valid, as against creditors without actual notice, because not recorded; yet such error is not ground for reversing a judgment in favor of the creditors where the assignment was clearly shown to be fraudulent in fact.

Appeal from circuit court, Wilkinson county; J. B. CHRISMAN, Judge.

This case is a sequence of the case of *Picard v. Samuels*, 2 South. Rep. 250. Samuels & Co. and Lauenburgh & Co. (the two firms being composed of Samuels & Lauenburgh) had two stores at different points in the county of Wilkinson. Appellant August Elbert was clerk at one of the stores, and appellant Julius Price clerk at the other. After certain actions on the part of the partners, as related in the case above referred to, both firms made an assignment; Samuels & Co. making its assignment to Elbert, and Lauenburgh & Co to Price. Mrs. Samuels, wife of one of the members of the firm, was a preferred creditor. Fraudulent practices on the part of the partners were clearly proved. Attachments were sued out against the two firms. Elbert interposed a claim to certain property, and Price claimed certain other property. On the trial of the claimants' issue, the court compelled both claimants to submit their respective claims to the same jury at the same time. The assignments made were in writing, but had not been recorded; and the court instructed the jury that the deeds of assignment were invalid, as against creditors not having actual notice of their execution, because not recorded. The trial resulted in a verdict in favor of the attaching creditors, from which Elbert and Price appealed.

D. C. Bramlett and A. G. Shannon, for appellants. C. P. Nelson and J. H. Jones, for appellees.

COOPER, C. J. It was a very dangerous experiment on the part of the plaintiffs to compel the claimants, Elbert and Price, to submit the trial of their respective claims to different portions of the property attached, to the same jury at the same time. It is not often that such course would not be such error as to necessitate a reversal. The court erred in instructing the jury that the deeds of assignment were not valid, because not recorded, as against creditors who did not have actual notice of their execution. If pos-

session of the property assigned was delivered to the respective assignees, the assignment might have been sustained, though not in writing. *Baldwin v. Flash*, 59 Miss. 61. The fact that the assignments were in writing did not render them invalid because not recorded. Notwithstanding any error committed on the trial, the judgment must be affirmed. It is perfectly manifest that the defendants in attachment were engaged in plundering their creditors, and that the assignments were but steps in the fraudulent schemes in which they were engaged. Judgment affirmed.

### MCLEOD v. GRAY.

(*Supreme Court of Mississippi*, May 21, 1888.)

#### 1. APPEAL—FROM JUSTICE OF THE PEACE—JURISDICTION.

Plaintiff obtained judgment in a justice's court for \$20, from which judgment defendant appealed to the circuit court, where he filed a set-off in an amount exceeding the jurisdiction of the justice's court after deducting plaintiff's demand. *Held*, that it was error for the circuit court to give affirmative judgment for defendant in such amount; its jurisdiction in the case being measured by that of the justice's court.

#### 2. LIMITATION OF ACTION—RUNNING OF THE STATUTE.

To a suit brought in 1886, defendant filed a set-off for the value of certain cotton which he had delivered to plaintiff in 1879 in payment of a tract of land to which plaintiff was to make title to defendant in 1884. *Held*, that the set-off was not barred by the three-years statute of limitations.

Appeal from circuit court, Covington county; A. G. MAYERS, Judge.

In 1886, appellant, McLeod, sued appellee, Gray, in the justice's court on a note for \$20 given by Gray for supplies furnished him by McLeod, and judgment was rendered in favor of McLeod, from which Gray appealed to the circuit court. In the circuit court Gray propounded a claim, as a set-off, for the value of 2,000 pounds of cotton, at 10 cents per pound, which he had delivered to McLeod in 1879. This cotton was given to McLeod in payment of a tract of land, to which McLeod was to make title to Gray in the year 1884, which title had not yet been made. McLeod claimed that this set-off was barred by the three-years statute of limitations, and insisted that the amount of it exceeded the jurisdiction of the court, being in excess of \$150 after deducting the amount for which he was suing, because, on appeal from a justice's court, the jurisdiction of the circuit court was measured by its jurisdiction. The trial resulted in a judgment for Gray for the amount of his claim, less that for which he was sued, from which McLeod appealed.

*J. F. N. Huddleston*, for appellant. *A. H. Longino*, for appellee.

CAMPBELL, J. The set-off was not barred by the statute of limitations; but, according to the testimony of the defendant himself, it was not within the jurisdiction of the court, being in excess of \$150, after deducting the claim sued on. Besides this, it was not presented in the justice's court, and the record does not show how it got into the circuit court, except that it is stated in the bill of exceptions that it was filed by consent of the defendant. This may be a clerical error. It may have been intended to show that it was by consent of the plaintiff; but, in view of the fact that the judgment must be reversed for the error of maintaining jurisdiction when it appears that the sum due the defendant was so large as he testified it was, we will leave the question, as to the consent to filing a set-off, an open one; remarking that the case of *Marx v. Trussell*, 50 Miss. 498, furnishes the rule on the subject, whatever exceptions may be admissible under certain circumstances not necessary to be mentioned now. Reversed and remanded.

(65 Miss. 504)

**HARDY et al. v. HARTMAN.***(Supreme Court of Mississippi. May 31, 1883.)***TAXATION—TAX TITLES—UNPATENTED LANDS.**

Where an act creating a corporation provided that patents to certain state land should be issued to the company, upon the condition precedent that it should file a certain bond, and the land was afterwards sold to the state for taxes, as the property of the company, but it did not appear that any bond was ever filed or patent issued to the company, the purchaser of the interest of the state under the tax sale took no title as against one holding a patent from the state.

**Appeal from circuit court, Lincoln county; J. B. CHRISMAN, Judge.**

Hartman sued Hardy et al. in ejectment, for possession of the land in controversy, and introduced as evidence of his title a patent for the land from the United States to the state of Mississippi, and a patent from the state of Mississippi to himself. The defendants introduced the act of 1871, creating the Pearl River Navigation & Improvement Company, and giving said company land on certain conditions; showed that the land was sold to the state for taxes as property of said Pearl River Navigation & Improvement Company, and that they had bought the tax title from the state. There was judgment in favor of Hartman, from which Hardy et al. appealed.

*Calhoon & Green*, for appellant. *R. H. Thompson*, for appellees.

**PER CURIAM.** It is not necessary, to dispose of this case, to enter the field of observation or discussion suggested by the name of the Pearl River Navigation & Improvement Company. It is not shown by the record that the company ever made or filed the bond required by law, as the foundation of its right or title to the land in controversy; nor does it appear from the record that any patent signed by the governor, and countersigned by the secretary of state, was ever issued to the company for the land in question, or for any land. The act of 1871, by which the company was created, did not divest the state of title to the land; but, on the contrary, it expressly provided that patents to the land, signed by the governor, and countersigned by the secretary of state, should be issued by the state to the company, and it was made by the act a condition precedent to this being done that the company should file in the office of the secretary of state a bond, with security, in the sum of \$50,000, and that the same should be approved by the governor. There is a bond in the record, which was filed in the office of the secretary of state, and approved by the governor; but it does not purport to be the bond of the company, and is not and cannot be regarded as such. The proposition is too plain for argument that if a patent issued for the land, without these conditions being complied with, it was void. **Affirmed.**

**MANSFIELD et al. v. OLSEN et al.***(Supreme Court of Mississippi. May 21, 1883.)***1. PARTITION—REPORT OF COMMISSIONERS—WHEN MAP SHOULD BE FILED.**

Although Code Miss. § 2564, providing that the commissioners in a partition suit "shall make a true field-book, specifying the bounds and number of each lot, and also a map of the tracts on which the several shares shall be laid down and numbered," is not to be literally followed in its requirement as to a field-book and map, yet the report should show distinctly the share of each person; and, where a reference to public records and memorials of the locality does not make certain the several shares, a field-book and map should accompany the report.

**2. SAME—SOLICITORS' FEES—TO WHOM CHARGEABLE.**

In partition suit by two heirs asking for a sale of the land for the reason that partition is impracticable, after answer by the remaining seven heirs and widow that partition is practicable, and upon decree confirming the report of commissioners appointed to make partition without sale, fees for complainants' solicitors are improperly allowed to be charged upon the whole 10 shares.

v.480.no.13—35

Appeal from chancery court, Jackson county; S. EVANS, Chancellor.

One Mansfield died, leaving a widow and nine children. Two of the adult children, Mary Ellen Olsen, *et al.*, filed a bill for a partition of the land left by Mansfield, alleging that it was incapable of being properly divided, and prayed that it be sold and the proceeds divided. The widow and seven children answered, and controverted the allegation that there could not be partition of the lands, and agreed to a partition of all the lands except the homestead. A decree was entered, appointing commissioners to make partition. They proceeded so to do, but did not follow the statute as to field-book and map; and they made their report, which was not definite and certain as to some of the shares allotted. A decree was rendered on the report of the commissioners, making partition as allotted, and it was further decreed that an attorneys' fee be allowed to attorneys for complainants in the sum of \$250, chargeable on the whole 10 shares, from which decree the widow and her co-defendants appeal. Section 2564 of the Code, referred to in the opinion, is as follows: "The commissioners shall number the several parts or shares laid off, from number one progressively, and in the same manner shall number each lot in the several shares, if it contain more than one lot, and shall make a true field-book, specifying the bounds and number of each lot, and also a map of the tracts on which the several shares shall be laid down and numbered, and shall proceed to make an allotment, by ballot, of the several shares of the tract or tracts of land among the several persons entitled thereto; and the commissioners shall proceed, in a public manner, to number as many tickets as there are shares marked on the map, which shall be put into a box, or other convenient thing, and the names of the persons entitled to shares shall be written on separate tickets, and put into another box, when a person appointed for that purpose by the commissioners shall proceed to draw a ticket of those containing the names and then a ticket of the numbers, and so proceed until the whole are drawn, and the number on the map which shall be drawn to the name of the joint tenant, tenant in common, or coparcener shall be his separate and divided share in the land so divided, of which balloting the commissioners shall make a full and ample certificate, under their hands and seals, specifying the time, place, and manner of balloting, and the allotment of shares. But, instead of making an allotment of shares by ballot, the commissioners may assign shares to the parties entitled, if so directed by the court or chancellor, or if they find that to be desirable."

C. H. Wood and C. S. Meriwether, for appellants. O. B. Chidsey, for appellees.

CAMPBELL, J.: The defendants should not have been required to pay any part of the fee of the solicitors of the complainants; and the report of the commissioners should have been required to be so amended as to show clearly and unmistakably the parts of land allotted or assigned to each. As to some it does not do this, and it should not have been confirmed. We do not hold that section 2564 of the Code is to be literally followed, in its requirement of a field-book and a map, in all cases; but the report, and decree made on it, should show distinctly and precisely the share of each person; and, where a reference to public records and memorials of the locality and description do not make certain the several shares, a true field-book and map, as specified in the statute, should accompany the report of the allotment. Reversed, and remanded for further proceedings in accordance with this opinion.

JONES v. MATHEWS *et al.*

(Supreme Court of Mississippi, May 21, 1883.)

## 1. INFANCY—ACTIONS—SERVICE OF PROCESS.

Under Code Miss. 1880, § 1531, a court cannot acquire jurisdiction over an infant by personal service, except where it appears that the process was served upon his father, mother, or guardian, or that the infant had no father, mother, or guardian in the state.

## 2. EVIDENCE—PRESUMPTION—NAMES.

Where the fact that one of the defendants was the father of an infant co-defendant does not appear of record, the court cannot assume such fact from the similarity of names.

## 3. APPEAL—DECREE—REVERSAL.

On appeal from a final decree enforcing a vendor's lien on land held by defendants as heirs of the vendee, a reversal as to one defendant necessitates a reversal as to all.

Appeal from chancery court, Copiah county: E. G. PATTON, Chancellor.

This is a bill filed by M. O. Mathews and others to enforce a vendor's lien. Complainants had conveyed to one Eliza Jones the lands in controversy in 1862. Eliza Jones died before the filing of the bill. She had given her notes for the purchase price of the land. Appellant, J. W. Jones, was a minor, and he and two adult co-defendants were the heirs of said Eliza Jones. At the January term, 1883, of the chancery court, complainants obtained an order taking the bill as confessed against all the defendants; appellant, Jones, being a minor. The record nowhere shows whether appellant, Jones, had a legal guardian or not, and he was served with process just as the adult defendants were. A guardian *ad litem* was appointed for him, who answered in the usual form; and a decree was rendered ordering all the lands to be sold to pay amount of purchase price, and directing any surplus to be paid over to defendants. The land was advertised and sold by the commissioner, and was bid in and struck off to M. O. Mathews at 10 cents per acre. The sale was reported to the court at its next term in July, 1883, and a decree rendered confirming the sale. Appellant, Jones, having attained his majority in 1887, appealed to this court. Appellees insist here that if the decree should be reversed as to appellant, J. W. Jones, it should be affirmed as to his co-defendants, J. B. Jones and Eugene Jones, who were adults when it was rendered, and when they were served with process.

H. C. Conn, for appellant. J. S. Sexton, for appellees.

COOPER, J. There is nothing in the record from which the court can find that the process for the infant, J. W. Jones, was served upon the father, mother, or guardian, or that the infant had no father, mother, or guardian in this state; and only upon such service, or upon it appearing that the infant had no father, mother, or guardian in the state, could the court acquire jurisdiction over him by personal service only. Code 1880, § 1531; *Erwin v. Carson*, 54 Miss. 282. It may be that J. B. Jones, one of the defendants, is the father of said infant, but, in the absence of such fact of record, the court cannot assume it to be true. The final decree is of an inseparable character, and a reversal as to the infant necessitates a reversal as to all the parties. Decree reversed, and cause remanded.

(65 Miss. 463)

## HEWLETT v. CINCINNATI, N. O. &amp; T. RY. CO.

(Supreme Court of Mississippi, May 21, 1883.)

## 1. CONTRACT—VAGRANCY—PUBLIC POLICY.

A contract by a railroad company to procure bail for a detective in its employ in case he should be arrested in the course of the employment, and to pay all expenses of his defense, is not against public policy.

**2. SAME—CONSTRUCTION—AGREEMENT TO FURNISH BAIL.**

A railway company employed a detective, agreeing to furnish him bail in case of arrest in the performance of his duties, and pay expenses of his defense. He was arrested and tried for being concerned in lynching a man whom he had caused to be arrested for wrecking a train. *Held* that, the detective's arrest not being the proximate result of the service, the company was not bound to furnish bail.

Appeal from circuit court, Hancock county; S. H. TERRAL, Judge.

Thomas G. Hewlett was employed by the Cincinnati, New Orleans & Texas Railway Company as a detective; and as his duties might be sometimes perilous, and he might be placed in a position to be prosecuted for some mistake, the railway company agreed, in the event of his being prosecuted or arrested for some error in the performance of his duties as detective, to furnish him bail in case of arrest, and to pay all expenses of his defense, arising out of the performance of the duties for which he was employed. A train of said company was wrecked, and several parties were injured. Hewlett was sent to the scene of the wreck, for the purpose of finding out who placed the obstructions on the track which caused the wreck. He worked up the case, made affidavit against one Parker before a justice of the peace, and Parker was committed to jail. A mob from an adjoining county in which Parker was in jail went and took Parker from jail, and hung him. The grand jury indicted several parties for the crime of hanging Parker, among them Hewlett, who was sent to jail; whereupon he asked the railway company to furnish him bail, and engage counsel for his defense. The railway company refused to do so. Hewlett was acquitted, on the trial, of any connection with the mob. He was in jail five days, and he brought this suit against the railway company to recover damages for \$10,000 for failing to keep contract. Defendant demurred to the declaration on the ground that the contract declared on was contrary to public policy. The demurrer was sustained, and judgment entered in favor of the railway company, from which Hewlett appealed.

*E. J. Bowers*, for appellant. *John W. Fewell*, for appellee.

CAMPBELL, J. We do not concur in the view that the undertaking declared on was contrary to public policy, and therefore void. Public policy favors bail, and a contract to furnish or procure it is unobjectionable. Greenh. Pub. Pol. rule 385, p. 450. The demurrer is sustainable on another ground. The indictment and arrest and imprisonment of the plaintiff were not the proximate, but the remote, result of the service he rendered the defendant in arresting Parker, and therefore were not within the contemplation of the contract, and the failure to procure bail for him in that case was not a breach of the contract. *Affirmed*.

(65 Miss. 479)

**QUIN v. STATE.**

(*Supreme Court of Mississippi*. May 23, 1883.)

**DISORDERLY CONDUCT—ABUSIVE LANGUAGE—PLACE.**

Under the statute of Mississippi making it an offense to use abusive language in "the dwelling-house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises," place is an essential element of the offense, and where the indictment charged use of the language in the yard, and the proof showed that it was used outside of the yard, there is a fatal variance.

Appeal from circuit court, Pike county; J. B. CHRISMAN, Judge.

W. P. Quin went to the house of one Jones, and, after some conversation and disagreement in the house, he left the house, and went into the yard, where Jones followed him. Quin then went out of the yard, and, after he got outside, cursed and abused Jones in severe language. He was indicted for using abusive language (setting out the words used) in the yard of Jones, and on trial was convicted, and a judgment was entered imposing a fine upon him, from which he appealed.

*W. P. Cassedy*, for appellant. *T. M. Müller*, Atty. Gen., for the State.

COOPER, J. If the indictment had charged the use of the abusive language used by the appellant to have been uttered near the premises of Mr. Jones, the conviction might be sustained. But the averment is that the words were used in the yard, and the evidence fails to sustain the averment as to place. The statute creating the offense makes place material; for it can be committed only where one "enters the dwelling-house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises," etc. Place is thus made an essential element of the offense, and must be charged in the indictment, and, being charged, must be proved as laid. 1 Bish. Crim. Proc. § 872. Judgment reversed, and new trial awarded.

(65 Miss. 466)

**HENDERSON *et ux.* v. HARTMAN.***(Supreme Court of Mississippi. May 21, 1883.)***USURY—AS A DEFENSE—ESTOPPEL TO SET UP.**

Defendant gave a usurious note, which, not being paid at maturity, was renewed by a new note for the amount and an additional sum. Desiring to send his children to college, the president of the college, at his request, took up the note, and agreed to look to it for tuition also. The note was afterwards transferred. *Held*, that defendant is estopped from setting up usury as a defense.

Appeal from chancery court, Lincoln county; L. McLAURIN, Chancellor.

J. A. S. Henderson borrowed money from one Davis, and gave him a deed of trust on certain land to secure the note, upon which usurious interest was paid by him; and the note was to bear 10 per cent. after maturity. The note was not paid at maturity; whereupon a new note for the amount of the old note and an additional sum was given, and a new deed of trust to secure the same; the new note bearing 10 per cent. interest. Henderson desired to send his daughters to college, and he procured Dr. Johnston, the president of the college, to take up the note and deed of trust, and grant him an extension of a year, and to look to that for tuition also. Nothing was said to Dr. Johnston about usury. Dr. Johnston died, and his wife, Mrs. Johnston, transferred the note and deed of trust to a merchant, the appellee, F. H. Hartman. The note not being paid at time to which it had been extended, Hartman ordered a sale of the land under the deed of trust, whereupon Henderson and wife filed this bill to purge the transaction of usury. A decree was rendered against the prayer of the bill, from which Henderson and wife appeal.

*H. Cassidy*, for appellants. *R. H. Thompson*, for appellee.

CAMPBELL, J. A person may be estopped from setting up usury as a defense, (2 Herm. Estop. §§ 911, 1012; 1 Daniel, Neg. Inst. § 859; Tyler, Usury, 418, 419;) and the facts of this case make the principle applicable. *Affirmed*.

(65 Miss. 483)

**TATUM *et al.* v. CASTON *et al.****(Supreme Court of Mississippi. May 28, 1883.)***EJECTMENT—EVIDENCE.**

Plaintiffs in ejectment showed title under sheriff's deed pursuant to decree of the chancery court against defendants, and that the latter had title at the time the decree was rendered. Defendants introduced conveyances from one of them, through intermediate conveyances, to his children. *Held*, that plaintiff was entitled to recover.

Appeal from circuit court, Amite county; J. B. CHRISMAN, Judge.

Ejectment by Tatum *et al.* against Caston *et al.* A jury was waived, and the cause submitted to the court. Plaintiffs showed title under a deed from the sheriff who sold pursuant to a decree of the chancery court against defendants, Caston *et al.*, and also showed title in Caston *et al.* at the time the de-

decree was rendered. Defendants introduced, over plaintiffs' objection, sundry deeds showing conveyances from Caston to one Jenkins, then from Jenkins to the wife of Caston, then four deeds of gift from Mrs. Caston to her children. Plaintiffs then offered to prove the pendency of the chancery suit, and that, during the pendency of this suit, defendants had disposed of all or nearly all of their property, and that the debt on which the decree was based, and for which the land was sold, was a valid existing debt when the defendant Mrs. Caston gave the land to her children, and also offered in evidence the chancery record all of which evidence of title was excluded. Judgment was rendered for defendants, from which plaintiffs appealed.

*C. P. Neilson*, for appellants.

CAMPBELL, J. The plaintiffs were entitled to recover. *Robinson v. Parker*, 8 Smedes & M. 114; *Doe v. Pritchard*, 11 Smedes & M. 327. Reversed and remanded.

#### WILLIAMS v. STATE.

(*Supreme Court of Mississippi*. May 23, 1888.)

CRIMINAL LAW—APPEAL AND ERROR—SECOND JUDGMENT FOR SAME OFFENSE—FAILURE TO EXCEPT.

Where defendant who was found guilty of assault, and who had been out on bail until February 10th, when he was fined, was brought into court February 20th, and judgment was entered setting aside the first judgment, and sentencing him to imprisonment, to which no exception was taken, and it was not shown that the first sentence had been executed, in whole or in part, the second judgment was affirmed.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

Williams was indicted and found guilty of assault. On February 10, 1888, he was fined for the offense. He had been out on bond up to that time; and it did not appear in the record that he had in any way paid or settled the fine imposed. On February 20, 1888, on motion of the district attorney, Williams was brought into court, and judgment was entered setting aside the first judgment, and he was sentenced to imprisonment in the county jail for 60 days, from which judgment he appealed.

*Pintard & Martin*, for appellant.

PER CURIAM. No exception was taken to the action of the court below in setting aside the first sentence, and imposing the second; nor is it shown, as matter of fact, that the first sentence had been executed, in whole or in part, when the second was ordered; wherefore the judgment is affirmed.

(65 Miss. 490)

#### SLOAN v. STATE.

(*Supreme Court of Mississippi*. May 23, 1888.)

JUSTICE OF THE PEACE—CRIMINAL JURISDICTION.

Code Miss. § 2316, conferring jurisdiction on justices "of all offenses . . . where the punishment does not extend beyond a fine and imprisonment in the county jail," embraces the offense of unlawful retailing, defined by Code Miss. § 1112, though that section provides that violators thereof "shall be liable to indictment, and on conviction shall be fined."

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

Isaac Sloan, the appellant, holding the office of a justice of the peace, caused a party who had been guilty of unlawful retailing to be brought before him, and he tried him, and found him guilty, and imposed a fine on him for his violation of the law as to retailing; and for so doing his duty, as he thought, Sloan was indicted for malfeasance in office, tried, convicted, and a judgment entered fining him, and removing him from office, from which he appealed.

*Pintard & Martin*, for appellant. *T. M. Miller*, Atty. Gen., for the State.

CAMPBELL J. Section 2216 of the Code confers jurisdiction on justices of the peace "of all cases of offenses against the laws of this state occurring in their several districts, where the punishment prescribed does not extend beyond a fine and imprisonment in the county jail;" and this embraces offenses under section 1112. The fact that this section provides that violators of it "shall be liable to indictment, and on conviction shall be fined," etc., does not exclude the cases under it from the list contemplated by section 2216. *Johnson v. State*, 59 Miss. 548. The indictment should have been quashed. Reversed, indictment quashed, and appellant discharged.

(65 Miss. 496)

KELLY v. ALRED *et al.*

(Supreme Court of Mississippi. May 23, 1898.)

## HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—DEVISE OF HOMESTEAD.

A devise by a married woman to her brother of her separate real estate, which had been occupied by herself and husband as a homestead, is valid.

Appeal from circuit court, Copiah county; T. J. WHARTON, Judge.

Mrs. Alred owned certain land which she and her husband occupied as a homestead. Her husband, Ellison Alred, was insane, and she herself became an invalid, and, expecting to die, made a will devising this land to her brother, James W. Kelly, providing that her husband should be taken care of. Afterwards Mrs. Alred died, and Kelly, failing to get possession of the property, brought this action of ejectment to obtain such possession. The husband, having recovered his mind, appeared, and defended on the ground that the property devised was the homestead. Hence Mrs. Alred could not devise it by will. A jury was waived, and the cause tried by the judge, who gave judgment against Kelly, from which he appealed.

*R. N. Miller and H. C. Conn*, for appellant. *Harris & Dodds*, for appellees.

ARNOLD, C. J. A married woman enjoys as large freedom in this state as a man, in regard to the testamentary disposition of her property. She may dispose of her estate, real and personal, by last will and testament, in the same manner as if she was not married. Code, § 1169. When the title to the homestead exempted from execution or attachment is in the husband, no conveyance, mortgage, deed of trust, or other incumbrance on it by him is valid or binding unless signed by his wife, if he is married and living with his wife. Code, § 1258. And, where the homestead is the separate property of the wife, no conveyance of it made by her is valid or binding unless signed and acknowledged by her husband, if living with her. Code, § 1260. The restrictions imposed by these sections of the Code on the husband and wife, as to the alienation and incumbrance of the homestead, do not limit or affect the right of either, as owner, to dispose of it by devise. By section 1277 of the Code the homestead and property exempted by law from execution and attachment descends, on the death of the husband or wife owning it, to the survivor of them, if there be, as in this case, no children of the decedent; but this section operates only in case of the intestacy of the owner of such property. *Norris v. Callahan*, 59 Miss. 140; *Osburn v. Sims*, 62 Miss. 429. It was not intended to interfere with the right of the owner to dispose of such property in the same manner, and with the same effect, that he or she might dispose of other real estate by will. Where there has been no testamentary disposition of the homestead by the owner, the surviving husband or wife, as the case may be, takes it by descent; but the right of the survivor is not absolute, but dependent on the owner dying intestate as to the homestead. This is the interpretation which has been uniformly placed on our statutes on the subject. Our present Code does not change the rule; and it applies, whether the homestead is owned

by the husband or the wife. *Osburn v. Sims*, 62 Miss. 429, and authorities there cited. The remedy of the husband or wife who is dissatisfied with the provision made for him or her in the will of the other is to renounce such provision, and claim a distributive share of the estate, whether it includes the homestead or other property, as provided in section 1172 of the Code; or, if no such provision is made in the will, to claim such distributive share, under sections 1173 and 1174 of the Code, without renunciation. *Turner v. Turner*, 30 Miss. 428; *Nash v. Young*, 31 Miss. 134. Reversed.

(65 Miss. 481)

JACKSON v. SCANLAND.

(*Supreme Court of Mississippi*. May 28, 1888.)

LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—JUDGMENT—EXECUTORS AND ADMINISTRATORS.

An execution issued, on motion of an administrator, who had qualified in another state, on a judgment rendered in favor of the decedent in her life-time, is void, and does not stop the running of the statute against the judgment, under Code Miss. § 2674, preserving a judgment for seven years from the date of the last execution; and the subsequent qualification of the administrator in this state, and having execution issue after the expiration of the seven years, does not relate back so as to prevent the statutory bar.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

Mary M. Morrison recovered judgment against appellant, W. L. Jackson, which became dormant, but was afterwards revived, and a *fi. fa.* issued thereon, and returned *nulla bona*. In 1880 an *alias fi. fa.* was issued with the same result. In 1882 Mary M. Morrison died, leaving a will, but appointing no executor; and in 1887 the appellee, Robert Scanland, appeared and filed, in the office of the clerk, an affidavit to the effect that he had been appointed, in Arkansas, administrator *cum testamento annexo* of Mary M. Morrison, and on December 12, 1887, lacking just 10 days of seven years from the time the last *alias fi. fa.* had issued, he caused execution to be issued on the judgment, which execution was, on motion of appellant, quashed March 2, 1888. Scanland, having furnished proper evidence of his authority as administrator according to the laws of this state, had another execution issued on said judgment, which was levied, it now having been more than seven years since the last execution, excluding the one issued in December, 1887. Appellant made a motion to quash this last execution, which motion was overruled, and Jackson appealed.

*W. P. & J. B. Harris*, for appellant. *Thos. J. Carson* and *Calhoon & Green*, for appellee.

CAMPBELL, J. As seven years had elapsed after the 22d December, 1880, and before the 2d March, 1888, when this execution was issued, it was barred by section 2674 of the Code, unless the execution of the 12th December, 1887, saves it from the bar. It did not, because it was not such an execution as is contemplated by the statute, which has in view one issued at the instance of one entitled to enforce the judgment, and who attempts to do it in pursuance of a right to do it. The right to enforce a judgment by execution is preserved as long as a period of seven years is not permitted to elapse after the date of the issuance of the last preceding execution. Inactivity for seven years will bar. The activity required to avoid the bar is that of him who is entitled to enforce the judgment. The provision for successive executions is in lieu of repeated actions on the judgment, and executions must be in behalf of him who could maintain an action. It is argued that an execution, merely voidable and not void, is sufficient to avoid the bar, and *Nye v. Cleveland*, 31 Miss. 440, is cited to support this position; and it is claimed, further, that the execution of December 12, 1887, was only voidable, and therefore, on the authority of the case cited, prevented the bar of the statute. That case holds

that the effect of issuing an execution, not a nullity but only voidable, is to prevent the bar of the statute; and it is the established doctrine in this state that an execution issued after the death of the plaintiff or defendant is voidable, and not void. But the execution in *Nye v. Cleveland* was in favor of one entitled to have execution of the judgment, and was therefore the active effort of the party entitled to enforce the judgment to do it, and came within the statute which makes such effort the equivalent of an action on the judgment, and effective to prevent the bar from attaching. This feature of the case qualifies the general language of the opinion, and renders it unobjectionable. In the case before us the execution of the 12th December, 1887, was not the effort of one entitled to enforce the judgment. It was the act of one without right or interest, a stranger and an intermeddler; for until the administrator appointed in Arkansas had qualified, according to our law, (section 2091, Code,) he had no standing in our courts, and the execution issued at his instance was as if he did not exist. It was therefore the mere act of the clerk, and not the effort of an authorized plaintiff seeking to enforce, as he might lawfully, his judgment, and failing because of some clerical error, as in *Nye v. Cleveland*. The sort of execution to prevent the bar of the statute is one to enforce the judgment, and manifestly it should be the effort of a party entitled to do it. *Harris v. West*, 25 Miss. 156; *Seavy v. Bennett*, 64 Miss. 735, 2 South. Rep. 177. No other cases satisfy the statute. An action by one without right cannot be invoked to interrupt the course of the statute of limitations in any case. Section 1747 of the Code does not entitle an executor or administrator, who could not sue in our courts, to have execution of a judgment as it provides. Until compliance with section 2091, Scanland was not entitled to have execution of the judgment, and all that preceded that is as if it had not occurred. It was of no value for any purpose. It had no effect whatever in preventing the running of the statute of limitations, which, having commenced, continued to run, and could not be interrupted in its course except by the act of an authorized person endeavoring to enforce the judgment by execution he was entitled to have. Subsequent qualification by Scanland to sue in our courts, did not have relation back so as to validate his unauthorized attempt to have execution of the judgment when he had no standing in court; for it is settled "that the facts which constitute the ground of a suit must exist at the time the suit is instituted;" and it cannot be maintained by supplementing it with matter occurring after its institution. Nor does section 2686 of the Code embrace this case. Reversed, and execution quashed.

(65 Miss. 492)

JOHNSTON *et al.* v. TUTTLE *et al.*

(Supreme Court of Mississippi. May 28, 1888.)

## FRAUDULENT CONVEYANCE—POSSESSION—STOCK OF GOODS.

Where defendants, having executed a deed of trust on a stock of goods to secure a debt, remain in possession, and conduct the business as before, the deed is fraudulent as to their creditors whether the understanding by which defendants remain in possession appears from the terms of the deed or otherwise.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

Tuttle Bros. gave a deed of trust, in the usual form, on a stock of goods, to secure one Eltringham in an indebtedness they owed him. Tuttle Bros. remained in possession, and conducted the business as before the deed was executed. Appellants, Johnston, Tallman & Co., sued out an attachment against Tuttle Bros. on the ground of fraud. Tuttle Bros. traversed the grounds of the attachment. On the trial, the court instructed the jury that unless fraud was intended, unless the evidence proved that it was the purpose of defendants to hinder, delay, and defraud creditors, the attachment should not be sustained. There was a verdict and judgment in favor of Tuttle Bros., from which Johnston, Tallman & Co. appeal.

*Thos. J. Carson and Pintard & Martin*, for appellants. *J. M. Gibson*, for appellees.

ARNOLD, C. J. The instructions for appellees were not applicable to the case made by the evidence, and should not have been given. Whether fraud was intended or not, the course of dealing under the deed of trust was such as to render it fraudulent as to creditors, and a ground for attachment. The legal effect of the arrangement disclosed by the record was to hinder, delay, and defraud creditors, and the law imputes to it conclusively a fraudulent purpose, without regard to the actual motives of the parties. And it is immaterial whether the agreement or understanding by which the grantors retained possession of the stock of goods, and continued to carry on the business as they had done before the deed of trust was executed, was expressed on the face of the instrument, or proved to exist, by evidence *altitudo*. In legal contemplation, the effect is the same in both cases. On the undisputed facts, the verdict should have been for appellant. *Harman v. Hoskins*, 56 Miss. 142; *Joseph v. Levi*, 58 Miss. 843; *Britton v. Criswell*, 63 Miss. 394; *Baldwin v. Little*, 64 Miss. 126; *Bump*, Fraud. Conv. (2d Ed.) 126. Reversed and remanded.

(55 Miss. 496)

DAVIS v. DAVIS.

(Supreme Court of Mississippi, May 31, 1883.)

1. INJUNCTION—TO RESTRAIN LEGAL PROCEEDINGS—DAMAGES.

One partner filed his bill to have a half interest in a farm held by his co-partner decreed to him, and for an account of the rents and profits; and while this bill was pending, but after it was adjudged there could be a decree for a transfer of the half interest, but not for an account, the bill not embracing all the partnership dealings, a second bill was filed, asking the same relief, and showing that other crops had grown since the first bill was filed, one-half of which plaintiff caused to be seized by the sheriff, and turned over to him; whereupon defendant in the first and second bills caused plaintiff therein to be enjoined from further proceedings under his second bill until the first was decided, and gave bond, and had the crop redelivered. *Held*, that it was proper to file a second bill for new crops grown, to which bill defendant therein should have made a direct defense, rendering an injunction unnecessary; and that he was liable for damages caused by the injunction, which liability was not affected by the fact that the other party had asked for a continuance of the injunction suit till the first suit should be determined.

2. JUDGMENT—RES ADJUDICATA—QUESTIONS NOT DIRECTLY PASSED ON.

Where one partner filed his bill against his copartner to compel a transfer of one-half interest in partnership land held in the latter's name, and also prayed for an account of the rents and profits, and the court granted a decree for the transfer, but refused the account because the bill did not embrace all the partnership dealings, the matter of the account is not thereby *res adjudicata*.

Appeal from chancery court, Adams county; WARREN COWAN, Chancellor.

In 1882, W. J. Davis filed his bill, No. 765, against his brother, Hugh L. Davis, setting out that they had been engaged in planting, as partners; and that a plantation, known as the "Duncan Place," had been purchased with money of the partnership, but that Hugh L. Davis took the title to himself individually, and refused to transfer to W. J. his half interest in said place; and he prayed that a half interest in said place be ordered transferred to him; and also prayed for an account of the rents and profits of said place, which Hugh L. had used to himself. Hugh L. demurred to the bill on the ground that it only brought a part of a general partnership business into account. The demurrer was sustained, and the case was appealed to this court, (60 Miss. 615,) which decided that, under the bill the legal title to one-half of the place could be transferred to W. J.; but there could not be an accounting of the rents and profits because the bill only embraced a part of the partnership dealings; and the cause was sent back. At the close of the year 1883, this bill was still undisposed of, when W. J. Davis filed another bill, No. 817, in which he showed that the rents of the Duncan place were now due, were not

embraced in the former bill, and should be settled; and prayed a partition of the same, and secured a writ of sequestration to seize his share of the cotton grown on the place, and the sheriff seized the cotton; whereupon Hugh L. Davis filed this bill, No. 820, in which he prayed for an injunction against suit No. 817, and against W. J. bringing any more suits whatever about the Duncan place, or the rents, etc., till the first bill was finally disposed of, and also prayed for an order for the sheriff to deliver up to him the cotton seized under the writ of sequestration. The chancellor granted the prayer of this bill, No. 820; Hugh L. gave bond in the sum of \$1,500; and the injunction was served on W. J., who answered No. 820; and Hugh L. had No. 820 set down for final hearing; but W. J. moved that the hearing of No. 820 be postponed till No. 765 was disposed of; which motion was granted. In 1887, No. 765 was finally disposed of by one-half of the Duncan place being decreed to W. J. Davis, who then moved to dissolve the injunction granted in No. 820. The court ordered a reference to the commissioner to ascertain the damages under said injunction. The commissioner reported more than \$2,000 damages; but there was a decree for \$1,500, the penalty of the bond, against Hugh L. Davis and his sureties, from which he appeals.

*Hugh L. Davis, pro se. Martin & Lanneau and T. Otis Baker, for appellee.*

CAMPBELL, J. If it be true that W. J. Davis improperly brought his bill, No. 817, in the chancery court, that did not justify Hugh L. Davis in bringing his bill, No. 820, for injunction. His proper course was to defend No. 817, whereby he would have obtained all that was properly obtainable by him. If No. 817 was one too many, No. 820 was the addition of another, equally unnecessary and objectionable. By it the cotton seized was caused to be delivered to Hugh L. Davis, and William J. Davis was enjoined not only from prosecuting suit No. 817, but from bringing any other about the affairs of the plantation, until suit No. 765 should be decided. Certainly, such inhibition was unauthorized. No court could deny to him the right to institute suit upon each accrual of a right of action as often as there was a receipt of annual rents by H. L. Davis. The injunction was wrongfully issued. The action of W. J. Davis in asking for a continuance of suit No. 820 until the disposition of No. 765 did not prejudice his claim for a dissolution of the injunction and for damages. The disposition of No. 765 by a decree for title, and no decree for rents, did not make the claim for rent *res judicata*, if the claim might have been adjudicated in that suit. The mere fact that a claim might be propounded in a suit does not make it *res judicata* if in fact it was not embraced in it. There is much loose talk on this subject in the books, but the true distinction may be found set forth in *Hubbard v. Flynt*, 58 Miss. 266, according to which the plea of *res judicata* is not available here. All the questions, so ably argued by the appellant, have been carefully considered by us, and we find no error in the record of which he can complain. Affirmed.

PERKINS v. STURDIVANT *et al.*

(Supreme Court of Mississippi. May 23, 1883.)

1. NEGOTIABLE INSTRUMENTS—ACTIONS—CONSIDERATION.

In a contest as to the validity of a note for \$4,000, expressed to be given "for value received" by decedent to his daughter, it appeared that on the death of the daughter's husband decedent took into his family and supported her and her children, and educated the children; that she had a personal estate worth a few hundred dollars, part of which he sold, retaining most of the proceeds, and the remainder of which he used in his business; that decedent proposed to divide certain cotton among his children, and the daughter's share, which was worth \$5,000, was marked with her initials, but nothing was said to her about it, and the proceeds were used by decedent; that, apprehending suits against himself, he had given

simulated mortgages upon his estate, among which was a mortgage and a note to the daughter, but these were afterwards destroyed. *Held*, that the evidence of consideration was insufficient.

**3. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—CLAIMS AGAINST DECEDENT.**

Under Code Miss. 1871, allowing one year after grant of administration within which to commence suit against the estate, a claim against an estate is not barred where no administration has ever been granted. Neither is the claim, in such case, barred by the Code of 1880.

**4. EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—LIABILITY.**

One who takes possession of a plantation on the owner's death, and markets the then growing crop, is chargeable with the cotton seed received by him therefrom.

**5. RECEIVERS—ACCOUNTING.**

The proper method of accounting by a receiver of a plantation appointed pending a litigation between the heirs, where he has used the personalty of one of the parties in its cultivation, is to find the rental value of the premises and the hire of the personalty, and then apportion the net proceeds.

**6. PLEADING AND PROOF—EVIDENCE—ADMISSIONS.**

Where a bill for the settlement of a decedent's estate alleges the receipt by defendant of a specified quantity of certain property, which is admitted by the answer, evidence of a different quantity is inadmissible.

Appeal from chancery court, Hinds county; E. G. PEYTON, Chancellor.

E. P. Odeneal died in 1877, owning a plantation and some personalty. After his death, his son, without administration being granted, took charge of the place, gathered and marketed the then growing crop. After the death of the father, his place was sold under a deed of trust executed in his lifetime, and at this sale appellee Mrs. Sturdivant bought the place in, and Mrs. Perkins, the appellant, filed this bill to have that sale set aside, and the estate properly administered and divided. Pending this litigation a receiver was appointed; and pending a former appeal to this court (which was taken without *superseades*) the land and personalty were sold by the receiver, under decree of the chancery court, and one Green purchased part, and Helm, one of the appellees herein, bought another part. The decree on first appeal was reversed by this court; and now Mrs. Perkins insists that the sale by the receiver be also set aside. There was a decree ordering an account, which was stated by the commissioner, to whom it was referred, and a decree rendered thereon, from which Mrs. Perkins appealed.

*Nugent & McWillie*, for appellant. *D. Shelton* and *Calhoon & Green*, for appellees.

COOPER, J. The fact that the statute of limitations was not set up by the complainant by amended bill or by formal pleadings would not preclude her from defending against the claims asserted against the estate of E. P. Odeneal by the defendants. But the claims against which the statute is interposed are not barred, for the reason that under the provisions of the Code of 1871 (which Code was in operation at the time of the death of E. P. Odeneal) there was allowed a period of one year after grant of administration upon his estate within which suit might be brought, and no administration has yet been granted. Nor are they barred by the Code of 1880, for the limitations prescribed by that Code have never attached to the claims, since there has not at any time been any personal representative in existence against whom suit might be instituted. A statute of limitations does not begin to run until there is some one against whom and in whose favor it can be put in operation. The defense of limitation cannot, therefore, be sustained.

Without detailing the very complicated facts contained in the voluminous record, we state the results reached in reference to the several exceptions taken by the complainant to the accounting. The account has been stated by several commissioners, under various orders of reference, and a single exception is in many instances presented several times in the record by being interposed to each report. We deal with them without reference to the order in which they were reserved or have been presented. The principal conten-

tion between the complainant and the defendant Sturdivant is as to the validity of a promissory note for \$4,000, executed by the decedent on January 1, 1875; which note and interest have been by the court below allowed to the defendant as a charge against the estate. The note upon its face bears a recital that it is given "for value received;" and it is contended for defendant that there has been no countervailing evidence to overcome the *prima facie* case made by the instrument itself. The facts in reference to the execution of this note, and of the antecedent relations and dealings between the parties, are that the intestate, in January, 1875, being then about to leave his home for a short visit to Jackson, made the note and delivered it to the defendant, his daughter, saying that it was for a part of what he owed her; that the true amount was much larger, but that the note was for as much as he could ever hope to pay, and that he gave it in order that she might be protected if "anything should happen to him,"—meaning that it would evidence a claim against him in event of his death. There had never been any accounting between the parties, and the defendant testifies that she did not know how much was due her. The defendant Sturdivant was married in 1859, and on her marriage her father gave her personal property, and bought a place upon which she settled, the title of which was taken to himself. In 1862 defendant's husband died, leaving two small children. The combined personal property of Mr. and Mrs. Sturdivant, at this time, consisted of 6 or 8 mules, the furniture of three rooms, 10 cows, 6 or 7 other cattle, a few hogs, and some corn and cotton; the quantity of the latter being presumably small, since the defendant cannot state the quantity, though she remembers the character and quantity of all other personalty. In addition to this there were the negroes that her father had given her, and a carriage. The latter was sold, and the money paid to defendant. Upon the death of Sturdivant, Mr. Odeneal removed his daughter and her two children to his house; and they became and were treated by him as members of his family. One of the children died soon after this; but the widow and her surviving child remained with Mr. Odeneal for some 15 years; and he supplied both mother and child with clothing, and educated the child. The negroes and mules of Mrs. Sturdivant were removed to the plantation of Mr. Odeneal, and there worked in common with his own, under an agreement between himself and Mrs. Sturdivant that she should have a proportionate part of the crops grown; which agreement, in her first deposition, she states was carried out, but in a deposition subsequently taken she affirms that, though she was to receive a part of the proceeds, it was never paid to her. This apparent conflict in her testimony is reconciled by her explanation that, though she was treated and considered as a member of the family, she thought the expense of her support was met by the use of her property by her father. The cattle, hogs, furniture, carriage, and the cotton and corn left at the time of Mr. Sturdivant's death, were sold by Mr. Odeneal. The proceeds of the sale of the carriage were paid to Mrs. Sturdivant, and that arising from the sale of the other property was used by him. The negroes, of course, were freed by the result of the war, and Mr. Odeneal could have had the benefit of their services for but one or two years. In 1865 or 1866, Mr. Odeneal had some 200 bales of cotton, and proposed to give to each of his children (4 in number) 40 bales. He delivered to Mrs. Jones, a daughter, 40 bales. He offered to give to his son, John H., the same quantity of cotton; but the son elected to take in lieu thereof its estimated value, (\$5,000,) which the father gave to him. The cotton intended for Mrs. Perkins (the complainant) was burned before it had been delivered to her, and nothing was given her in lieu thereof. Forty bales of cotton were carried from the farm to Mr. Odeneal's residence, and were marked with the initials of Mrs. Sturdivant; but she testified that nothing was said to her about it, and it was afterwards sold and the proceeds used by Mr. Odeneal. In 1867, Mr. Odeneal apprehended that a large suit would be

brought against him to compel him to pay some debts for which he was liable as surety; and he also feared that an officer for whose official conduct he was bound, was in default, and that a consequent liability would be fixed upon him. For the purpose of securing his property from liability to execution, he executed simulated incumbrances on his estate; and, among other mortgages given, was one to Mrs. Sturdivant, to secure a debt of \$6,000, evidenced by a promissory note that he made to her. After he had lost all apprehension of danger from the attacks of creditors, he procured the persons to whom he had given these incumbrances to cancel them, and, among others, Mrs. Sturdivant canceled the mortgage that had been given to her.

The inquiry is whether, upon the whole evidence, a consideration valuable in law has been shown for the note propounded against the estate. We are of opinion that no such consideration appears, and that the chancellor erred in allowing this claim. The note recites that it is given for "value received," and this admission (as, also, the character of the instrument) is *prima facie* evidence, in favor of the holder of the note, of the fact of sufficient consideration, but it is not conclusive of the fact; and if, upon the whole testimony, it does not satisfactorily appear that there is a valuable consideration, the plaintiff (the defendant here) must fail; since the burden of proof, upon the whole case, is upon her. 1 Daniel, Neg. Inst. § 164; *Burnham v. Allen*, 1 Gray, 501; *Small v. Clewley*, 62 Me. 155. We fail to find in the record any satisfactory evidence of the existence of any debt from the intestate to his daughter, the defendant. The evidence, we think, discloses great solicitude upon the part of the father for the comfort of his daughter. Upon the death of her husband he took her to his home, and for many years supported her and her child as members of the family. The record is free of any suggestion that he intended to make any charge against her for the expenses so incurred; but it is equally certain, we think, that the proceeds of the sale of the small personal estate of which he took charge was not made the foundation of a debt against himself in her favor, on which the note in question was based. This estate was received and disposed of during the war between the states, and, if sold for anything, must, we are forced to assume, have produced only Confederate money, and this, if reduced to the currency in use at the time of the execution of the note, would have amounted at the most to a very few hundred dollars. It is inconceivable that the obligation to pay for such property should have been in the mind of the maker of the note. He had expended many times its value in the support of the defendant and her daughter. No account of the amount received by him on this account ever seems to have been rendered by him, or discussed between the parties, and we find nothing in the record to indicate that the note in question was intended as payment for the articles sold. It is true that, when threatened by his creditors with suits, he executed to the defendant his note for a large sum, and probably spoke of his liability to account to her for the proceeds of the sale of this personal property as the consideration in whole or in part of the note then given; but this was not a real transaction, nor so dealt with by the parties. As soon as he was relieved of apprehension of suits against him the note then given was destroyed, the mortgage by which it was secured was canceled, and thereafter nothing was said or done for years indicating that he considered himself as debtor, or that the defendant thought herself to be his creditor. If there be any supposed consideration that operated upon Mr. Odeneal to execute this note, we are convinced that it was not the sums received by him from the sale of her little estate, but his supposed legal liability to account to her for the proceeds of the 40 bales of cotton that he intended to give to her, and which was marked in her name, and afterwards sold by him. The value of this cotton exceeded the amount of the note. He had given to two of his other children cotton or money to a like value, and it is not unlikely that he treated and considered himself in his latter years as morally bound to make some arrange-

ment by which she should at his death receive the value of the cotton he had intended to give her. But this did not create a legal liability, nor does it furnish a sufficient support for his promise to pay its value. There was no gift of the cotton. He never parted with its possession or control, and never spoke to the defendant about it except in the most general way. A note founded upon his supposed accountability for the proceeds of the undelivered cotton would be but *nudum pactum*, and, if one was given, and afterwards the one in controversy was substituted for it, the defect of consideration would attach to it, and it could not be enforced, either against him or against his estate after his death. *Parker v. Carter*, 4 Munf. 273; *Hill v. Buckminster*, 5 Pick. 391; *Pink v. Cox*, 18 Johns. 145; *Smith v. Kitttridge*, 21 Vt. 238; 1 Daniel, Neg. Inst. § 179.

The complainant, by her bill, averred that there were 18 mules belonging to her father's estate at the time of his death, for which the defendants were responsible. The defendant John H. Odeneal admitted that there were this number, and the defendant Mrs. Sturdivant admitted the number to have been 17. In this condition of the pleadings it was not competent for them to show that there were in fact only 13, and that the others (which were on the place, and which confessedly the defendants dealt with as the property of the intestate) were the property of John H. Odeneal. The allegation and admissions removed this subject of controversy from the field of litigation, except that it was material to fix the value of the mules admitted to have been in their possession; and if it was sought to charge Mrs. Sturdivant with 18 instead of 17, it would have devolved on the complainant to establish the fact that she received the additional one, not admitted by her answer to have been received.

John H. Odeneal should have been charged with the reasonable value of the cotton seed received by him out of the crop of 1877. Such seed was personal property of the estate; valuable, it is true, for purposes of fertilizing, but valuable, also, as salable property.

The evidence of relative values of the place known as the "Home Place," and that known as the "Daniels Place," the first of which belonged to E. P. Odeneal, and the other to the defendant John H., leads us to the conclusion that the rent of the Daniels place, with the personality thereon, did not exceed 50 per cent. of the rental value of the Home place, with the personality thereon, at the time of the death of E. P. Odeneal. Accepting the rental value of the Home place to have been as found by the chancellor, (\$1,260,) \$630 should be a fair rent for the Daniels place and its personality. This sum will be allowed in the future accounts, instead of the sum of \$300 heretofore allowed by the chancellor.

It may be that, upon restating the account of Mrs. Sturdivant, it will be found that her demands against the estate will be paid by the rents of the land, and that she will not be found to be entitled to retain the mules with which she has been charged without making payment therefor in cash. If this should be found to be the condition of things, and she should decline to pay therefor, the court will of course treat them as still the property of the estate, (unless the complainant should prefer to take a personal decree against Mrs. Sturdivant for their price;) and it would be unnecessary to go into an accounting between Mrs. Sturdivant and the receiver as to the hire for the mules. But if such accounting should be found necessary, we think it improper to allow hire at so many dollars per mule. The receiver is not the agent of the complainant, engaged in farming for her account. He is the agent of the court, and, per consequence, of all parties in interest. To charge him with hire of the mules of one of the parties may render it impossible to pay the rent of the lands to the other. The proper method of accounting is to find the rental value of the lands for each year in which the business has been conducted, and the hire of the personality used by him. The net proceeds

of the business for each year should then be apportioned between the owners of the property by which the same was produced, in proportion to the value of the hire or rent of the same. This will give to each owner an equal relative part of the profits made, if any are realized, or charge them up with a fair part of the losses incurred. Reversed and remanded.

(24 Fla. 153)

**STATE *ex rel.* OWENS v. BARNES, Comptroller.**

(*Supreme Court of Florida. May 30, 1888.*)

**1. CRIMINAL LAW—CONVICTION.**

While, in its ordinary sense, the word "conviction" is used to indicate the ascertainment of the guilt of a prisoner by his plea of guilty, or by the verdict of a jury, it is often used in a broader sense, to include the sentence or judgment of the court.

**2. OFFICE AND OFFICER—PROSECUTING ATTORNEYS—FEES.**

It is used in this broader sense in section 2 of the act of 1883, c. 2459, in relation to "conviction fees" of state attorneys; and the "conviction fees" of county solicitors, as prescribed by the act of 1887, c. 3731, § 14, being the same paid to state attorneys in like cases, and to be paid in like manner, has the same meaning as in the former act.

**3. SAME—WHEN PAYABLE.**

Neither a state attorney nor a county solicitor is entitled, under these acts, to payment of a conviction fee by the state until after sentence of the court against the person convicted, and the failure of such person to pay the same, and a return of the sheriff that he has no goods or chattels out of which the same can be made. The last clause of section 14, c. 3731, does not remove these requirements.

(*Syllabus by the Court.*)

*Motion for mandamus.*

*A. W. Owens, for motion. The Attorney General, contra.*

**MAXWELL, C. J.** This is an original proceeding for *mandamus*, in which the relator sets forth that, as county solicitor for the criminal court of record for Duval county, he filed at the February term, 1888, three several informations,—one against Dave Holmes, charging him with gambling in a gambling-house, one against Joseph Welch, charging him with vagrancy, and the third against George White, charging him with trespass with malicious intent; that Holmes pleaded guilty, whereupon the court ordered that sentence be suspended upon payment of costs by him; that Welch also pleaded guilty, and the court simply ordered that sentence be suspended; and that White was tried and convicted by verdict, but the court set the verdict aside and granted him a new trial. The clerk of the court gave a certificate that the said parties have been convicted in the said court of the offenses charged against them, and that they have not paid the conviction fees of the relator, and that the sheriff of the county has made return that said defendants have not sufficient goods and chattels from which said fees can be made. Said certificates having been presented to the respondent as comptroller, and demand made that he should audit the same, he refused to do so; wherefore relator prays for a writ of *mandamus* commanding said comptroller forthwith to audit the claim. Upon motion for the writ, respondent resists, on the ground that the relator is not entitled to conviction fees in the cases mentioned, as those cases now stand, according to the facts of the petition.

No objection having been interposed to the proceeding because of its purpose to control the discretion of the comptroller, we understand that each objection is waived, and we proceed to consider the case on that understanding. The only question we have to decide is whether the relator was entitled to conviction fees from the state before final disposition of the cases by sentence or judgment. Section 14, c. 3731, Acts 1887, provides that "the county solicitors shall be paid three dollars per diem, and receive the same conviction fees that are now paid to the state's attorneys in like cases, to be paid quarterly by the state, in like manner as the per diem and conviction fees of the state's

attorneys are now paid; and the said conviction fees shall be paid in cases when new trials are granted, and appeals taken, the same as in other cases of convictions." The act of 1883, c. 3459, fixes the conviction fees of state attorneys; and the relator contends that the term "conviction" means the ascertainment of the guilt of a party, either by a plea of guilty, or by the verdict of a jury. In its ordinary sense, and perhaps technically correct sense, that is its meaning. The law dictionaries so give it. Blackstone (book 4, p. 362) says "If the jury find [the prisoner] guilty he is then said to be convicted of the crime whereof he stands indicted; which conviction may be in two ways, —either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country." In *Com. v. Lockwood*, 109 Mass. 323, it is said: "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while judgment or sentence is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." There are numerous other authorities to the same effect, some of which are cited in this case, but it is needless to multiply them here. On the other hand, there are numerous authorities that hold the judgment or sentence to be a necessary component part of "conviction," that is, that the use of a word in a constitution or statute or judicial decisions may be in such connection as to show that judgment or sentence was to be included in it. This is admitted in the case of *Com. v. Lockwood*, *supra*, in which Judge GREY says: "When, indeed, the word 'conviction' is used to describe the effect of the guilt of the accused, as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court." In *Smith v. Com.* 14 Serg. & R. 69, the defendant was sentenced to imprisonment for life on a charge of having committed a second burglary. The statute under which he was indicted provided "that if a man shall commit burglary a second time, and be thereof legally convicted, he shall be sentenced to undergo imprisonment \* \* \* at hard labor during life." The indictment charged that he was convicted on a former indictment, and the court gave judgment. It was held that his sentence was error; the court saying: "It does not appear in this indictment what judgment was given on the former indictment. It is indeed set forth that the defendant was convicted on a former indictment, and the court gave judgment. But what that judgment was is not said. Where the law speaks of 'conviction' it means a 'judgment,' and not merely a verdict, which in common parlance is called a conviction." In *Com. v. Gorham*, 99 Mass. 420, the court says: "The term 'conviction' is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty; but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt." The Code of Illinois "declares that each and every person convicted of any of the crimes therein enumerated, of which larceny is one, shall be deemed infamous, and shall forever thereafter be rendered incapable of holding any office \* \* \*, of voting at any election, of serving as a juror, and of giving testimony." In *Faunce v. People*, 51 Ill. 311, where the question was whether under that statute a witness who had been convicted of stealing goods, but had not been sentenced, should be permitted to testify, the court held that he should; summing up its conclusion in a head-note of the case thus: "It cannot be said that a person has been convicted of a crime, so as to render him incapable of giving testimony within the meaning of the [Code] until there has been a judgment rendered on the verdict of guilty." See, also, *Gallagher v. State*, 10 Tex. App. 469; *Blaufus v. People*, 69 N. Y. 107; *Kethler v. State*, 10 Smedes & M. 192. Without referring to other cases,

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it will be seen from those we have cited that the use of the word "conviction" often implies a judgment or sentence as well as the verdict of a jury. It is so used in our constitution in section 11, art. 4, which empowers the governor, "in cases of conviction for treason, \* \* \* to suspend the execution of sentence until the case shall be reported to the legislature;" also in section 12 of same article, which authorizes the governor, justices of the supreme court, and attorney general to "remit fines and forfeitures, commute punishment, and grant pardons after conviction;" and also in section 5 of article 6, which gives power to the legislature to enact laws to exclude from office and from the right of suffrage "all persons convicted of bribery, perjury, etc.; \* \* \* but the legal disability shall not accrue until after trial and conviction by due form of law."

Recurring, now, to the statute which allows to county solicitors the same conviction fees as to state attorneys, to be paid "in like manner" as conviction fees of the latter officers are paid, we are to ascertain the sense in which the word "conviction" is there used. It must have the same sense it has as used in regard to state attorneys. The second section of the statute as to them is this: "That in all cases of convictions, under criminal charges in the circuit courts, the conviction fee of the state attorney shall be taxed with the costs in the case, and paid by the defendant: provided, that if the defendant does not pay the same, and by the return of the sheriff it be shown that the said fee of the state attorney cannot be made out of the goods and chattels of the convicted defendant, the conviction fee of the state attorney shall be paid by the state, to be audited by the comptroller, and paid by the treasurer, upon the presentation of the certificate of the clerk of the court in which the conviction is made showing that the conviction has been made, the nature thereof, that the defendant has not paid the conviction fee, and that the sheriff has made a return showing that the convicted defendant has not sufficient goods from which the said fee of the state attorney can be made." It is very plain that this statute contemplates a sentence of the court as necessary to entitle the state attorney to a conviction fee. The costs are not taxed till the sentence is given, and the defendant is not required to pay till they are taxed. Then, if he fails to pay, the sheriff must make return that the fee cannot be made out of his goods and chattels before the state can be called on to pay, and such return could only be made on an execution, which never issues, unless specially authorized by statute, before final judgment. It follows that "conviction," as used in this statute, includes a sentence of the court, and the same meaning must be given to it in the statute allowing the fee to the county solicitor. But this latter statute contains a clause not to be found in the former, which, it is suggested, may make a difference between the two. It is this: "The said conviction fees shall be paid in cases when new trials are granted and appeals taken the same as in other cases of conviction." By this it could not have been intended that a conviction by the verdict of a jury entitled the solicitor to his fee, notwithstanding the granting of a new trial or the taking of an appeal, because to be paid the "same as in other cases of conviction" excludes the idea of such intention. We have seen that in "other cases" there can be no demand for payment by the state until after judgment or sentence, and the failure of the defendant to pay, followed by a return of the sheriff that the defendant has no goods or chattels out of which the fee can be made. There can be nothing of this kind before the final disposition of the case. Hence we think the more correct construction of this clause would be to say that the conviction fee should abide the result of the case the "same as in other cases." Else if, on a new trial, whether after the granting of a new trial, or after reversal on appeal, there should be an acquittal, the state of things would be one in which the prerequisites to a charge against the state did not exist; no mode of getting payment from the state in such case being provided. But if, on the new trial, there should be another conviction.

resulting in a sentence, then the solicitor shall have his fee the "same as in other cases," that is, one conviction fee. The motion for a *wendamus* is denied.

(24 Fla. 42)

McIVER *et al.* v. MARSHALL.

COUNTY COMMISSIONERS v. STATE *ex rel.* PATTON *et al.*

(*Supreme Court of Florida. January 12, 1888.*)

WRIT OF ERROR—PROCEDURE ABOVE—SUPERSEDEAS.

The law as to the issuance of writs of error in civil and criminal causes, including cases of *habeas corpus*, and as to giving such writs the effect of a *supersedeas*, stated.

(*Syllabus By the Court.*)

Application for writ of error.

In the cases of McIVER and Chamberlain, plaintiffs in error, against W. G. Marshall, defendant in error, and County Commissioners, plaintiffs in error, against State *ex rel.* Patton *et al.*, defendants in error, the plaintiffs made application for writs of error.

RANEY, J. In each of the above causes an application has been made during the present term to a justice of this court for an order allowing a writ of error. It is not necessary (nor is it proper practice) to have such an order to entitle either an original plaintiff or a defendant to a writ of error to a judgment of the circuit court in an ordinary civil action at law. A defendant in such an action is entitled to a writ of error as a matter of right, without even paying costs which have accrued up to the time of applying for the writ; but an original plaintiff in the circuit court must, to obtain such a writ, pay all costs which have accrued in and about the suit up to the time of applying for the writ, and must also enter into bond, with one or more sureties, in a sum sufficient to cover all the costs which may accrue in the prosecution of the writ, conditioned to pay the same if the judgment shall be affirmed. Sections 4, 5, p. 447, Thomp. Dig. Such writs are issued by the clerk of this court, or by the clerk of the circuit court in which the judgment has been rendered. Section 4, *Id.*

When, however, it is desired to have a writ of error in a civil action operate as a *supersedeas* to the judgment which it is sought to have reviewed, an order to be made in the manner provided by the statute, and bond with surety, are requisite to give the writ this effect, but not to simply obtain the writ. *Id.*

As to the condition of *supersedeas* bonds, see last paragraph of the opinion in *Simmons v. Spratt*, 22 Fla. 370, 374.

In criminal cases writs of error do not issue without a judicial order allowing them. *State v. Newman*, 24 Fla. —, 3 South. Rep. 467; McClel. Dig. § 4, p. 455, and § 11, pp. 456, 457. This is also true of writs of error in *habeas corpus* cases, yet the practice in proceedings on error in such cases is regulated by the *habeas corpus* act, and not by the general statute governing writs of error in criminal cases. Section 12, p. 565, McClel. Dig.; *Tyler v. Painter*, 16 Fla. 144.

(40 La. Ann. 631)

CHAFFE *et al.* v. WHITFIELD.

(*Supreme Court of Louisiana. June 18, 1888. 40 La. Ann.*)

1. NEGOTIABLE INSTRUMENTS—AS COLLATERAL SECURITY—RIGHT TO SUE.

A note secured by mortgage, issued by a planter to the order of his merchant, to make good all advances for the working of a plantation, although received as "collateral security," may be sued on directly by the latter for the exact amount of the advances, as a pledgee could do.

**2. MORTGAGE—FIDELITY—EVIDENCE.**

In the absence of proof of want of consideration, and in the presence of evidence showing that the advances have been made, payment of the note may be enforced by the seizure and sale of the mortgaged property.

(Syllabus by the Court.)

Appeal from district court, parish of Richland; WILLIAMS, Judge.  
*Montgomery & Rhymes*, for appellees. *Potts & Hudson*, for appellant.

BERMUDEZ, C. J. This is an action *via ordinaria* to enforce the payment of a note of \$3,000, secured by mortgage. The defense is "that the note was given as collateral security for an account of supplies, and cannot be enforced, being without consideration except for the amount due upon the principal debt,—that for supplies; and that, as nothing was due on that account, the note cannot be enforced." From a judgment in favor of plaintiffs the defendant appeals. It appears that the defendant, who is a widow, applied, in 1880, to the plaintiffs for an advance of supplies for her plantation. To this the plaintiffs assented on condition that she would execute a note for \$3,000, secured on her plantation, saying that they would hold it as collateral security for her indebtedness. The note was drawn, and the mortgage given. On receiving the note the plaintiffs passed the amount to the defendant's credit, charging her with all advances of whatever nature made by them to her, and sending her regular accounts of their relations, as merchants and planters, until the amount was absorbed,—it appears by an indorsement on the note, up to January 17, 1884.

We have carefully weighed the testimony adduced by the plaintiffs, and that given by the defendant, and remain satisfied that the advances alleged to have been made during a course of years have been received, and that the defense of want of consideration set up is utterly groundless. In her testimony the defendant admits advances, although she does not specify the amount, and shows that out of the moneys received by her she bought mules for more than \$1,000. The defendant can derive no comfort or relief from the circumstance that the plaintiffs had agreed to hold the note as "collateral security." The intention of the parties was clearly that the plaintiffs would furnish the supplies on a mortgage security given them by the defendant, and that, in case of non-payment for those advances, the plaintiffs would have the right to enforce the note and mortgage. This is apparent from the circumstance that the note is made payable to the order of the plaintiffs, and that the mortgage given to secure the note is executed in their favor. The right of the plaintiffs to sue directly on the note for the amount of the advances really made is undeniable, (Rev. Civil Code, art. 3292,) and may well be assimilated to the right of the pledgee of a note, suing on the note pledged, to recover the amount due, and which the pledge was designed to secure, (Rev. Civil Code, art. 3170.)

The judgment of the lower court has done justice between the parties, and should not be disturbed.

(40 La. Ann. 627)

COLVIN v. WOODWARD.

(Supreme Court of Louisiana. June 13, 1883. 40 La. Ann.)

**1. APPEAL—APPELLATE JURISDICTION—COMPLIANCE WITH JUDGMENT UNDER PROTEST.**

Where a devolutive appeal is taken from an alternative judgment, which directs the defendant to do a certain thing within a fixed delay, and in default thereof inflicts a more onerous penalty, execution of the first alternative under protest, and with reservation of rights of appeal, is not such voluntary acquiescence as destroys the appeal.

**2. HOMESTEAD—WAIVER.**

The homestead right cannot be contractually waived, renounced, or destroyed otherwise than by sale or its equivalent; and, finding that in this case the defendant has not sold or alienated his homestead, his claim for its protection must be sustained. Motion to dismiss denied, and judgment reversed.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lincoln.

*Patterson & Dorman*, for appellee. *Graham & Holstead*, for appellant.

**FENNER, J.** This action is brought to enforce specific performance of the following written contract, signed by defendant: "I hereby agree to carry J. M. Colvin one bale of cotton, and make a deed to him of forty acres of my land, and he make a deed to me for the land I deeded him, and which is now on record in his name. *This October 5, 1886.*" The defense is that the land referred to in the instrument is part of the duly-recorded homestead, and that under the constitution of the state the court is without jurisdiction or authority to compel him to execute the agreement, so far as said land is concerned. The court *a quo* gave judgment in favor of plaintiff, ordering defendant, within 30 days from its date, to execute a deed conveying to plaintiff 40 acres out of the 160-acre tract claimed as his homestead, and in default hereof that plaintiff "have the right of selecting from the above-described land such 40 acres as he may desire; and upon filing such selection in the office of the clerk of court, and having same duly recorded in the book of conveyances, he be decreed the absolute owner, and be put in possession of same." Defendant forthwith applied for and obtained a devolutive appeal to the circuit court, which dismissed it (so far as the land is concerned) on the ground that it involved the homestead right, which is within the exclusive appellate jurisdiction of this court. Defendant then took out his present devolutive appeal to our court. Before the lapse of the 30 days allowed in the judgment of the district court defendant executed a deed to plaintiff of 40 acres of land selected by himself; reciting, however, in the deed, that he had taken, and intended to prosecute, a devolutive appeal from the judgment, and reserved all his rights of appeal, and that he so acted because he was unable to take a suspensive appeal, and because, on his failure to do so, plaintiff would execute his judgment by selecting the most valuable 40 acres, containing the dwelling, etc., of himself and family, and oust them from the possession thereof.

MOTION TO DISMISS.

This motion is based on two grounds: (1) That the case involves no right to homestead, because the contract sued on is a sale of part of the homestead, which is expressly permitted by the constitution; (2) that the defendant has acquiesced in the judgment by the voluntary execution thereof.

So far as the first ground is concerned, it clearly goes to the merits of the case, and involves the very question to be decided by us as to the validity of the homestead right set up by defendant.

The second ground we consider untenable. The Code of Practice denies the right of appeal to a party when he has acquiesced in the judgment by executing it voluntarily. Article 567. Here was an alternative judgment, under the terms of which defendant was bound, within 30 days, to convey to plaintiff 40 acres of his homestead tract, selected by himself, or, on his failure to do so, giving plaintiff the absolute right to select the land on which the dwelling-house of his family was situated, and to turn them out and take possession. Being unable to appeal suspensively, what was defendant to do? The alternative presented to him was very similar to that discussed in a former case, where the court said: "The defendant had to satisfy the judgment or go to jail. There is not here the acquiescence which the law contemplates. It must be the voluntary act of the debtor." *State v. Brown*, 29 La. Ann. 862. Here the defendant had to select and convey the land, or have himself and family turned out of house and home. In another case, where payment

was made under threat to seize and sell a merchant's stock in trade, this was held not to be such voluntary execution as debarred appeal. *Johnson v. Clark*, Id. 762. In a case yet more similar to the instant one, the judgment condemned defendant to deliver 6,000 pounds of cotton, or, in default thereof, to pay \$3,120. Execution having issued, defendant delivered the cotton, which cost him only \$1,920, in order to avoid a seizure for the larger alternative sum named in the judgment; and this was held to be not a voluntary settlement, but one made "under compulsion of the law," and not debarring a devolutive appeal. *Yale v. Howard*, 24 La. Ann. 458. It is true that in the above case execution had been issued; but here, execution was not necessary to expose the defendant to the danger and damage which he sought to avert, because, under the terms of the judgment, by the mere lapse of 80 days, his right to select the 40 acres to be delivered expired, and plaintiff acquired the absolute right to make his own selection, which defendant would, thereafter, have been powerless to prevent. For these reasons the motion to dismiss the appeal is denied.

#### ON THE MERITS.

Plaintiff denies that defendant is entitled to any protection under the homestead law, on two grounds, which we will consider successively.

1. He claims that the defendant's recorded homestead claim had been lost by virtue of a prior sale which he had made to him of the entire property. It appears that in 1886 defendant, being indebted to plaintiff in the sum of \$79.89, executed a deed to the latter of his whole homestead tract of 160 acres. It is stated, among the allegations of plaintiff's own petition, that this conveyance was executed "in order to secure unto him the full and punctual payment of said sum," and that he gave to defendant "a counter-letter, stating that said deed was made for the purpose of securing to petitioner the payment of the said sum of \$79.89; and agreeing that, if said sum was paid by the 1st of November, 1886, he would reconvey said land to the defendant." Neither the deed nor the counter-letter appear in the record; but the foregoing statement of their contents conclusively stamps the transaction, which was unaccompanied by any delivery, as merely hypothecary or figurative in its character, and neither intended nor operating as a divestiture of plaintiff's title. The amount due was subsequently paid by defendant, and the transaction was canceled by a return to each other of the deed and the counter-letter, though plaintiff never executed a formal reconveyance of the land, which he is ordered to do by the present judgment. We are satisfied this transaction never transferred the ownership, or destroyed defendant's homestead right.

2. It is claimed that the contract now sought to be enforced is itself enforceable as a sale or promise to sell a part of the homestead, which is valid under article 222 of the constitution, which, after prohibiting mortgages or waiver of homestead rights, declares that "the right to sell any property which shall be recorded as a homestead shall be preserved." The defendant undoubtedly has the right to sell; but has he sold? It is too self-evident to require comment that the instrument copied in the beginning of this opinion is not a sale. It is simply an executory promise to convey. Article 220 of the constitution declares: "No court or ministerial officer of this state shall ever have jurisdiction or authority to enforce any judgment, execution, or decree against the property set apart as a homestead." This decree is obviously one to be enforced against the homestead property, in satisfaction of a right claimed which is not within any of the exceptions to the prohibition. No court has any authority to render or enforce any such decree. This defendant has his homestead rights in this property, which he cannot validly waive or renounce, or contractually destroy, otherwise than by sale or its equivalent, and he has not sold or alienated the property. He asserts those rights, and we are bound to protect them. It is not necessary, nor do we mean, to de-

termine whether any alienation of the homestead other than by sale would be valid. Here there was no alienation.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it orders defendant to convey to plaintiff any portion of his homestead tract, or recognizes the right of plaintiff to claim or take any portion thereof, be, and the same is, annulled, avoided, and reversed, and the demand of plaintiff to that effect is rejected, without prejudice to any other portions of said judgment which are not within our jurisdiction; plaintiff and appellees to pay costs of this appeal.

(40 La. Ann. 650)

**SPEARS v. HIS CREDITORS, (FULLER et al., Opponents.)**

(*Supreme Court of Louisiana. June 18, 1888. 40 La. Ann.*)

**1. INSOLVENCY—PROCEDURE—RIGHTS OF CREDITORS.**

Any creditor may oppose the appointment of a syndic, or charge fraud against the insolvent debtor, by means of an opposition laid before the court within 10 days next following the meeting of creditors.

**2. SAME.**

The acceptance of an insolvent's surrender, and the selection of a definitive syndic by a meeting of his creditors, cannot conclude judicial inquiry into the legality of the syndic's appointment, or a charge of fraud against the insolvent.

**3. SAME—PROOF OF CLAIMS.**

At such a meeting of the creditors of the insolvent, their respective claims are certified on oath to be true and legitimate, and such certification of their claims entitles them to vote. This is an *ex parte* proceeding before a notary public possessed of no judicial powers, and cannot operate as an estoppel or *res judicata* in respect to subsequent judicial proceedings.

**4. SAME—MEETING OF CREDITORS.**

At such a meeting of creditors only two questions can be presented or determined: one is the acceptance of the insolvent's surrender, and the other is the selection of a syndic.

**5. SAME—SALE OF INSOLVENT'S ESTATE.**

Before any proceedings can be taken looking to the sale of the property of the insolvent, and the application of its proceeds to his debts, it is necessary that a syndic should have been qualified, and an order of court for the sale obtained. As an incident of such proceedings a meeting of creditors must be called for the purpose of determining the terms and conditions of sale.

**6. SAME—SECURED CREDITORS.**

Mortgaged and privileged creditors may determine whether they desire the property affected with their liens to be sold for cash, or on terms of credit, in satisfaction thereof.

**7. SAME.**

Privileges must be ascertained and settled contradictorily with all the creditors. Creditors cannot litigate their demands separately against the syndic, or in an opposition to the appointment of a syndic.

(*Syllabus by the Court.*)

Appeal from district court, parish of Claiborne.

*I. W. Holbert*, for appellee. *Everett & Everett* and *McClendon & Seals*, for appellants.

**WATKINS, J.** Fuller & Co. opposed the cession of their insolvent debtor, Spears, and the homologation of the proceedings of a creditors' meeting whereat a syndic was chosen, and the terms for the sale of his property fixed, on the following grounds, viz.: (1) That they were placed on the insolvent's schedule of debts as ordinary creditors, when they should have been placed thereon as creditors with vendor's lien and privilege on a certain steam mill, engine, and fixtures, which are included among the property surrendered; (2) that Jacob Stein & Co. were placed upon said schedule as creditors, when they were not in fact; (3) that, just prior to making his surrender, the insolvent favored some of his creditors, to their prejudice and injury, by giving them property in satisfaction of their demands, and "this was an unfair preference, working an injury to the rest of his creditors;" (4) that the schedule of

his assets did not include the whole of the insolvent's property; (5) that the insolvent did not produce, and on proper demand therefor failed and refused to produce and surrender, "his books, accounts, notes, etc., for inspection." Opponents substantially aver that, in so doing, the insolvent was guilty of such fraud as should deprive him of the benefits of the insolvent law. The insolvent denies all of these charges; alleges that he made a fair and faithful surrender of his property; and avers that all those who are placed on his schedule are really and actually his creditors. He also pleads *res judicata*, estoppel, payment, and novation. The demands of the opponents are rejected in the court below, and they have appealed.

1. The pleas of estoppel and *res judicata* are predicated on the proceedings of the creditors at the general meeting whereat the surrender of the insolvent was accepted, a definitive syndic chosen, and the terms of sale of property regulated. It is the homologation of those proceedings which is resisted by opponents. The pleas are not well founded. The law provides that "should any creditor of an insolvent debtor deem it necessary to oppose the appointment of syndic, or to charge fraud against the debtor, he shall, within ten days next following the meeting of creditors, lay before the court his written opposition, stating specially the several facts of nullity of the appointment, or fraud alleged against the insolvent debtor." Rev. St. § 1802. It is obvious, therefore, that the acceptance of an insolvent debtor's surrender by a majority of his creditors in number and amount, does not preclude inquiry into the legality of the syndic's appointment, much less the examination of a charge of fraud preferred against the debtor. Express permission is given by the statute "to any creditor \* \* \* to oppose the appointment of syndic, or to charge fraud against the debtor" after the meeting of the creditors have accepted the surrender and selected a syndic. On such proceedings no question of fraud or nullity is raised. The statute provides that, "at the meeting of the creditors after having certified on oath their respective claims to be true and legitimate, they shall proceed to the appointment of a syndic." Id. § 1796. Such certification on the oath of the respective creditors is necessarily *ex parte*. It is made before a notary public, possessed of no judicial power whatever. It would be anomalous, indeed, to hold that such a proceeding could estop or debar judicial inquiry. It is only after the insolvent's surrender has been finally acted upon and accepted by his creditors that those dissatisfied thereat are called upon to make opposition. The pleas of *res judicata* and estoppel cannot prevail.

2. An examination of the *procos-verbal* of the proceedings of the meeting of the creditors discloses the fact that, not alone was a definitive syndic elected, but the terms of sale of the insolvent's property were fixed, and same was ordered to be sold, subject to such privileges as may exist thereon according to law; the amount of all bids less than \$10 payable in cash, and those in excess of that sum payable on the 1st of November following. Opponents complain of this part of the proceedings on the ground that the creditors had no authority "to fix the terms of sale of the machinery," etc., on which they assert a vendor's privilege. The petition of the insolvent which accompanies his schedules shows that he desired to make a voluntary surrender of all his property to his creditors, and that, for the purpose of laying before them a statement of his affairs, a meeting of his creditors should be called. It is accompanied with a prayer that a meeting of his creditors be convoked before a notary public at a time and place to be indicated, at which time and place he might "lay before them his affairs, and surrender to them his property," and that, in the mean time, all proceedings against his person and property should be stayed. The order of court followed the averments and prayer of the petition. It is apparent that the creditors have not, at this stage of the proceedings, any right to fix the terms of sale of the property of the insolvent. Under the prayer of the petition and order of the court there were but two ques-

tions submitted to their consideration, and those were: (1) The acceptance of their debtor's surrender; and (2) the selection of a definitive syndic. This was the only power given to such a meeting of creditors. *Id.* Of course, it was absolutely necessary that the creditors should first accept their debtor's surrender, and choose some one to undertake the administration of his estate, and that he should have qualified, and entered upon the discharge of the duties of his office, before any proceedings could be taken looking to the sale of the debtor's property, and the application of the proceeds to the payment of his debts. These things having been done, the property ceded may "be ordered by the court to be sold at public auction at such times and places, and upon such terms and conditions, as may be determined by the creditors." *Id.* § 1812. But such order must be preceded by a petition of the syndic; and, when presented, the court will convoke a meeting of the creditors for that purpose. The mortgaged and privileged creditors shall not be bound by the decision of the majority of the other creditors if they desire the property affected with their liens to be sold on a credit. They have also the right to require that a sufficiency thereof be sold for cash to satisfy their privileged claims. *Id.* § 1800. The proceedings of the creditors' meeting, in so far as they relate to the fixing of the terms of the sale of the insolvent's property, are premature, and on that account are null and void. For this reason, we do not feel authorized to decide whether opponents are entitled to the recognition of their vendor's lien or not. It must be relegated to some future proceeding, and determined contradictorily with other creditors of the insolvent. The total assets surrendered are stated to be worth only \$2,800, and the insolvent's debts are placed at \$8,800. If the claim of opponents is recognized as being secured by a vendor's lien, and entitled to be paid by preference, a large portion of the assets will be absorbed thereby, and the amount applicable to ordinary debts correspondingly reduced. Hence ordinary creditors have an interest in the determination of this question. In *Tenny v. Provosty*, 14 La. Ann. 221, it was held that "privileges must be settled contradictorily with all the creditors, upon a tableau of distribution filed. The creditors cannot litigate their demands separately against the syndic." *Fabre v. McRae*, *Id.* 648 and authorities therein collated; *Robert v. His Creditors*, 2 La. Ann. 535.

3. A fair preponderance of the testimony favors the validity of the debt of Jacob Stein & Co., that is entered upon the insolvent's schedule. It is at least sufficient to justify the insolvent in placing it there, and to exonerate him from the charge of fraud that opponents have preferred against him on that account. But we do not hold that the proof submitted in reference to this claim can, in any manner, affect the rights of other creditors. The validity of said debt, as such, must, like the question of opponents' privilege, be homologated to future adjustment.

4. On the charge preferred against the insolvent, of having given goods and property to some of his creditors in satisfaction of their demands, no proof was adduced by opponents. They rest this branch of their case exclusively upon the admission made by the insolvent in his evidence. They are to the effect, substantially, that, shortly anterior to making his surrender, his saw-mill was destroyed by fire, and he collected \$1,648 insurance money. This he expended for goods, in payment of plantation supplies, and in making payment of some small debts he owed. To his answer is appended an itemized statement of such expenditures. He admits that he gave small amounts of goods in exchange for labor, corn, and other things; and that he paid a few small debts that he owed, in goods. But the amount of the debts thus paid was quite small. He states that, at the time of his surrender, he had none of the insurance money on hand; that he had no intention of defrauding his creditors in thus expending his money, and disposing of his goods; that his mercantile business was quite small;—his stock scarcely exceeding \$300 at any one time. He says: "The goods and their value were

used by myself and family and mill hands and farm hands, and I sold a part of them. The amount disposed of, and the amount on the schedules under seizure, accounts for all the goods I had on hand. I had no money, or amounts due for goods, or goods that were not surrendered." There is no countervailing evidence. Some of his neighbors testify to his good reputation and character. We think it would be a strained interpretation of these acts of the insolvent debtor to style them fraudulent in the sense of the provisions of Rev. St. § 1802 *et seq.* On the contrary, they indicate an intention to satisfy his debts just as speedily as possible, consistent with his slender resources. It was the seizure of his property by the opponents which brought about his surrender. This ground of opposition is untenable.

5. The proof satisfies us that the schedule fairly accounts for all the insolvent's property.

6. The insolvent states that he kept no mercantile books. The only one he did keep was a small memorandum book, and this he tendered to the opponents in court. He evidently does not come within the denunciation of the statute against "those who, being merchants or shop-keepers, shall have concealed their commercial books and papers \* \* \* with the intention of keeping same from their creditors." *Id.*

7. We have taken the pains to review with care all the points of objection urged *pro* and *con*, and have reached the conclusion that the action of the creditors in fixing the terms of sale of the insolvent's property was premature and unauthorized; and that, in this respect, their proceedings should be annulled; that the questions raised with regard to the alleged privilege of the opponents, and the validity of the debt of Jacob Stein & Co., should be postponed until the *concursus* is formed, and adjudicated therein contradictorily with all the creditors; and that the judgment should be, in other respects, affirmed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to reject and annul that part of the proceedings of the creditors' meeting which fixes the terms of sale of the insolvent's property; and further amended so as to postpone consideration of the opponents' privilege, and the validity of the debt of Jacob Stein & Co., until a *concursus* is formed with all the creditors. It is further ordered, adjudged, and decreed that in all other respects said judgment be affirmed, and that the costs of appeal be taxed against the succession of the insolvent, and those of the lower court to await the final termination of proceedings in the court *a quo*.

(40 La. Ann. 523)

Succession of WORLEY, (opposition of LEHMAN *et al.*)

(Supreme Court of Louisiana. June 14, 1888. 40 La. Ann.)

1. EXECUTORS AND ADMINISTRATORS—DUTIES—PAYMENT OF CLAIMS.

The law makes it the imperative duty of administrators of successions to see to and provide for the payment of succession debts, and, when necessary, to provoke the sale of the property, movable and immovable, for that purpose.

2. SAME.

This duty cannot be paralyzed by the mere judicial denial by an heir that the debts acknowledged by the administrator are truly due.

3. SAME—RIGHTS OF HEIRS.

In order to restrain the execution of an order of sale provoked to pay debts, an heir must not merely allege, but prove, that the debts do not exist.

4. SAME—SALES UNDER ORDER OF COURT.

The law does not forbid the sale of succession property in the summer time; and the probate judge having, in the exercise of his discretion, ordered the sale, we have no authority, on such ground, to interfere.

(Syllabus by the Court.)

Appeal from district court, parish of Morehouse; ELLIS, Judge.  
*R. B. Todd, Jr.*, for appellants. *Mr. Bussey*, for appellee.

WATKINS, J. The succession of T. C. Worley was opened by his death on the 27th of April, 1886, and his property, real and personal, was appraised at about \$7,000. He died intestate, and his father and one sister were his only heirs, and by operation of law the latter inherited three-fourths and the former one-fourth thereof. In May following opponents caused an execution to issue under a judgment they had previously obtained against A. T. Worley, the father, and thereunder to be seized the undivided one-fourth interest he had inherited in the succession of T. C. Worley, the son; and, at execution sale made in the month of November following, they became the adjudicatees thereof. During the pendency of these proceedings A. T. Worley applied for and obtained the appointment of administrator of his son's succession, and he was qualified as such on the 6th of July, 1886. On the 11th of July following he filed a provisional account, which was opposed by the purchasers, and, their opposition having been rejected *in toto*, they have appealed.

1. At the time of his death T. C. Worley owned and operated a cotton plantation. It had been planted, but the crop was so immature that it was valued in the inventory as worth nothing. There was opposition made to the appointment of A. T. Worley as administrator, and during the pendency of the opposition the applicant continued to manage the plantation, and superintend the cultivation of the crop thereon, and furnished the laborers, who were working on the share system. After his qualification he continued to buy goods and supplies for these purposes, upon terms of credit, and had the same charged to his account as tutor, notwithstanding they were used on the plantation. He gathered the crops, and marketed them. He closed the accounts of laborers by accepting cotton in settlement. He assumed the responsibility of applying the proceeds of the crop to the satisfaction of certain privileged and ordinary debts. On his personal account he charged himself with the amount of the inventory, the net proceeds of the cotton crop, \$5,661.46, and the proceeds of the sale of corn; the whole aggregating the sum of \$13,524.82. He credits himself with the value of the real and personal property on hand unsold. He shows that he disbursed the proceeds of the crop in payment of bills for supplies, bagging and ties, shop and freight bills, and, in fine, bills of every nature applicable to the cultivation of a cotton crop. He shows that, in addition, he paid individual debts of the deceased to the amount of \$3,981.77. On this showing, it appears that the amount of the debts remaining unpaid is only \$4,045.52, and that, by virtue of the administrator's planting operations, the condition of the estate has been improved to the extent of \$2,960.31, within less than one year after he had qualified. The position assumed by the opponent's counsel is that the *status* of a succession is fixed at the date it is opened, and its liabilities cannot be augmented afterwards by any act of the representatives of the deceased. He then formulates the proposition, viz.: At the death of T. C. Worley his property was inventoried at \$7,085.50. The crop of 500 acres, not inventoried, was well worth \$5,000. Then according to this inventory on file, and a fair estimate of the crop, Worley's succession, at the time of his death, was worth \$12,085.50. With this assumption as the basis of his client's case, he undertakes to show that all the debts that were contracted by A. T. Worley, as tutor and administrator, for the account of the succession, in the course of his planting operations in 1886, should be entirely eliminated from the account. The only items of indebtedness which he intimates a willingness to allow are the supply account of John Phelps & Co., of \$2,500, and the amount the administrator paid on the mortgage of Moses Wolf of \$798.90. This allowance would result in a balance of \$2,568.42 for which the administrator should account. The opponents specially resist the allowance of the claims of Handy,

Devenport, Andrews, and Miss Alma Worley. The only objection urged in oral and printed argument against the first three is that they were contracted by A. T. Worley, either in his capacity of tutor or administrator, after the succession of T. C. Worley was opened, and that he did not have the power or rightful authority to bind his succession therefor. But the one that is urged against the claim of Miss Alma Worley is that the deceased was not indebted to her for rent of the years 1885 and 1886, because there was no contract of lease during those years; and because the deceased had expended for her account, in 1884, more than the amount of the rent, there was nothing due for that year.

2. In this controversy it may be conceded, *arguendo*, that Lehman, Abraham & Co., as the purchasers of the undivided share of A. T. Worley in the succession of the deceased, occupy identically the same position that he did as an heir. They purchased *cum onere*, and subject to the payment of his proportion of the debts of the deceased. When T. C. Worley died, A. T. Worley, his father, was the only living male heir. He was the only person capable of taking charge of the plantation, and of administering its affairs. The deceased had planted a crop, and his death occurred in the month of April; that particular season when it most needed attention and care. His application to administer was opposed by them, and his qualification was delayed, on that account, until July. It seems to us needless to cite authority to demonstrate his right to act in the premises as he did. In our opinion, he would have proven himself a recreant father and heir, and an unfaithful administrator, if he had not. It appears to us to be unreasonable and unjust to treat the proceeds of the crop as an asset of the succession, and, at the same time, to refuse to allow credit to the administrator for the amounts he expended, necessarily, in its cultivation and preparation for market. It seems to us equally unreasonable to treat it as an individual adventure of A. T. Worley, when it manifestly yielded a large profit for the estate. Evidently there is involved in these transactions no question of maladministration. It is manifestly improper for us to grant opponents' request, when we take into consideration the fact that they purchased the interest of A. T. Worley in November, 1886, when the crop was fully mature, and without protest; and considering the further fact that they were fully advised by the account of the large profit the venture had yielded, when in July, 1887, they filed their opposition and made pretention to it. We have no hesitancy in approving the acts of A. T. Worley, tutor and administrator, as legitimate and proper acts of administration. This case is easily distinguishable from that of *Succession of Sparrow*, 39 La. Ann.—, 2 South. Rep. 501; for in that case, in discussing the identical question under consideration here, we employed this language, viz.: "The rule is not absolutely inflexible, to the extent of annulling or defeating a debt incurred by an administrator in meeting the expenses necessary to save and harvest a crop already begun, or hanging by the roots at the date of his appointment. *Miltenberger v. Elam*, 11 La. Ann. 668; *Succession of Decuir*, 22 La. Ann. 372; *Miltenberger v. Taylor*, 23 La. Ann. 189; *Carroll v. Davidson*, Id. 428; *Florshelm v. Holt*, 32 La. Ann. 133, 702." This succession occupied just that situation at the date of T. C. Worley's death, and that of A. T. Worley's appointment, and that doctrine is strictly applicable to the debts and obligations which A. T. Worley contracted for its account, and disbursed from the proceeds of the crop that was grown and gathered during the ensuing season. They were undoubtedly proper charges against the crop, if not debts of the succession, strictly speaking.

3. It appears from the evidence that Miss Alma Worley owned a small plantation of 250 acres, which T. C. Worley cultivated during the years 1884, 1885, and 1886. In 1884 he contracted to pay for her land \$5 per acre; that is, \$1,250 for the whole. During that year he purchased of her \$800 worth of corn. This contract of lease was renewed in 1880, and again in 1886, by

a verbal agreement or tacit reconduction. The following settlement was made of the mutual accounts of the parties, viz.:

She charged him with note for corn and rent in 1884,	\$2,000 00
Rent of 1885 and 1886,	2,400 00
Total,	\$4,400 00
Credit by schooling, clothing, and general maintenance, two and one-third years,	\$1,400 00
By possible amt. of taxes,	300 00
By 1,000 barrels corn rec'd of adm'r,	500 00
	\$2,200 00
Balance due,	\$2,200 00

This statement was accepted by the judge of the vicinage, who knew the witnesses and heard them testify, and our examination of the record justifies the conclusion he reached. We have no doubt of the fact that opponents' counsel acted in their interest, with the lights he has upon the questions involved, and as he would not have done had he been possessed of the facts that were elicited upon the trial. The administration of the estate has been delayed, and possibly embarrassed, by this litigation, but that is a misfortune common to all litigants. This is not a case that would justify us in assessing damages against the opponents for the prosecution of a frivolous appeal. Judgment affirmed.

TODD, J., takes no part in this opinion.

(40 La. Ann. 630)

LEHMAN *et al.* v. WORLEY.

(*Supreme Court of Louisiana*, June 14, 1888. 40 La. Ann.)

1. EXECUTORS AND ADMINISTRATORS—DUTIES—PAYMENT OF CLAIMS.

The law makes it the imperative duty of administrators of successions to see to and provide for the payment of succession debts, and, when necessary, to provoke the sale of the property, movable and immovable, for that purpose.

2. SAME.

This duty cannot be paralyzed by the mere judicial denial by an heir that the debts acknowledged by the administrator are truly due.

3. SAME—RIGHTS OF HEIR.

In order to restrain the execution of an order of sale provoked to pay debts, an heir must not merely allege, but prove, that the debts do not exist.

4. SAME—SALE UNDER ORDER OF COURT.

The law does not forbid the sale of succession property in the summer time, and the probate judge having, in the exercise of his discretion, ordered the sale, we have no authority, on such ground, to interfere.

(*Syllabus by the Court.*)

Appeal from district court, parish of Morehouse; ELLIS, JUDGE.

R. B. Todd, Jr., for appellee. Bussey & Naff and Newton & Cason, for appellants.

FENNER, J. The defendant, administrator of the succession of T. C. Worley, alleging that the succession owed debts of large amounts, a full settlement of which he embodied in his petition, and that the sale of the property, movable and immovable, was necessary in order to pay them, applied for and obtained an order of court for such sale. Subsequently, and while the advertisement of said sale was pending, he filed a provisional account of his administration to date, and appended thereto *tableau* of the debts due by the succession, corresponding to the statement embodied in his petition for the sale. The plaintiffs, who had become the owners of the share of one of the heirs in the succession, filed an opposition to this account, in which, among numerous other objections, they disputed the debts set down as due by the

succession, and denied that the succession owed them. They then filed the present suit for an injunction, restraining the administrator from proceeding with the sale which had been ordered until further orders of the court. The preliminary injunction was granted, the case went to issue and trial, and final judgment was rendered dissolving the injunction, from which the present appeal is taken. The grounds of the injunction are three: (1) That, inasmuch as plaintiffs in their opposition had put at issue the existence of any debts due by the succession, the sale should not proceed until that issue had been determined; (2) that the succession owed no debts which required or justified the sale of its property, and therefore the sale could not lawfully be made; (3) that the season of the year at which the sale was to take place was one when money was scarce, and when the property could not find bidders for its value.

The first ground, by itself, has no merit. As said by us in a former case: "It is the first and paramount duty of executors and administrators to watch over the interests of creditors, and to see to and provide for the payment of their just claims against the successions which they represent, and to that end they are vested by law with full power to provoke the sale of the personal, and, if need be, the immovable, property of the succession." *Succession of Labor*, 38 La. Ann. 344. The law made it the imperative duty of this administrator to apply for the sale of the property in case he found such sale to be necessary for the payment of debts which he has ascertained to be due. Civil Code, arts. 1164, 1165, 1668, 1670. This is a duty which he owes to the creditors, and of which, in his default, they can compel the performance. This duty cannot be paralyzed by the mere judicial denial by an heir that the debts which have been ascertained and acknowledged by the administrator are actually due. If an heir may restrain the execution of an order of sale obtained to pay debts acknowledged by the administrator, it must be not because he has denied the existence of such debts, but because, in point of fact, they do not exist. In this injunction suit, he carried the burden of establishing that the debts did not exist, and that, therefore, the sale of the property for their payment was unnecessary and unauthorized by law. The presumption in favor of the validity of the debts resulting from the administrator's acknowledgement cannot be overcome by the mere denial of the heir, which did not, therefore, vacate the order, or furnish a cause for suspending the sale.

The second ground, if sustained by proof, would have been proper ground for the injunction; but it is not sustained. We need not discuss it further in this case, because the opposition itself, involving this issue, has been tried, and is this day decided on appeal, rejecting the opposition, and affirming the existence of the debts.

The third ground has no merit. The law is not a respecter of seasons, any more than of persons, and her writs and orders operate as effectually in summer as in winter. Judgment affirmed.

TODD, J., takes no part.

(40 La. Ann. 633)

**PARIISH BOARD OF SCHOOL DIRECTORS v. EDRINGTON.**

(*Supreme Court of Louisiana*. June 15, 1888. 40 La. Ann.)

**1. EXECUTION SALE—TITLE BY PURCHASER.**

One who purchases, at an execution sale, the right, title, and interest of the defendant in execution, acquires only such title as the latter had.

**2. SAME.**

If, among the property sold, there is a lot, of which the expropriated owner possessed as a lessee, the adjudicatee would take as such, and be substituted as lessee in his place *pro tanto*.

**3. LANDLORD AND TENANT—RIGHTS AND LIABILITIES—TITLE BY PRESCRIPTION.**

Prescription *acquiritendi causa* cannot be acquired under a title resulting from a lease.

## 4. DEED—RECORDING—NOTARIAL TITLES.

Prior to the passage of the act of the 23d April, 1853, notarial titles were not required to be filed, and registered in the book of conveyances, in the recorder's office.

## 5. SAME—ORGANIZATION OF NEW PARISH.

The right of a proprietor of real property evidenced by the registry of a conveyance thereof in the proper book and the proper office, in the parish in which it is situated at the time, is not affected by the incorporation of it into a new parish; and no additional registry in the new parish is necessary in order to preserve its effect.

(Syllabus by the Court.)

Appeal from district court, parish of Madison.

A. L. Slack, for appellee. Stone & Murphy, for appellants.

WATKINS, J. In this, a petitory, action, the parish board of school directors sue for the recovery of about 160 acres of valuable land, known as section 6 of township 18 N. of range 14 E. The averment is that it belongs to petitioner; "said tract having been designated, under the act of congress of the United States, as school lands, and is so specified on the abstract book of entries of said parish, made by the register of lands, and that same is located on what is familiarly known as 'Tarradin Neck,' and embraced in a plantation which is cultivated by the defendant, who resides in the state of Mississippi." The further averment is that on the 5th of July, 1836, this land was leased by the trustees of the public school funds for ward 1 of the then parish of Carroll, wherein the same was situated, to H. P. Morancy, for a term of 50 years; and that the present defendant acquired by mesne conveyances from Morancy; that this title of defendant was vicious and defective, and on which no right by prescription could be founded; and that he was a mere naked trespasser, without color of right as owner. The prayer is that the directors be recognized as owners, and placed in possession. The defense is substantially that—*First*, that plaintiff has not disclosed title in itself; *second*, prescription of 10 years.

The following are the salient facts of the case, viz.: On the 5th of January, 1837, the school trustees of ward 1 of Carroll parish, in pursuance of an act of the legislature relating to the disposition of school land therein situated, entered into a notarial act authenticating a lease which had been made on the 18th of July, 1835, at public auction, and whereat H. P. Morancy became the lessee, for a term of fifty years, of the land involved in this suit. This act was duly recorded on the 2d of February following. On the 16th of June, 1845, Morancy conveyed, by notarial act, to William H. Edrington, the father of the defendant, a large tract of land, embracing the property in suit. This act contains the following recital, viz.: "It is understood that the said Morancy does not sell lot No. six to the said Edrington in fee simple, nor warrant the title to the same, but simply transfers to said Edrington all the right, title, and interest only that he acquired to a lease for forty years, dating from the year 1837 or 1836." This deed was recorded in the notary's book of notarial records on the 1st day of August, 1845, in the parish of Carroll. An abstract of all the lands which had been sold or located within the limits of the parish of Madison was made, and duly certified by the register of the land-office at Monroe, La., on the 19th of April, 1852, from which it appears that the land in dispute is entered and designated, in the column of purchasers' names, "as having been selected for schools." This abstract is found in the original abstract of sales-book, on file in the office of the recorder of that parish. It is an exemplification of the records of the United States land-office. On the 4th of April, 1868, the sheriff of the parish of Madison, under an execution issued under a judgment in the suit entitled *Eliza M. Edrington vs. W. H. Edrington, Her Husband*, No. 446, passed a title to the plaintiff in the writ for the said plantation, which the defendant in execution had acquired, as above recited, from Morancy. This deed, in terms, conveyed to the purchaser, her heirs and assigns, "all the right, title, and interest of the

said William H. Edrington" only in said property. This deed was duly and seasonably recorded. Mrs. Eliza M. Edrington died a few years subsequently, possessed of this title, and the defendant and his brother, as the only heirs, accepted her succession unconditionally. The defendant afterwards acquired his brother's interest. His title was, a few years later, expropriated for delinquent taxes, but it was redeemed.

2. In our opinion, the effect of the execution sale to Mrs. Eliza M. Edrington was to convey to her just the same title that her husband, W. H. Edrington, possessed, and it was a fee-simple to all the plantation except section 6, and only his rights of lease to that for the remainder of the 50 years. That deed did not convey to the purchaser an adverse right to that of the defendant in execution, as tenant of the sixth section, as school lands. The effect of her purchase was just the same as that of Edrington from Morancy to substitute her in his place in the contract of lease. Such being the character of her contract, and possession at the commencement, it could not be thereafter changed, by herself or her heirs, to the prejudice of his lessor. Such a title is not the "just title" that is mentioned in Rev. Civil Code, art. 3484 *et seq.* Article 3485 declares that "prescription cannot be acquired under a title resulting from a lease or loan, because these contracts do not transfer the ownership of the property." It is therefore clear that the term of prescription in favor of the defendant, if at all, commenced only at the expiration of the Morancy lease, on the 18th July, 1885.

3. A question is raised, as though it were an important one in this case, in regard to the registry of the title of W. H. Edrington from Morancy. On the 1st of August, 1845, when that deed was put to record in the record book kept by the notary passing the act, there was no law which required it to be deposited or recorded elsewhere. For the first time the act of April 23, 1853, made it the duty of notaries in the country parishes "to deposit in the office of the parish recorders \* \* \* the original of all acts passed before them." This act further provides that "said acts, when thus deposited in the office of the parish recorder, shall form a part of the archives of the same, and shall immediately be recorded by him," etc. *Vide*, article 2247 of Morgan's Civil Code, and statute of 22d of April, 1853, No. 151, following. Defendant's counsel insists in his argument, presented in briefs, that because the lease of Morancy, and his deed to Edrington, were not recorded in the parish of Madison, within the territorial limits of which the property now is, same conveyed no notice to Mrs. Eliza M. Edrington, their ancestor, and hence the defendant must be considered to have purchased an adverse title. This precise question was decided just the other way in *Hayden v. Nutt*, 4 La. Ann. 65. The court say: "This undivided interest was bought by Nutt from Dawson in 1835. \* \* \* This deed was recorded in the mortgage book in the parish of Carroll, where the land lay, in 1835. The parish of Madison, subsequently created, comprised these lands," etc. Again, at page 72: "We do not think that the right acquired by the inscription of this mortgage in the parish of Carroll was affected by the subsequent establishment of the parish of Madison, which embraced the lands mortgaged." While that decision deals with the question of the registry of a mortgage, certainly no more onerous conditions could be imposed in respect to the registry of conveyances. This same principle was maintained in *Ellison v. Her*, 22 La. Ann. 470, with reference to the effect of a mortgage which had been regularly inscribed in the parish of Franklin against real estate afterwards incorporated in the new parish of Richland. This is a sound principle of law. Otherwise the legislature, by the incorporation of property into a new parish, could with impunity destroy the rank of mortgages, and impair the obligation of contracts at will.

We think the case was correctly decided in the court below. Judgment affirmed.

(24 Fla. 225)

**SAULS et al. v. FREEMAN, County Com'r, et al.**

(Supreme Court of Florida. July 2, 1883.)

**1. APPEAL—PRACTICE—REHEARING.**

A petition for a rehearing which suggests nothing that has not been fully considered by the court in making its decision, should be denied.

**2. SAME.**

A petition for a rehearing which is either a reargument of points made in the briefs and argument of the cause, or which assumes any new ground or position not taken before, is a violation of supreme court rule 24, regulating the practice as to such petitions.

(Syllabus by the Court.)

On petition for rehearing. For former opinion, see *ante*, 525.  
*Poster & Gunby* and *John W. Price*, for petition.

**RANEY, J.** The petition for a rehearing filed in this cause has been considered. It suggests nothing that had not been carefully considered by us in reaching the conclusions set forth in the main opinion.

In so far as the petition is a reargument, or assumes any new ground or position not taken before, it is clearly in violation of supreme court rule 24, and the practice of this court, as has been settled by the adjudications. *Smith v. Croom*, 7 Fla. 180; *Bank v. Ashmead*, 2 South. Rep. 665, 23 Fla. 879. A rehearing is denied.

**COLE v. STATE.**

(Supreme Court of Mississippi. May 21, 1883.)

**1. LARCENY—EVIDENCE—ALIBI.**

On an indictment for larceny it appeared that the stolen cotton had been carried upon a wagon from the owner's gin; that there were wagon tracks from where the cotton was concealed to defendant's house; that the wheels of his wagon were muddy, and two of his mules were sweating; and that defendant was found early the next morning with one who was convicted as an active participant in the larceny. *Held*, that an alibi was not a complete defense, and the question of defendant's guilt or innocence was properly left to the jury.<sup>1</sup>

**2. SAME—INSTRUCTIONS.**

On a trial for larceny, a refusal to instruct that, in doubtful cases, the character of the accused is conclusive of innocence, is proper; character being a question for the jury to weigh and consider with the rest of the evidence.

**3. SAME—VERDICT.**

On a trial for larceny it is not necessary that the jury should find the value of the property stolen.

Appeal from circuit court, Lowndes county; **W. M. ROGERS, Judge.**

Daniel Cole *alias* Daniel Halbert was indicted jointly with two others for grand larceny. Certain bales of cotton were taken from the gin of the owner on Sunday night, placed on a wagon, which was hauled by hand to the gin, after which mules were hitched to the wagon, and the cotton taken away; but before proceeding far the wagon broke down, when another wagon was procured, and the cotton taken towards town. Wagon tracks were found leading

<sup>1</sup> When an alibi is set up as a defense, the burden of proof is on defendant, *State v. Rivers*, (Iowa,) 27 N. W. Rep. 781, and note; but he is not obliged to prove it beyond a reasonable doubt, *State v. Fry*, (Iowa,) 25 N. W. Rep. 738; but simply by a preponderance of evidence, *People v. Lee Sare Bo*, (Cal.) 14 Pac. Rep. 810, and note; *State v. Johnson*, (Iowa,) 84 N. W. Rep. 177; and if the evidence, including that as to the alibi, leave a reasonable doubt in the minds of the jury, they cannot convict, *State v. Maher*, (Iowa,) 87 N. W. Rep. 2.

Where the evidence does not show the distance between the place of the commission of the crime, and that where defendant was seen an hour or two earlier, an acquittal on the ground of alibi will not be directed by the court. *Burger v. State*, (Ala.) 3 South. Rep. 819.

As to instructions on the defense of alibi, see *Wisdom v. People*, (Colo.) 17 Pac. Rep. 519; *State v. Freeman*, (N. C.) 5 S. E. Rep. 921; *Ackerson v. People*, (Ill.) 16 N. E. Rep. 847. v. 480, nos. 14, 15—37

to Cole's house from the point where the cotton was left. The wheels of his wagon were muddy. Two of his mules were found to be sweating, while the third one was dry. Cole was found early next morning with one Charleston, who was indicted with him, and convicted as one of the active participants in the larceny; the theory of the prosecution being that appellant furnished his team to aid in the larceny, though not probably present himself. One of the witnesses for the state testified that the two parties jointly indicted with Cole had been convicted of the offense. Appellant did not object to this testimony. Witness for Cole testified that Cole was at home in bed at the time the cotton was stolen. The trial resulted in a verdict of guilty, and judgment was rendered thereon, from which Cole appealed. The eighth instruction for defendant reads as follows, the parts in brackets being the modifications added by the court: "If the jury are satisfied that the cotton was stolen, and if they have any reasonable doubt as to whether the defendant, [with others,] or some one else, [without any participation in the crime on his part,] stole it, they should say not guilty."

*J. E. Leigh*, for appellant. *T. M. Miller*, Atty. Gen., for the State.

**COOPER, J.** No exception was reserved in the court below, nor was any objection made, to the testimony of the witnesses that Marshall Charleston and Fayette Holderness (persons jointly indicted with defendant) had been convicted of the larceny. In this condition of things the appellant cannot assign the introduction of such testimony as error. The court did not err in modifying the instructions asked by the appellant. By the fourth instruction the appellant asked the court to charge the jury that, "when an *alibi* is proved, the jury should acquit;" which instruction the court refused to give, but amended it so as to read: "When the evidence of an *alibi* produces a reasonable doubt, under all the evidence in the case, of the guilt of the accused, the jury should acquit." The state's theory of the larceny was that the cotton was stolen by several, and that the appellant furnished his wagon and team as the instruments by which it was to be transported from the premises of the owner to a place of concealment. If this was true, the appellant was guilty of the larceny, though he may have been, at the time of the stealing, at his home and in bed. The modification of the eighth instruction was made for the evident purpose of more clearly informing the jury of the real question for its determination, viz., that, if the defendant had no participation in the crime, he should be acquitted; but that if others actually removed the cotton, and the defendant, though not personally present, participated by aiding the others, he was as guilty as they. By the tenth instruction the court was asked to charge the jury that "the character of the accused is as much a fact for the jury as any other fact, and in doubtful cases is conclusive of innocence." The court struck out the concluding clause, and this is assigned for error. This was not error. It is for the jury to weigh the evidence, and the court ought not to instruct that any fact is conclusive; for so to do is to instruct upon the weight and sufficiency of the evidence, and this is to usurp the functions of the jury. It was not necessary that the jury should find the value of the property stolen. *Wilborn v. State*, 8 Smedes & M. 345; *Cook v. State*, 49 Miss. 8. The judgment is affirmed.

(40 La. Ann. 638)

**SINGER v. McGUIRE, Sheriff, et al.**

(Supreme Court of Louisiana. June 14, 1888. 40 La. Ann.)

**1. APPEAL—APPELLATE JURISDICTION—JURISDICTIONAL AMOUNT.**

The supreme court has no jurisdiction over a controversy in which the matter in dispute is the nullity or validity of a judgment rendered for less than the lower limit of its appellate jurisdiction.

## 2. COURTS—JURISDICTION OVER SUBJECT-MATTER—WAIVER OF OBJECTION.

An appellee who has represented to this court that a case was not within its jurisdiction, and the court has acted on that representation by dismissing the appeal, who subsequently acquiesces in the judgment, and voluntarily permits, without any objection, the circuit court to hear and determine the same case; who afterwards applies for a prohibition to this court to arrest the execution of the judgment of the latter court, but is denied the same; and who sues to annul the judgment,—surely cannot be heard any longer to set up want of jurisdiction *ratione materia* in the court rendering the judgment.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. RICHARDSON, Judge. On motion to dismiss appeal.

John T. Ludeling, for appellants. C. J. & J. S. Boatner, for appellee.

BREMUEZ, C. J. The appellee claims that the court is devoid of jurisdiction *ratione materia* over this controversy, as the matter at issue does not exceed \$2,000. The object of this suit is to annul a judgment for some \$750 rendered by the court of appeals for the Second circuit, the execution of which standing provisionally enjoined. This judgment was rendered in a case in which it is alleged the amount in dispute exceeded, by an insignificant fraction, the upper limit of the jurisdiction of that court, and over which it had no authority. It appears that, previous to the trial and determination of the case by the court of appeals, the matter in controversy had been brought up for adjudication to this court; but that, on the representation of the appellees, among whom figured conspicuously the present plaintiff, that this court had no jurisdiction, as no judgment could, in any contingency, be rendered against any of the appellants, for a sum exceeding \$2,000, the appeal was dismissed *proprio motu*. *Bank v. Allen*, 39 La. Ann. 807, 2 South. Rep. 605. The natural consequence of this dismissal was the assumption of jurisdiction by the court of appeals over the cause, and the determination by it of the issues involved in it. It is an important factor in this litigation that subsequently, when the case appeared before the circuit court, it was tried and determined in the absence of all objection on the part of the present plaintiff, who was then, as he had been before this court, the main appellee. It is another significant circumstance that, after the circuit court had rendered judgment for some \$750 against the plaintiff, he applied for a prohibition to this court to arrest the execution issued on the judgment, and which was in the hands of the sheriff, and to prevent the court from exercising any jurisdiction over the case; the application resting on the ground that the court of appeals had no jurisdiction to render the judgment, as the amount involved in the case exceeded the upper limit of the jurisdiction of that court. This court refused the prohibition on the ground that, as the relator had represented to it that the case was not within its jurisdiction, the appeal had been dismissed on that showing, and the case had been tried and determined by the circuit court without any objection on his part, he was estopped from questioning the jurisdiction of that court, and could not be heard any longer to complain on that score. It was never held, for under no circumstances could it have been, that by his consent the plaintiff had conferred jurisdiction on the circuit court in the case in question. This court simply denied relief because the relator there, who is the plaintiff here, was estopped and it did not lie in his mouth to contest the validity of the judgment attacked as rendered by an incompetent court. *State v. McGuire*, 40 La. Ann. —, ante, 222, (decided in New Orleans in March last.)

It needs no reasoning to show that the appeal taken in this case cannot stand in this court; the matter in dispute being the validity or nullity of a judgment for a sum beneath the lower limit of its jurisdiction. It is manifest that the appellant, who is the judgment creditor, entertained serious doubts touching the appealability of the case to this court, as a similar appeal was sought and obtained to the circuit court by which the judgment leveled against

him was rendered. The appellant, by the dismissal of the appeal here, is not left without hope for relief, as the certainty is that the judgment of the court of appeals must set the matter now agitated forever at rest. It is therefore ordered and decreed that the appeal herein be dismissed, with costs.

(40 La. Ann. 615)

#### Succession of OSBORN.

(*Supreme Court of Louisiana. June 15, 1888. 40 La. Ann.*)

#### 1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT AND ACCOUNTING—ADVANCES BY ADMINISTRATOR—PRIVILEGE.

Advances clearly proved to have been diverted to other than plantation purposes cannot be allowed a privilege.

#### 2. SAME—COUNSEL FEES.

For services rendered by counsel in the settlement of a succession in which there was little or no litigation, the assets realizing some \$6,000, an allowance of \$500 is ample, and will not be increased.

#### 3. VENDOR AND VENDOR—VENDOR'S LIEN.

A vendor of real estate is entitled to a privilege for the payment of the unpaid price, which exists until it has been relinquished, or the debt satisfied.

#### 4. SAME—ABANDONMENT.

The abandonment need not be in absolute terms. It is enough if it can be inferred from the acts of the parties that the vendor intended to waive his rank in favor of another—to subordinate his claim—in order to secure payment of the latter by preference over himself. What surplus, if any, remains thereafter accrues to the vendor.

(*Syllabus by the Court.*)

Appeal from district court, parish of Ouachita; R. W. RICHARDSON, Judge. On opposition to account.

C. J. & J. S. Boatner, for appellant. *Stubbs & Russell*, for appellee.

BERMUDEZ, C. J. In the distribution of the funds of this succession, the district court disallowed certain advances, which the administrator, in his individual capacity, claims to have made for the working of the plantation of the deceased. The court reduced the amount claimed by the counsel of the administrator for their services in settling the succession, and ordered a mortgage creditor to be first paid out of the proceeds of the property. It, besides, admitted the claim of an opponent which is conceded to be due. The parties aggrieved by this judgment now appear, and complain that it is erroneous.

1. The first complainant is the administrator, in his own name. He charges that the district judge has erred in rejecting his claim for \$244.35, which he had advanced Osborn for taxes, insurance, and notarial fees. The district judge considered that the amount disbursed was not advanced for purposes connected with the cultivation of the crop, and therefore was not secured by privilege. It is not claimed that it is not so; but it is urged that, although the advances were not used for such purposes, they are secured by privilege, as the party advancing cannot be expected to control the disposition of the cash advanced by him for that object. Premitting the question as to what extent the advances of supplies and cash is bound to follow the actual application in order to preserve his privilege, it is sufficient to say that the judge *a quo* disallowed all such as were clearly proved to have been diverted to other than plantation purposes, and that we see no reason to interfere with his finding.

2. The next matter to be considered is the fee of counsel. There was no evidence adduced in support of the amount placed on the account. Possibly, none was necessary under the circumstances of the case. On this subject the district judge says that there appears to have been no litigation except what has arisen on the opposition to this account, which has been provoked by ignoring the Brooks claim, and appropriating proceeds of the plantation to the

Scottish-American Mortgage Company. The net amount realized and proposed to be distributed is \$5,975.71. He accordingly reduced the allowance to \$300. The services rendered in the litigation touching the distribution did not necessarily inure to the benefit of the estate; for of what concern was it to the succession that the mortgage company ranked or not Brooks, the vendor, or that McLain individually was or not entitled to a privilege for the amount of advances which he claimed to have made? We find no error in the conclusion of the district judge.

3. The subject now to be considered is whether Brooks, an opponent, is entitled to be paid the amount which he claims to be due him as vendor, by preference over the mortgage company before alluded to. It appears that Brooks had sold to Osborn the plantation in question for \$6,000, one-third cash, and the rest equally at one and two years; and that, when part of the debt on credit matured, Osborn undertook to borrow from the company a certain sum of money. The company would not agree to make the loan unless payment of it was secured by first rank on the property. Hence a notarial act was executed, in which it is declared that, in order to assist Osborn in raising the money, Brooks authorizes the recorder to cancel and erase his mortgage to the extent of \$2,500, and to enter on his records his waiver of rank in favor of the mortgage company; it being his intention to cancel the same so far as the payment is made, and waive the rank of his mortgage for the balance only in favor of said company, and the owners and holders of the notes. The money raised by the loan was received by Brooks, and the notes which he held credited for as much. The contention now is that, while he waived his mortgage, he did not abandon his privilege as vendor, which exists by operation of law so long as it has not been formally relinquished; and that, as he has done so as to his mortgage only, he ranks, as such, the company. No doubt the authorities are in that sense; but the issue is not one of law, but one of fact, on this subject. It is manifest to our minds, as it was to that of the district judge, that the intention of Brooks was to forego, and that he did give up, whatever incumbrance secured his debt on the property, in order to induce the company to loan the amount which it lent, and which he received. It is no defense to say that he was not paid the \$2,500, but that he received only \$2,239.50. The record shows that he has acknowledged in writing to have received the \$2,500. There is neither charge nor proof that the receipt was fraudulently procured, and it appears to have been his voluntary act. Had he chosen, he might still have received less, and, even without any consideration, have yielded altogether the security in his favor for the payment of his claim. However, as the waiver and subordination were made exclusively in favor of the mortgage company, Brooks would be entitled to receive what would remain of the proceeds after paying what privileged claims are to be satisfied out of them, superadding thereto that of the mortgage company. We understand that the district judge has thus ruled.

4. The claim of Chambliss, an opponent, was allowed below, and is recognized here. It must so remain.

It is therefore ordered and decreed that the judgment appealed from be affirmed, with costs.

(41 La. Ann. 1165)

LOCKHART v. MOREY.

(Supreme Court of Louisiana. June 15, 1888. 40 La. Ann.)

1. MORTGAGE—FORECLOSURE—ADVANCES FOR WORKING THE LAND WHILE IN SHERIFF'S CUSTODY.

A vendor, seizing the plantation securing his claim, has a right to make the advances necessary for the working of the place while in the sheriff's custody, and to oversee it, with the sheriff's consent. In both cases, he is entitled to recover the amount of the advances shown to have been made, and to receive payment for his services.

**2. PLEADING—PETITION—ANNEXED ACCOUNT.**

An account annexed to a petition "for reference" stands as an amplification of the petition, and justifies the admission of proof in support of the items figuring upon it.

(*Syllabus by the Court.*)

Appeal from district court, parish of Madison.

Action by John M. Lockhart against Frank M. Morey to recover for advances made in working defendant's plantation. Defendant appeals from a judgment in favor of plaintiff.

*Stone & Murphy*, for appellant. *C. J. & J. S. Boatner*, for appellee.

BERMUDEZ, C. J. This is a suit for the recovery of \$2,579.71 for advances made in different ways to work defendant's plantation. The defense is that part of the advances consists in the payment of plaintiff's services, and part in unauthorized disbursements. The answer contains charges of misrepresentations by the plaintiff to defendant, in consequence of which the latter claims that he has sustained damages amounting to upwards of \$6,000. From a judgment in favor of plaintiff, and rejecting the reconventional demand, the defendant has appealed. The main complaints seem to be that the plaintiff was allowed \$366.66, for his services as overseer, and \$789.11 for advances for 1887, made without authority. The advances for the difference for 1886 do not appear to be disputed. The record shows that in June, 1886, the plaintiff sold to the defendant the plantation in question, part cash and part on time; and that, by a contemporaneous understanding, the parties agreed that the management of the plantation would be intrusted to the plaintiff until the end of the same year, and that he would make all the necessary advances to raise the crops, and that the proceeds would first be applied to the reimbursement of those advances, and the surplus, if any, would go towards the extinguishment of the unpaid portion of the price of sale. It appears also that early in 1887 the plaintiff caused executory process to issue, under which the plantation passed to the sheriff's keeping, and that, while it was in the custody of the law, the plaintiff, acting under advice of counsel, made the advances required for its management, and to prevent the property from going to ruin and loss. There is nothing to show that the defendant, in any mode, protested against or opposed such administration of his property. The sheriff had a right, nay, was bound, to manage and administer the property, if it required it, and if he could provide for the means to do so. He certainly was under the obligation of performing that duty, where the plaintiff himself was willing to make the advances; and the plaintiff, having done so, is surely entitled to recover them back, with the privilege allowed by law in such cases. To make such advances the plaintiff did not require defendant's authority. He derived the right from the law, for the preservation of the property by which his rights were secured, and, at the same time, for the protection of those of the defendant, as owner, having an interest in a proper keeping of his estate. The advances, made as well during 1886 as 1887, are well established by the testimony adduced on the trial, which also proves the services of the plaintiff as overseer during 1887. The objection to the payment of those services seems to be that the evidence was admitted without an averment in the petition to justify it. This objection is met by the simple statement that the bill or account in which they are set forth is annexed to the petition for reference, in amplification of the amount claimed by the plaintiff. The record shows that numerous objections, made to the admission of some oral testimony, were overruled. They are not urged on appeal, and even then they could not be sustained, for the reason that they went to the effect, and not to the admissibility, of the proof offered to be made. The plea in reconvention is for damages alleged to have resulted from misrepresentations of plaintiff to the defendant, touching the quantity of cane on the land at the time of sale.

On the trial, the defendant has adduced no proof in support of these charges; he has not even offered his own testimony. While the plaintiff was on the stand, some effort was made to establish by him those misrepresentations and certain alleged promises, but without success. The plaintiff, on the contrary, proves that he showed the place to the defendant before the sale, and merely stated to him what had been told him, leaving the defendant to verify and judge for himself before accepting. This view of the matter renders unnecessary any opinion on the bill of exceptions reserved by the defendant to the refusal of the district judge to allow the witness to answer a question touching a promise to reserve 20 acres for planting in 1887; the fact being that subsequently, in the course of his examination, the plaintiff denied the promise, and was not contradicted. A letter of the defendant, to which is attached as "P. S.," shows that he did not dispute the advances for 1886, nay, approved them; and that, while he admits he had no right to expect advances for the following year, he, to some extent, induced the plaintiff to make them. There is a demand for damages for a frivolous appeal, but we do not think that, under the circumstances of this case, it ought to be allowed. Judgment affirmed.

(40 La. Ann. 640)

## MEYER v. LUDELING.

(Supreme Court of Louisiana. June 15, 1888. 40 La. Ann.)

## LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—INTERRUPTION BY ARBITRATION.

A submission to arbitration of the matters embraced in a subsequent litigation, and a suit in affirmance of the award, praying that it be made executory, constitute a legal interruption of prescription.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. RICHARDSON, Judge. Action on accounts by S. Meyer against John T. Ludeling, for goods, wares, and merchandise sold and delivered. Defendant appeals from a judgment in favor of plaintiff.

C. J. & J. S. Boatner, for appellee. John T. Ludeling, pro se.

WATKINS, J. The plaintiff sues upon mercantile accounts for goods, wares, and merchandise furnished him during the years 1884 and 1885. Deducting a credit of \$7,044.45, he claims a balance of \$3,845.02. *In limine* the defendant tendered a plea of three years' prescription against each and every item of the several accounts, and it was separately tried and overruled. The defendant's answer sets up the general issue, and a full settlement of accounts up to and including 1888. He avers that in the spring of 1884 he entered into an agreement with the plaintiff to purchase certain supplies for plantation use from him, under the following terms and conditions, to-wit: Ten per cent. to be added to cost for meat and tobacco, to be paid for at the end of the year. For dry goods and supplies, except meat and tobacco, he was to pay cash; the price to be 10 per cent. added to cost. He avers that in pursuance of said arrangement he had, up to the middle of June, 1884, "settled for all amounts represented by plaintiff to be due for cash purchases," in cash and drafts. That on or about the 24th of June, 1884, he purchased a bill of merchandise, and delivered to him a lot of wool, "to be sold by plaintiff for defendant, and the proceeds of sale applied" thereto; and that no account has been rendered to him thereof, and plaintiff owes him therefor. He then avers "that, notwithstanding the said periodical settlements, plaintiff's accounts erroneously contain charges for articles alleged to have been purchased within the periods for which defendant had settled," and, though requested so to do, plaintiff failed to give him bills of the merchandise from time to time. Complaint is made of "the charges for freight bills," as being erroneous and unauthorized; and he avers that "in all instances [he] reim-

bursed plaintiff, and as soon as he was informed of such payments." He specially avers that the charge of \$15 for peas was reimbursed. The defendant then represents that he delivered to plaintiff, in 1884 and 1885, 277 bales of cotton, of which 265 were sold him, and 12 were consigned for shipment and sale for his account; that in January or February, 1885, he delivered him six additional bales, for which plaintiff has rendered him no account, "nor have the proceeds been credited" to him on account; that in like manner other cottons were delivered to him for sale on account, and of which he has received no return. He avers that plaintiff held the proceeds of the sale of all of said cotton hereinabove described as a special deposit for [him,] and that he owes him for the proceeds, \$12,430.98. for which he prays judgment in reconvention against the plaintiff, with legal interest; and he also prays that plaintiff demands be rejected. After a protracted trial and a full investigation of the accounts of the parties *pro* and *con*, and the vast amount of parol and documentary evidence, the judge *a quo* rendered judgment in favor of plaintiff's for the amount claimed, subject to a credit of \$559.32; and from this judgment the defendant has appealed. In this court the plaintiff and appellee has answered the appeal, and demanded that the judgment be increased in his favor.

1. The first question for us to determine is that of prescription. The date at which prescription *libriande causa* begins to run on open mercantile accounts is at their maturity: that is, at the end of the year in which they are contracted. On this question there is no dispute. This suit was filed, and service of citation made on the defendant in person, on the 3d of January, 1888. Hence all items of indebtedness which were contracted on any date, either in 1883 or 1884, became prescribed on the 31st of December, 1887,—three days antecedent to the service of citation on the defendant,—unless same was interrupted in some of the modes provided by law. Those contracted in 1885 were saved from prescription by this suit. The first point made by plaintiff's counsel is that at different times, and seasonably, the various accounts were rendered to the defendant, and that same were not specifically denied or disavowed by him, and that on that account and in the manner same acquired the character and *status* of "stated accounts," which are only prescribed in 10 years. His petition makes mention of them as "the several accounts \* \* \* for the years 1884, 1885, and 1886." Special mention is made of the \$262 balance of account of 1883 as having been rendered, but no other account. This was a much mooted question on the trial of the plea; and we think a fair preponderance of the evidence shows that such of the accounts as were rendered were disputed, and payment was refused, in part at least. But we are of the opinion that the arbitration proceedings and the suit to enforce the payment of the award of the arbitrators constitute a legal interruption of prescription, and that the current of prescription remained suspended during their pendency. A submission of the identical matters litigated in this suit was made to arbitrators, and they were sworn on the 18th of November, 1886. They made and signed an award on the 8th day of April, 1887. On the 20th of August, 1887, the present plaintiff sued in affirmance of the award, and prayed a judgment rendering it executory. On an exception tendered by the present defendant the judge who tried and decided this cause tried and maintained the exception on the sole ground that the arbitrators failed to make their award within three months, and that the umpire did not appear to have been sworn. The Code provides that a legal interruption of prescription takes place when the debtor "has been cited to appear before a court of justice, \* \* \* whether the suit has been brought before a court of competent jurisdiction or not." Rev. Civil Code, art. 3518. In the case of *Satterley v. Morgan*, 33 La. Ann. 846, this court entered into an extensive examination of adjudicated cases under this article of the Code, and upon most careful consideration held that there is a clear "distinction between the technical sufficiency of a citation

as a basis for the maintenance of proceedings and judgment, and its sufficiency for the purpose of interrupting prescription." The same can be as correctly said of the character of the suit. An arbitration is a covenant by which persons who have a lawsuit or difference with another select arbitrators to decide the matter. Rev. Civil Code, art. 3099. They may submit "a lawsuit already instituted or only in contemplation." Id. art. 3102. "The arbitrators ought to determine as judges, agreeably to the strictness of law." Id. art. 3110. We think it is clear that the proceedings of arbitrations are *quasi* judicial. During the pendency of their proceeding plaintiff's right of action for the enforcement of his demands in the courts was suspended; and hence prescription was suspended, if not interrupted, thereby. The defendant's counsel claims that the plaintiff dismissed his former suit voluntarily, and that he thereby lost the benefit of the interruption, if any was produced thereby. Not so; the judge tried the defendant's exception, and sustained it, and rendered an interlocutory judgment dismissing the suit as of nonsuit, and with a full reservation of plaintiff's right "to sue upon the matters shown in the submission." We are of the opinion that the judge *a quo* correctly overruled defendant's plea of prescription.

2. On the merits, the principal contention of defendant's counsel is that the plaintiff has not introduced a sufficient amount of positive proof to entitle him to judgment. That while it is true that the plaintiff, as a witness, states emphatically that the accounts are correct, yet he, upon cross-examination, admitted that he did not know that of his own personal knowledge, but that he knew that the accounts were drawn from his books, and that they were correctly kept. His contention is that a merchant's books are not evidence in his favor, and hence parol evidence cannot be. This is a *non sequitur*. The testimony of the proprietor that he knows that his books are correctly kept is not proof of their contents, but that their contents are correct. This is certainly competent evidence, if not sufficient, when taken in connection with the books. Now, the accounts are the mere exemplification of the books, and his statement is that the accounts have been correctly kept, to his knowledge. In addition to this, all of these accounts were rendered to the defendant years ago, and, while it is true that he did not remain silent, and thus acquiesce in their correctness, yet he did make only a few objections to some of the items. Those items not objected to were certainly admitted. The quotations we have made from his answer clearly admit that there were dealings between himself and plaintiff in those years. In the spring of 1884 he represents and judicially admits that there was an agreement between himself and the plaintiff, whereunder the latter undertook to furnish him plantation supplies upon certain specified terms. He again states that he settled for all amounts represented by the plaintiff to have been purchased for cash, up to the 24th of June, 1884; that he delivered him a lot of wool for sale, and that the plaintiff had agreed to sell the wool and place the proceeds to his account; that "notwithstanding he had made periodical settlements, plaintiff's accounts erroneously contain charges for articles alleged to have been purchased within the period for which he had settled; that the charges made in the accounts for freights paid, are erroneous and unauthorized. In addition to all these guarded admissions in the defendant's answer, clearly admitting the truth and genuineness of the accounts, with limited exceptions, there is other evidence in the record, which it is unnecessary for us to detail, which serves to fortify and strengthen the conclusion that the district judge has done ample and exact justice in the premises. Among others, one incident may be cited, and that is the award of the arbitrators, which places about the same estimate upon the defendant's indebtedness as the judgment appealed from does. While it was not offered in evidence for the specific purpose, yet it is in the record, and we may give it consideration as a circumstance that may be placed in the scales before striking the balances. But, without any of these circumstances being considered,

the plaintiff's own statement made on cross-examination, in the absence of other testimony, would be ample. It is as follows, viz.: "Question. Did you sell the articles enumerated in your accounts? Answer. I think I did; not all of them myself. Q. Do you know the particular ones you sold? A. Not the specific articles. Q. Do you know of your own knowledge that they were sold? A. I saw the majority of them sold." These statements are corroborated by the evidence of Herman Meyer and Solomon Meyer. The latter states emphatically that he delivered these accounts to the defendant, and that he made no objection to them at that time or subsequently. Altogether we are of opinion that the accounts are substantially proven, and that the credit allowed defendant, in addition to the credit of \$7,044.45 allowed by the plaintiff on the face of the account, and before suit, is all that he is entitled to. Judgment affirmed.

(40 La. Ann. 645)

LUDELING v. CHAFFE *et al.*

(Supreme Court of Louisiana. June 15, 1888. 40 La. Ann.)

1. JUDGMENT—EFFECT—RES ADJUDICATA.

Where plaintiff has brought a hypothecary action against a third possessor for the recognition of his mortgage on property held by the latter, and for a decree that the property be sold to satisfy the same, and has recovered contradictory judgment to that effect, which has become final, and has issued execution thereon, said judgment is *res judicata*, as to all antecedent matters which he urged or might have urged as defenses in said suit, and he cannot set them up again as grounds for an injunction against the execution of the judgment.

2. SAME—COLLATERAL ATTACK.

When a judgment of revival of a judgment against a bankrupt debtor has been rendered contradictorily with the assignee in bankruptcy who has been cited and has answered, such judgment cannot be treated by a third person as an absolute nullity, and collaterally attacked, without any action or prayer to annul it. The propriety of such a proceeding finds countenance in several decisions of this court, and presents a grave question, which it is to be assumed was considered and passed upon by the judge who rendered the judgment.

3. EXECUTION SALE—IRREGULARITIES—COMPENSATION FOR IMPROVEMENTS.

Other questions considered and determined.

(Syllabus by the Court.)

Appeal from district parish of Ouachita; R. W. RICHARDSON, Judge.

John T. Ludeling, for appellant. Stubbs & Russell and C. J. & J. S. Boatner, for appellee.

FENNER, J. This is an injunction suit to restrain the execution of a judgment rendered against plaintiff, and affirmed by this court, in a certain suit entitled *Chaffe v. Ludeling*, reported 34 La. Ann. 962. J. & C. Chaffe were the recorded judgment creditors of Mrs. E. C. Warfield, and the suit just referred to was a hypothecary action brought against Ludeling as third possessor of certain property claimed to be subject to their judicial mortgages, and judgment was asked recognizing their mortgage on the said property, and decreeing it to be sold in satisfaction thereof. Defendant interposed a plea of discussion and other defenses, which were overruled for reasons given in the opinion, and judgment was rendered recognizing the mortgage, and condemning Ludeling "either to pay the judgment, with the costs hereof, or to give up the land to be sold therefor." This judgment was affirmed by this court. It is too obvious to admit of serious discussion that this judgment absolutely and finally settled, as between the Chaffes and Ludeling, the right of the former to require Ludeling to pay off their mortgage debt, or to sell the land for the satisfaction thereof. Ludeling has had his day in court on this issue, and was bound to urge all his defenses, and his mouth is closed as to all matters antecedent to the judgment which he urged, or might have urged, against its rendition. In his present petition for injunction he sets up a multitude of matters, which were either pleaded or might have been pleaded, as grounds for

denying or qualifying the above absolute judgment, as to all of which the judge *a quo* sustained the plea of *res judicata*, and we consider his ruling to be clearly correct. The plaintiff, however, assigns other grounds for his injunction, arising subsequently to the judgment, which require consideration.

2. He pleads that the judgment of Chaffes against Warfield, the record of which is the basis of their mortgage on his property, is pre-empted and prescribed. Unless it is prescribed, there is no foundation for the plea of pre-emption; the reinscription having been seasonably made. The question of prescription depends upon the validity and effect of the proceedings taken by the Chaffes to revive their judgment against Warfield. These proceedings were taken in proper season, before the lapse of 10 years from the rendition of the judgment. Article 3547, Civil Code, provides: "All judgments for money shall be prescribed by the lapse of 10 years from the rendition of such judgments: provided, however, that any party interested in any judgment may have same revived at any time before it is prescribed, by having a citation issued, according to law, to the defendant, or his representative, from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived; and if such defendant be absent, and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served. Any judgment revived as above provided shall continue in full force from the date of the order of court reviving the same," etc. The defendant Mrs. Warfield had removed from the state, and died, and had no heirs resident in the state, or property situated therein. Prior to her death, she had made a surrender in bankruptcy, and her assignee in bankruptcy was still in office, having never been discharged. In their petition for revival, the Chaffes represented the death and bankruptcy of Mrs. Warfield, and the non-residence of her heirs; alleged that W. T. Atkins had qualified as assignee of her estate, and had never been discharged; set forth the non-residence of her heirs; and prayed that, "if they were in any sense her representatives," a curator *ad hoc* should be appointed to represent them; asked that the assignee and the curator should be cited, and for judgment reviving the judgment. A curator was accordingly appointed. Atkins, the assignee, was duly cited, and appeared and filed answer. The curator accepted service of the petition, and waived citation, but appeared and filed answer. On issue thus joined, the court regularly tried the case, and rendered a judgment of revival, which is now final. The plaintiff in injunction has never brought suit to annul this judgment. Even in his present action, he has offered no prayer to have the judgment annulled, nor has he brought in any of the parties thereto except the present defendants. He simply treats it as an absolute nullity for want of citation. It is indubitably true that a judgment rendered without citation is a nullity, so absolute that it may be invoked in any proceeding, and by any one interested. But here, so far as the assignee is concerned, there was a perfect citation, followed by appearance and answer. The petition advised the court of the grounds on which it was claimed that such assignee was the proper representative of the judgment debtor contradictorily with whom the proceeding in revival should be carried on. It may be assumed that the court, in rendering its judgment, considered and determined that he was the proper representative of the judgment debtor. The question as to his capacity to represent the bankrupt debtor in such proceeding is, under the jurisprudence of this court, to say the least, a doubtful one. In the case of *Alter v. Nelson*, 27 La. Ann. 242, which was a suit to revive a judgment against a bankrupt, it was held that the citation of the latter was unavailing, and certainly suggested as the only alternative that the assignee was the proper party. In *Wheelless v. Fisk*, 28 La. Ann. 731, where bankruptcy occurred pending a suspensive appeal, it was held that plaintiff had a right to proceed in order to preserve his right against

the surety on the appeal-bond, and the court of its own motion ordered the assignee to be made a party, and rendered judgment contradictorily with him. *Serra v. Hoffman*, 29 La. Ann. 17, was precisely similar to the last, and it was held that the assignee could not be made a party. *Chapman v. Nelson*, 31 La. Ann. 341, certainly says that the assignee is not a necessary or proper party in a proceeding to revive a judgment against a bankrupt, but the *dicta* on that point were *obiter*, because the case went off on the question of jurisdiction of the court. In the case of *Grayson's Ex'r v. Norton*, later than the foregoing, the proceeding was to revive a judgment against a bankrupt by citation of the assignee alone. It was first held that it could not be done, but on rehearing, on the ground of *stare decisis*, it was held that the proceeding was proper and valid. Manning's Unreported Cases, 187. In the case of *Grayson's Ex'r v. Norton*, 33 La. Ann. 1018, we quoted at length from the last-mentioned decision, and indicated our approval of it, when the assignee was still in office, but held it could not apply when the assignee had been discharged. Finally, in a very recent case, which was also an action to revive, we said, on the foregoing authorities: "We think the assignee was properly made a party to the action, and the only one that could represent the bankrupt debtor or his estate." *Stackhouse v. Zuntz*, 36 La. Ann. 529. If there be error in these decisions, it is one which originated long ago, and which has been perpetuated on the ground of *stare decisis*, to protect parties who have acted upon this jurisprudence as a means of saving their judgments from destruction by prescription. The question involves nothing but a method of proceeding in order to interrupt prescription, which is subject to the arbitrary control of the legislature, and no class of cases invokes so strongly the application of *stare decisis*. In a proper case we might review them, and might consider the distinction between bankrupts who have secured their discharge and those who have not; though the bankrupt who does not plead his discharge is just as amenable to suit as if undischarged, and in several of the cases the bankrupt had not been cited at all. At all events, and without finally committing ourselves on all these questions, it is obvious that the judgment of revival here invoked is not infected with any nullity so absolute as to authorize it to be questioned by a third person in this collateral way; but that its validity depends on a grave question of proceeding, the propriety of which seems to be sanctioned by the judgment itself. This obviates the necessity of considering the validity of the proceeding, as against the curator, under his waiver of citation. The defense of prescription was therefore properly overruled.

2. The objections as to the form of the execution, and the failure of the sheriff to advertise the sale in the paper suggested by the defendant in execution, have been elaborately considered by the judge *a quo*, and we consider his reasons for disregarding them sufficient. The defendants in this case are not responsible for the sheriff's default in the matter of the advertisement, and it may be corrected in the future proceeding, which will be necessary. Had it been the sole ground of the injunction, it would doubtless have been corrected as soon as suggested.

3. Plaintiff claims credit for the enhanced value of the property arising from the improvements made, not only by himself, but by his immediate vendor, the succession of Dinkgrave, his warrantor. He has already recovered judgment against his warrantor for the full price paid by him, which naturally includes the value of the improvements made at the date of the sale. He certainly cannot claim the value of Dinkgrave's improvements out of the sale, and, at the same time, hold a personal judgment against his succession for the same value. He may subject this value to his uncollected judgment against Dinkgrave, but he cannot directly claim it. The whole of this claim should have been asserted against the proceeds of sale, and had no place in this injunction suit, but the judge *a quo* recognized plaintiff's claim

to the value of his own improvements, and, as no amendment is asked in that respect, it must stand. Defendants' prayer for an amendment, allowing them a judgment for rents and revenues, has no foundation in the pleadings, and cannot be allowed in this proceeding. Nor do we think it proper to amend the judgment as to damages. Judgment affirmed.

(84 Ala. 586)

BRUNSON *et al.* v. MORGAN *et al.*

(Supreme Court of Alabama. June 13, 1883.)

## 1. MORTGAGES—FORECLOSURE—RIGHTS OF PURCHASER.

Where a trustee who had sold lands under a power of sale contained in a mortgage, the mortgagee being purchaser, did not execute a deed to such purchaser, but subsequently transferred the mortgage, with all his rights thereunder, to a grantee of such purchaser, and the mortgagor acquiesced in the sale for about 14 years, such grantee succeeds to all the rights and equities of the mortgagee, and is entitled to a decree vesting in him whatever legal estate remained in the mortgagors.

## 2. SAME—PARTNERSHIP.

A firm of which defendant was a member conveyed lands, purchased and held as partnership property, by the firm name; defendant receiving his portion of the purchase money. *Held*, that one claiming under such conveyance was entitled to a decree vesting in him whatever estate defendant might have in the lands.<sup>1</sup>

## 3. SAME—PARTIES.

In a suit to obtain such decree, it appeared that a firm which previously owned such land had mortgaged the same, one member of the firm not signing, but joining in the making of the mortgage; that the mortgage had been foreclosed, plaintiff claiming through the latter firm under such foreclosure. *Held*, that such member was a proper party to the action, as whatever legal title he had in the land was not divested, he not having signed the mortgage, and plaintiff was entitled to a decree vesting the same in himself.

## 4. LANDLORD AND TENANT—ESTOPPEL TO DENY LANDLORD'S TITLE.

After foreclosure of a mortgage executed by a firm, a member of the firm went into possession of the property as tenant of a grantee of the purchaser at foreclosure sale. *Held*, that such tenant could not avail himself of the defense of adverse possession as against a grantee of his landlord.

Appeal from chancery court, Pike county; THOMAS W. COLEMAN, Chancellor.

This was a bill filed by the appellees, Sally Morgan, M. L. Morgan, her husband, and Silas Brunson, against Matthew Brunson and C. S. Lee, to have all the title to a certain tract of land described in the bill divested out of the defendants, and invested in the complainants. The defendants demurred to the bill on the ground of misjoinder of parties defendant. The chancellor overruled said demurrer, and the defendant Brunson pleaded title to the land in controversy by adverse possession, while a decree *pro confesso* was taken against the defendant Lee. On final hearing, the chancellor decreed that the complainants should have the relief prayed for, and that all title to the land in controversy be divested out of said Matthew Brunson and C. S. Lee, the defendants, and be vested in the complainants. The defendants appealed, and now assign the ruling of the chancellor on the demurrers, and his final decree, as error.

*Gardner & Wiley*, for appellants.

CLOPTON, J. The only defense set up by Matthew Brunson is adverse possession and claim of ownership under a parol gift of the lands by his father, Matthew Brunson, Sr., in 1865. In March, 1871, M. & S. Brunson, a firm composed of Matthew Brunson and Silas Brunson, who is one of the complainants, with Matthew Brunson, Sr., executed a mortgage, which included the land in controversy, to M. H. Amerine as trustee, to secure a note

<sup>1</sup>As to real property owned by partnerships, and the rights of purchasers thereof, see *Roberts v. Eldred*, (Cal.) 15 Pac. Rep. 16, and note; *Davis v. Smith*, (Ala.) 3 South. Rep. 697, and note.

which M. & S. Brunson gave to Gary & Hudson, payable October 1, 1871. Matthew Brunson, though he did not sign the mortgage, joined in making it, as is shown by his own evidence. By its terms the mortgagors covenanted and agreed that, until the note is paid, they would hold the property as tenants of the trustee. Without this stipulation, the mortgagors did not hold adversely to the mortgagees, and do not, especially when they admit in the mortgage that they are in possession as tenants of the trustee. On January 30, 1872, the trustee sold the lands under a power of sale contained in the mortgage, and Gary & Hudson became the purchasers, but no deed to them was executed by the trustee. A foreclosure under a power of sale cut off the equity of redemption as effectually as a foreclosure by a decree of a court of equity; and, the validity of the sale not having been impeached, the purchasers are entitled to have vested in them whatever legal title and estate was in the mortgagors, who acquiesced in the sale until the bill was filed, about 14 years thereafter. Gary & Hudson, in February, 1872, sold and transferred the lands to Stoudenmire & Co., and the trustee transferred to them the mortgage, with all the rights, powers, and privileges in him vested. By the sale and transfer, Stoudenmire & Co. succeeded to all the rights and equities of the mortgagees and purchasers at the mortgage sale. By the sale and conveyance of Stoudenmire & Co., in November, 1881, to Silas Brunson, and of Silas Brunson, in January, 1882, to Sally Morgan, one of the complainants, the latter succeeded to all the rights and equities of Silas Brunson, who succeeded to all the rights and equities of Stoudenmire & Co. After the sale of the lands to Stoudenmire & Co., Matthew Brunson went into possession as their tenant, and in recognition of their title. Under these circumstances, he cannot avail himself of the defense of adverse possession. Not having signed the mortgage to Amerine, the legal title, if he had any, did not pass out of him thereby. The complainants have a right to have whatever title and estate is in him divested, and for this purpose he is a necessary party. Charles S. Lee, the other defendant, was a member of the firm of Stoudenmire & Co. The conveyance of Silas Brunson was executed in the firm name. The bill alleges that the lands were purchased and held by them as partnership property, and that Lee received his portion of the purchase money. By suffering a decree *pro confesso* to be taken against him, he admitted the allegations of the bill. On these allegations, complainants are entitled to have whatever title and estate is in him divested, and vested in them. Affirmed.

(84 Ala. 367)

ALLEN v. ALLEN.

(Supreme Court of Alabama. June 12, 1883.)

1. DIVORCE—ABANDONMENT—EVIDENCE.

In an action for divorce, plaintiff's evidence tended to show that she left defendant, two years before filing her bill, "for abuse and threatening her life;" and, as establishing that she tried to return to him, she showed that on one occasion she, with others, went to defendant's house, and he refused to admit them. The evidence on the part of defendant tended to show that plaintiff was made to leave him by the influence of others, particularly her mother, who was always trying to make trouble between them; that he was never unkind to plaintiff, never threatened or used violence towards her; that on one occasion they had a slight misunderstanding, lasting about two weeks, but this was passed over; that he had offered all sorts of inducements to get her to return, but she had refused, saying she would never live with him again; that she had never returned to his house but once since leaving, and then in company with her mother and others, with a load of furniture which they said they wanted to put in the house, and he had refused to admit them. Held, that a decree granting plaintiff a divorce was not warranted by the evidence, and would be reversed.<sup>1</sup>

<sup>1</sup>Respecting cruelty as a ground for divorce, see *Mercer v. Mercer*, (Ind.) 17 N. E. Rep. 182, and cases cited in note.

**2. SAME—REMOVAL OF HUSBAND AS TRUSTEE OF WIFE'S ESTATE.**

In such action, it appeared that the husband was trustee for his wife's separate estate, and her bill charged him with unfitness for the trust, and prayed his removal. There were no children of the marriage; and the separation, from the nature of the breach, was likely to remain permanent. *Held*, that a decree removing the trustee would not be reversed.

Appeal from chancery court, Lamar county; THOMAS COBBS, Chancellor.

This bill was filed by the appellee, Belle Allen, by her next friend, against the appellant, R. T. Allen, and sought to have the bonds of matrimony severed, and have the complainant declared divorced therefrom. The complainant alleged in her bill, as the cause of the filing of the bill and for the divorce, her abandonment by her husband for the two years next preceding the filing of the bill, and bad treatment at his hands. The defendant, in his answer, denied the charge of abandonment and mistreatment, and sets up his abandonment by complainant. The evidence for the complainant tended to show that she left the defendant two years before the filing of the bill; that the cause of her leaving him was "for abuse and threatening her life;" and there was some effort to prove that she tried to go back to him, by showing that on one occasion she, with others, went to the house of the defendant, and that he would not let them come in. The testimony on the part of the defendant tended to prove that the complainant was made to leave the defendant by the influence of others, (her mother;) that he was never unkind to her in his life; always treated her as kindly and considerately as he possibly could; that they had, on one occasion, a little misunderstanding, which lasted about two weeks, but that was soon over with; that the mother of the complainant was always trying to raise a fuss between them; that he had never threatened her life, or used any acts of violence to her in his life; that, when the complainant left the house of the defendant, he was down in his field working and did not know anything of it until he came to the house; that he tried often and often to get her to return, and live with him as his wife; that he offered all sorts of inducements to her, but that she stubbornly refused, and said that she had "no words for him, and was never going to live with him again;" that the complainant never came to his house but once, and that was when she came, in company with her mother and several men, on a wagon having a load of furniture on it, and they told him that they had come to put that furniture in his house, and that he would not let any of them come in; but that he has always been anxious to make up with his wife, and again to live together as man and wife. Upon the evidence as thus testified to, the chancellor decreed that the complainant have the relief prayed for; that she be divorced from her marriage bonds with the defendant; and that he be removed from the trusteeship of the separate estate of the wife, the complainant. Whereupon the defendant appealed, and here assigns this decree of the chancellor as error.

*Watts & Son*, for appellant.

STONE, C. J. The present suit is an application for divorce, filed by the appellee, charging abandonment by appellant, her husband, for two years next preceding the filing of her bill, January 8, 1885. The answer denies the charge of abandonment, and sets up in defense that complainant abandoned him. Many witnesses were examined, but the proof is very unsatisfactory. Much, if not most, of the testimony bears on its face unmistakable evidence that it is either hearsay or mere opinion. There is no proof that defendant abandoned complainant, while there is proof that complainant abandoned defendant. She charges in her bill that she was driven from home by her husband's violence; but there is no proof of a single fact that goes to sustain this charge. Quitting her husband on "account of abuse" is not such proof as judicial action can be based on. A feeble effort was made to prove that the wife offered to return, and renew conjugal relations, and that he repulsed and refused to receive her. The proof utterly fails to sustain this aspect of the

case, or to show any real disposition on the part of the wife to resume the relation and duties of a wife. If the facts existed, they are not proved. The result of what is stated above is that the complainant, Mrs. Allen, has entirely failed to establish her right to a divorce; and the decree of the chancellor, to that extent, must be reversed, and a decree here rendered dismissing that feature of her bill. What we have said above is rested on the weakness of complainant's proof, and not on any particular merit shown on defendant's part. There is such a meager presentation of facts that we are compelled to own that we know but little of the merits of the quarrel. There are no children of the marriage; and, from the nature of the breach, the separation is probably permanent. When the bill was filed, the husband was trustee of the wife's separate estate. The bill charged him with unfitness for the trust, and prayed his removal from it. This the chancellor granted, and there is not enough in the record to satisfy us that he erred in this. *Boaz v. Boaz*, 36 Ala. 334; *Kraft v. Lohman*, 79 Ala. 323. The decree granting divorce is reversed, and the bill, as to that feature, is dismissed, without prejudice. In the other relief granted, the decree is affirmed. Let the costs of suit in the court below, and the costs of appeal, be paid equally by appellant and by appellee's next friend.

(84 Ala. 68)

EVANS v. DAUGHTRY *et al.*

(Supreme Court of Alabama. March 23, 1888.)

## PRINCIPAL AND SURETY—CONDITIONAL EXECUTION OF BOND—ESTOPPEL.

One who signs a guardian's bond as surety upon condition that he shall not be liable unless certain other parties sign, is not estopped from showing such condition by the fact that he has permitted the guardian to obtain the appointment, and act under it; it not being shown that he knew of the appointment until a short time before the guardian's settlement, when he took prompt steps to avert injury resulting from the use of his name.<sup>1</sup>

Appeal from probate court, Bullock county; S. T. FRAZER, Judge.

This was a motion in the form of a petition by F. V. Evans for an order to supersede the execution of a decree rendered by the probate court against one W. N. Raney, as guardian of E. R. Daughtry, formerly E. R. Raney, on the final settlement of the guardianship of the said Raney. The petition further prayed that the decree be vacated as to Evans, who was one of the securities on the guardian bond of Raney, and as such surety the decree was rendered against him, together with the other sureties and Raney himself. Evans signed the bond conditionally, as appears from the facts stated in the opinion, and, for the reasons which sufficiently appear from the opinion, sought to have the decree as to him vacated. The probate court overruled the motion of Evans, and he thereupon appealed.

*W. F. Foster*, for appellant. *Norman & Son*, for appellees.

STONE, C. J. There is no conflict in the testimony in this case. It fully proves that Evans signed the bond conditionally, and left it with Raney, his principal, with the understanding and instruction that he was not to become a surety on the bond unless Pearson and Scott became co-sureties with him. In other words, it was left with him as an escrow. Neither Pearson nor Scott signed the bond, and it results, if there is nothing else in the transaction, that Evans is not bound as a surety on the bond. *Bibb v. Reid*, 3 Ala. 88; *Guild*

<sup>1</sup>As to the effect upon the obligation of a surety of the delivery of a bond, signed conditionally, before the performance of the condition, see *Taylor Co. v. King*, (Iowa,) 34 N. W. Rep. 774, and note; *Wager v. Huntington*, (Minn.) Id. 745.

Sureties have a right to stand on the strict terms of their obligation. *Plow Co. v. Walsley*, (Ind.) 11 N. E. Rep. 283, and note; *Bowers v. Cobb*, 81 Fed. Rep. 678; *Graster v. De Wolf*, (Ind.) 18 N. E. Rep. 111; *Bank v. Gerke*, (Md.) 18 Atl. Rep. 358; *Spurgeon v. Smitha*, (Ind.) 17 N. E. Rep. 105.

v. *Thomas*, 54 Ala. 414; *Marks v. Bank*, 79 Ala. 550; *Smith v. Kirkland*, 81 Ala. 345, 1 South. Rep. 276. The court below found as fact that Evans did sign on the condition claimed. It was contended in the probate court, and the court so ruled, that Evans, by permitting Raney to obtain the appointment of guardian on said bond, and to act under it, had estopped himself to deny his liability as surety. *Wright v. Lang*, 66 Ala. 389, is relied on as supporting this view. The principle is certainly sound if the facts justify its application to this case. To make this principle applicable, however, it must be shown that the party sought to be estopped had knowledge that his confidence had been abused, or had notice of some suggestive fact which, if followed up, would have led to such knowledge. *Machins Co. v. Ashley*, 60 Ala. 496; *Burns v. Campbell*, 71 Ala. 271; *Herring v. Skaggs*, 73 Ala. 446. The testimony in this case, if believed, shows that Evans took prompt measures to avert any injury that might result from an improper use of his name. There is no testimony that he even knew that Raney had been appointed guardian until shortly before the latter was brought to settlement; nor is there proof of fact or circumstance which made it his duty to inquire. If any such facts existed, they are not proved. Under the facts as shown in the record, Evans is entitled to have the execution so modified as to strike his name therefrom, and to be discharged from all liability as one of the sureties. Reversed and remanded.

(84 Ala. 499)

**CAMPBELL et ux. v. LARMORE et al.**

(*Supreme Court of Alabama. June 13, 1888.*)

**1. EVIDENCE—PROOF OF EXECUTION OF WRITING SUED ON—WHEN NECESSARY.**

Under Code Ala. 1886, § 2770, providing that every written instrument, the foundation of a suit, purporting to be signed by defendant, his agent, etc., must be received in evidence without proof of the execution, unless the execution is denied by plea, etc., testimony by a defendant that, when he signed a contract sued on, he also signed another paper, and delivered the two to a third person to be fastened together and delivered together, is not admissible, except under a plea denying the legal execution of the instrument declared on, as such testimony tends to show only an authority to deliver both papers together, and the delivery of only one would not be a legal execution.

**2. DESCENT AND DISTRIBUTION—ADJUSTMENT OF ADVANCES—CONSIDERATION.**

An agreement by one of several heirs and her husband, to accept from the other heirs a certain sum in full settlement of the question of advances made by the ancestor, and to forbear litigation for the same, is a sufficient consideration for an agreement by the other heirs to pay such sum.

**3. CONTRACT—EXECUTION—FAILURE TO READ—ESTOPPEL TO DENY SIGNATURE.**

The fact that a person signed a contract without reading it is no defense to an action thereon.<sup>1</sup>

Appeal from circuit court, De Kalb county; JOHN B. TALLY, Judge.

The charge referred to in the opinion was given by the court at the request of the defendants, and was as follows: "The court charges the jury that, if they believe all the evidence, their verdict must be in favor of the defendants." The plaintiffs excepted to the giving of this charge by the court, and assign the giving of it as error. Code Ala. 1886, § 2770, provides that every written instrument, the foundation of a suit, purporting to be signed by defendant, his agent, attorney, etc., must be received in evidence without proof of the execution, unless the execution is denied by a plea, etc.

*Dobbs & Howard*, for appellants.

STONE, C. J. V. C. Larmore died, leaving an estate of which H. B. Campbell became the administrator. The administration is still unsettled, so far as the record informs us, and the value of the estate is not shown. The chil-

<sup>1</sup>See, also, *Taylor v. Fleckenstein*, 30 Fed. Rep. 99, and note; *Association v. Esche*, (Cal.) 17 Pac. Rep. 675, and note.

dren of the decedent, as the agreement after shown tends to show, are seven in number, of whom Mrs. Campbell, Mrs. Nicholson, and Mrs. Garrett are married women. On February 22, 1886, a written agreement was drawn up, containing in the body of it the names of the seven children, and the names of the husbands of the married daughters. All of said persons, except Sarah B. Campbell and her husband, Henry B. Campbell, are called parties of the first part, and Mrs. Campbell and her husband, parties of the second part. Said agreement recites that the said V. C. Larmore in his life-time "made certain advances [advancements] to his said children; and whereas, there is an inequality in the advances made by the said V. C. Larmore in his life-time, in this, that he lacked the sum of nine hundred dollars giving the said Sarah E. Campbell as much as the rest of the children, now, therefore, for the purpose of settling the question of advances between the parties to this agreement, or such of the contracting parties as enter into this agreement, they do agree as follows: (1) That the said Sarah E. Campbell is to be made equal in property to the other children, the parties signing this agreement as parties of the first part hereby agreeing and binding themselves to see that she is made equal by them paying an amount to be agreed on, not to be less than enough to make her equal to, or to receive as much as the other parties have received; and, in consideration of this, she and her husband hereby agree to accept the same in full settlement of the question of advances, and to not litigate for the same." This agreement was signed by C. T. Larmore, T. J. Larmore, J. A. Garrett, L. J. Garrett, E. P. Nicholson, M. M. Nicholson, S. E. Campbell, R. B. Campbell. Two names found in the body, O. J. Larmore and Sam G. Larmore, are not signed to the agreement. The present suit was brought by Campbell and wife against all the other signers of said agreement, and was commenced April 9, 1886. It seeks to recover said \$900, with interest. Garrett and wife neither pleaded nor made defense. The others pleaded the general issue.

There was some oral testimony as to the circumstance attending the signatures of T. J. Larmore and E. P. Nicholson to the agreement. Larmore testified that he signed the paper without reading it. This, if true, was no defense for him. He ought to have read it; and, failing to do so, he must take the consequences. *Blum v. Mitchell*, 59 Ala. 535; *Gostter v. Pickett*, 61 Ala. 387. The testimony of Nicholson was that he signed two papers, and delivered them to Garrett; the two to be fastened together, and delivered to Campbell. The additional paper he testifies to have so signed, is utterly repugnant to the agreement declared on. The one may tend to nullify, but it cannot explain, the other. Any attempt to construe them together would be an absurdity. Garrett's testimony contradicts Nicholson's. He testified that Nicholson and his wife signed the second paper, and gave it to him to be delivered to Campbell, which he did. He testified, not that this paper was intended as a qualification of the contract declared on, but as a substitute, which Nicholson preferred to have as the evidence and terms of the compromise. Campbell refused to accept the substitute offered, and threw it away. The only point of view in which Nicholson's testimony could be material would be its tendency to prove that, when he (Nicholson) delivered the agreement to Garrett to be delivered to Campbell, he also delivered the other paper, signed by himself and wife, to be attached to and delivered with the main paper. This, giving it full effect, could only tend to show that Garrett was only authorized to deliver the papers attached together as one, and that he had no authority to deliver the one without the other. He and Garrett being at issue on this point, it was a question for the jury, if there had been a proper plea to raise it. It presented the question of delivery as an escrow, which, if believed, defeats the delivery, and destroys its execution as a legal, binding executed instrument, unless there has been a performance of the condition on which the delivery is authorized to be made. *Evans v. Daughtry*, ante, 592. The defense referred to in the last paragraph above can be made only under a sworn

plea, general or special, denying the legal execution of the instrument declared on. Code 1886, § 2770. There being no such plea in the present record, Nicholson's testimony was illegal.

The contract sued on in this case shows on its face a sufficient consideration to uphold it. *Allen v. Prater*, 35 Ala. 169; *Bozeman v. Rushing*, 51 Ala. 529; *Lee v. Sims*, 65 Ala. 248; 1 Pars. Cont. (7th Ed.) bottom page 468; Bish. Cont. (enlarged Ed.) § 57; 1 Wait, Act. & Def. 95. So we think an action for money may be maintained upon it, and a recovery had for the same, "not to be less than enough to make her equal to, or to receive as much, as the other parties have received." This the parties of the first part bound themselves to see done, "by their paying" such amount. The minimum sum being agreed on, and the plaintiffs claiming nothing in excess of it, the words of the contract, "to be agreed on," have no field of operation. The amount, however, would not be \$900. One-seventh of that sum would be Mrs. Campbell's part of the loss. Six-sevenths of the sum, with interest from the date of the contract, is the extreme of her right of recovery from her co-distributors if she is successful. More than this would place her in excess of what will have been left with them after making good her deficiency. The contract declared on is a strange one, and, altogether, it is difficult to conceive a motive for entering into it, in the form in which it is expressed. Our duty, however, is to interpret and enforce, not to make, contracts for parties. The charge of the court is opposed to the views set forth above. Reversed and remanded.

(35 Ala. 38)

**STEVENSON et al. v. MOODY et al.**

(Supreme Court of Alabama. June 28, 1888.)

**EVIDENCE—RECORD—DECLARATION OF EXEMPTIONS.**

In ejectment by one tenant in common against another, defendant alleging an agreement of partition, the original book from the probate clerk's office of the record of declarations of exemptions containing such declaration of plaintiff, purporting to be sworn to, and the affidavit, but not the declaration, being subscribed by plaintiff, such affidavit and record being required by Code Ala. 1886, §§ 2515, (2828,) and 2516, (2829,) is admissible to prove such partition, its genuineness and identity being unquestioned; and such evidence is of equal dignity with a certified transcript of such record. Reversing 3 South. Rep. 695. CLOROX, J., dissenting.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

On rehearing. For statement of facts, see former opinion, 3 South. Rep. 695. P. O. Harper, for appellants. M. N. Carlisle, for appellees.

STONE, C. J. On February 15, 1888, we announced a decision in this cause, affirming the judgment of the circuit court. That case, with the opinion of this court affirming it, is reported in 33 Ala. 418, 3 South. Rep. 695. We have since reconsidered the case, and have taken back the opinion. We, in that opinion, said: "The declaration of exemptions would have been admissible in evidence as an admission of Jane Moody, one of the plaintiffs, that she adopted and acted upon the alleged partition, and claimed the lands allotted to her, if proof had been made that she signed or verified the declaration, or a properly certified transcript of the record of the probate court had been offered." We then announced that the record failed "to show that such proof was made or proposed, or that such transcript was offered." It is thus seen that we impliedly said that, if it had appeared that Mrs. Moody signed and verified the claim of exemptions, it would have been competent evidence against her; or a certified transcript from the probate court would equally have been legal evidence. Looking more narrowly into the transcript, we find that the claim of exemptions offered purports on its face to have been signed by Mrs. Moody. True, her name is not signed at the foot of the description of the property claimed, but it is signed to the affidavit which asserts and verifies the claim. There was then attached the official certificate

of the clerk of the probate court that Mrs. Jane Moody personally appeared before him, etc., and that said claim of exemptions was "sworn to and subscribed before" him, giving the date and his official signature; and this was recorded in the "record of exemptions of probate court of Pike county." Now, the affidavit to the claim of exemptions, and the registration of the claim in the probate office in a book kept for that purpose, are each provided for by law. Code 1886, §§ 2515, (2828,) 2516, (2829.) Being provided for by law, they are official acts, and import verity; and certified or authenticated copies of them are evidence. Code 1886, § 2788; *Dudley v. Chilton Co.*, 66 Ala. 593. The record statement of the evidence offered and rejected in this case is in the following language: "The defendants offered the following declaration of exemption of Jane Moody from the record of exemptions of probate court of Pike county, and which court refused to admit, and to which defendant duly excepted." No ground is stated on which the court's ruling was based. Under this language, we do not think we are permitted to indulge the presumption that any question was raised as to the identity or genuineness of the book offered. If that had been the ground, would not the language of the bill of exceptions have been that they offered what purported to be the record of exemptions? The language of the bill of exceptions is, that they offered "the following declaration of exemption of Jane Moody, from the record of exemptions," etc. Is not this an assertion that the document offered was the declaration of Jane Moody, that it had been recorded, and the offer was from the record of it? In other words, that they offered to prove it by the book of records? We think the bill of exception precludes the inference that the objection was to the form in which the offer was made. But if the objection had been that the original record had been offered, instead of an examined or certified copy,—we mean the record admitted, or proved to be the record required to be made,—we are at a loss to perceive how a copy taken from the record can be higher or more reliable evidence than the record from which it is taken. We understand the rule of this state to have been long settled that the original record-book, proven or admitted to be such, is original evidence,—as much so as a certified copy of it can be. *Lauson v. Orear*, 4 Ala. 156; *Carville v. House*, 6 Ala. 710; *Müller v. Boykin*, 70 Ala. 469; *Williams v. State*, 68 Ala. 551. We do not intend to be understood as affirming that one court, except in special cases, can compel another court to surrender its record for inspection or for use as evidence. All we decide is that when such record is thus produced, and admitted or proved to be what it purports to be, it becomes evidence of equal dignity with a certified copy of the same. Nor is it our intention to question or overturn *Ansley v. Carlos*, 9 Ala. 973, and cases which followed it. 1 Brick. Dig. 829, § 348. Charge 3 asked by defendants ought to have been given, but its refusal was not separately excepted to. Reversed and remanded.

CLOPTON, J., (*dissenting*.) It was not intended, in the former opinion, to gainsay the rule that the record-book, when proved or admitted, is receivable in evidence whenever a certified transcript therefrom is competent, though it is susceptible of such construction, not having been as clearly and explicitly expressed as it should have been. What we intended to say was that the declaration of exemptions was not competent evidence of an admission of the alleged partition, whether the original paper or original record or an authenticated transcript was used, without preliminary proof of its execution or verification by Mrs. Moody, or connecting her with it in some way; as by its use, or being instrumental in having it recorded. I dissent from the construction of the statute (section 2788, Code 1886) under which its effect is to make a certified or authenticated transcript from the book in which the law requires such declarations to be recorded presumptive evidence, in this or similar cases, of its execution or verification. Whether the land in controversy was

formerly held by the litigant parties as tenants in common, and been partitioned between them, were disputed collateral facts. The declaration of exemptions, tending to show that Mrs. Moody occupied and claimed the portion allotted to her as her homestead, was only relevant and competent as an admission of the partition. There can be no doubt that the statute constitutes a duly-certified transcript from the book of exemptions presumptive evidence, to have the same effect as if the original were produced and proved, in any proceeding in which the claim of exemptions is directly involved; but, in my opinion, its operation should be restricted to such cases. Though the official acts of sworn officers may import verity, such presumption should not be extended so as to impart to the record itself, in a suit between third persons, competency as evidence of a material and independent fact which is merely collateral and incidental. I cannot suppose that it was the intention of the statute to give the book in which the declaration of exemptions is recorded greater probative force than the original; to make the record competent evidence, not only that it is a true copy, but also of the execution of the original, when the original, if offered, would not be self-proving.

(84 Ala. 553)

*Cox et al. v. Bridges.*

(Supreme Court of Alabama. June 26, 1888.)

## 1. HOMESTEAD—RIGHT OF WIDOW—PROCEEDINGS TO ESTABLISH.

Under Code Ala. § 2543, providing that a widow is entitled to a homestead exemption not exceeding 160 acres in quantity, nor \$2,000 in value, when in the country, which exemption shall take effect at the death of the husband, and which she may retain until it is ascertained whether the estate is solvent or insolvent, the husband's occupancy of a homestead at the time of his death, and value within the statutory limitation, entitle a widow to the exemption, and on the trial of the claim of exemptions the question whether the husband's estate is indebted is immaterial.

## 2. SAME.

The statute defining the jurisdiction of the probate and circuit courts in proceedings to set apart a homestead to a wife out of the lands of her deceased husband does not authorize a trial of disputed titles to the land in such proceedings, and therefore the question as to the validity of a conveyance of the land made by the husband in his life-time is without the jurisdiction of the circuit court.

Appeal from probate court, Pickens county; THOMAS G. WILLIAMS, Judge.

Petition by Frances R. Bridges for allotment of homestead out of the lands of her deceased husband. From a decision setting apart a portion of the husband's estate as a homestead Martha Cox and others appeal. The statute referred to in the opinion as relating to homestead exemptions is Code Ala. § 2543.

*W. F. Johnston*, for appellants. *D. C. Hodo*, for appellee.

CLOPTON, J. The appellee selected and claimed a homestead exemption as the widow of her deceased husband, Robert Bridges, and petitioned the probate court to have the same allotted to her. Commissioners were appointed to allot and set off a homestead, and to appraise its value. They returned their report to the court. Within proper time, exceptions were filed thereto by the appellants, and the testimony taken. The issue formed on the exceptions was certified by the probate court to the circuit court, where a trial was had, judgment rendered in favor of the petitioner, and the judgment certified back to the probate court for further proceedings; whereupon judgment was rendered confirming the report of the commissioners, and allotting the homestead. Under the statute a widow is entitled to a homestead exemption not exceeding 160 acres in quantity, nor \$2,000 in value, when in the country, which takes effect at the death of the husband, and which she may retain until it is ascertained whether the estate is solvent or insolvent. Whether or not the estate of her husband owes debts is an immaterial question on the trial of the claim of exemptions. The husband's occupancy of a homestead

at the time of his death, and value within the statutory limitation, entitle a widow to the exemption. We must conclusively presume that, by the verdict of the jury and the judgment of the circuit court, it was ascertained and determined that the husband of the petitioner occupied the lands as a homestead at the time of his death, and that it does not exceed the statutory value. The main exception to the allotment of the homestead made by the appellants is that the lands were sold and conveyed to Mrs. Cox, one of the appellants, by the petitioner and her husband in October, 1878, and that the husband did not die seized of the lands. The jurisdiction of the probate court and of the circuit court to hear and determine the validity of the claim to the homestead is derived from the statute, which prescribes the mode of proceeding, and limits the jurisdiction; the purpose being to carve the homestead out of the estate of the husband, and separate it from the lands subject to administration. The title to the lands is not involved. In *Coffey v. Joseph*, 74 Ala. 271, it is said: "The statutory jurisdiction is limited and confined to the inquiry whether the lands in which homestead is claimed were, at the death of the husband and father, impressed by his occupancy with the character of the homestead, as occupancy is defined by the statute, and whether the assignment made by the commissioners is in value excessive. It does not authorize a trial of disputed titles to land." The validity of the conveyance to Mrs. Cox was a matter without the jurisdiction of the circuit court, and must be tried and determined in other and appropriate proceedings. Whatever opinion we might express in regard to its validity would be mere *dicta*, and we therefore decline to consider it. Affirmed.

(84 Ala. 421)

WHITE v. STATE:

(Supreme Court of Alabama. June 20, 1883.)

1. HOMICIDE—MANSLAUGHTER—INTENTION TO TAKE LIFE.

Intent to take life is not essential to manslaughter in the first degree; and an instruction that it is indispensable to a conviction upon an indictment for murder that the existence of the intent to commit the offense should be proved beyond a reasonable doubt is erroneous.

2. SAME—GROSS CARELESSNESS.

Upon indictment for murder caused by suddenly applying the brake to a hand car on which deceased, defendant, and others were riding, whereby the car was stopped, and deceased killed, an instruction that if defendant did not know the result of stopping the car suddenly, although he may have stepped on the brake in jumping off the car, he would not be guilty, is erroneous, as, if he knew that stepping on the brake would stop the car suddenly, and did so intentionally, he might thereby have been guilty of gross carelessness, which, causing death, would be at least manslaughter.

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

Indictment for murder. One of the counts in the indictment in this case charged "that \* \* \* Henry White unlawfully, and with malice aforethought, but without premeditation, killed William George by suddenly stopping a moving hand car on which the said William George was riding, by suddenly applying, and without warning putting on or applying, the brakes to said hand car; thereby throwing the said William George from and in front of said moving hand car, causing the same to run over the said William George, mashing his head," etc. The defendant, White, the deceased, William George, and nine or ten other railroad hands were returning on a hand car, after working hours, to Gadsden. When they approached the corporate line of Gadsden, and were at the top of the grade, the car was stopped, and one of the parties got off. Some one then said to the defendant that he had better get off, and defendant said, "No;" he would ride down opposite where he was boarding, and get off. One witness testified that defendant further said: "No; this car was made to put off men where they want to get off." The car moved off down grade, and was running at the rate of 10 or 15 miles per

hour. Just before the car reached the point opposite defendant's boarding-house, the brakes were "rather put on," and some one said to defendant: "Don't put on the brakes." The car did not then stop; and, when it arrived opposite his boarding-house, the defendant sprang from the car, and that instant the car stopped suddenly, the front wheels jumped the track, all the parties who were on the car were thrown from it, the car moved forward a little way, and William George was instantly killed. There was a brake on the car, which extended four or five inches above the platform of the car, and upon which the defendant probably stepped when he jumped from the car, although none of the witnesses testified that they saw the defendant step on the brake. There was evidence that deceased, who was the "boss," cautioned the hands about putting on the brakes slowly, or some one would be hurt. The following charges were requested by defendant, and were refused by the court: "(6) That, before the defendant can be convicted, it is indispensable that the existence of the intent to commit the offense should be proved by the state beyond a reasonable doubt. (7) That the jury may look to the evidence (if there be such) tending to show that the defendant was 'green,' or knew but little about railroads, in ascertaining whether or not he knew what the result would be by stopping the car suddenly; and if they believe from the evidence that the defendant did not know the result of stopping the car suddenly, although he may have stepped on the brakes in jumping from the car, then he would not be guilty." The defendant was convicted of manslaughter in the first degree, and sentenced to the penitentiary for two years.

*J. L. Cunningham*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

STONE, C. J. Intention to take life is not necessarily an ingredient of manslaughter even in the first degree. *Harrington v. State*, 83 Ala. 9, 3 South. Rep. 425, *Williams v. State*, 83 Ala. 16, 3 South. Rep. 616. The sixth charge asked for the defendant was rightly refused. One clause of the seventh charge asked to be given to the jury was that "if they believed from the evidence that the defendant did not know the result of stopping the car suddenly, although he may have stepped on the brake in jumping from the car, then he would not be guilty." This clause of the charge ignores all other inquiries than the want, on the part of the defendant, of knowledge of the effect of stopping the car suddenly. Had the charge been given, it would have been the duty of the jury to acquit, even though they found that the defendant stepped on the brake knowingly and intentionally, and that he knew the effect of stepping on the brake would be to stop the car suddenly. Gross carelessness, even in the performance of lawful acts, is punishable if another is injured thereby; and, if the injury result in death, it is at least manslaughter. 1 Bish. Crim. Law, §§ 342, 343, 351. This charge was rightly refused, and the record presents no other questions for our review. Under our statutes, manslaughter has two degrees. The first is "by voluntarily depriving a human being of life." That offense is fully discussed and defined in *Harrington's Case*, 83 Ala. 9, 3 South. Rep. 425, and we need add nothing to it. Code 1886, § 3731. In section 3732 another offense, resulting in death, is made manslaughter in the first degree, but it has no bearing on this case. We have said: "To constitute manslaughter in the first degree, there must be either a positive intention to kill, or an act of violence from which ordinarily, in the usual course of events, death or great bodily harm may result." *Harrington's Case*, *supra*. We were interpreting section 3731 of the Code, the statute by which the guilt of the present defendant must be measured. If the record fairly sets forth the testimony, it is difficult to perceive how the defendant could be guilty of voluntary manslaughter unless the jury were convinced he intentionally stopped the car. This question, however, is not before us, and we have no power to grant any relief. Affirmed...

(84 Ala. 212)

**STRANGE et al. v. KING.***(Supreme Court of Alabama. June 23, 1888.)***EJECTMENT—TITLE TO SUPPORT—POSSESSION.**

Where neither plaintiff nor defendant in ejectment connects himself by paper title with the oldest claimant, but plaintiff enters into possession, builds a house, and puts a tenant therein, such possession will support ejectment against one who merely shows a later possession, without title to authorize it.<sup>1</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This was a statutory action of ejectment, brought by Peyton G. King against one Gentles, a tenant of the appellants, Strange & White, who were admitted to defend the action. The state of the record title to the property in controversy appears in the opinion. There was evidence that, at the time King erected the house on the land, he was notified of the appellant's claim thereto; that, after the erection of the house, King placed a tenant therein, who remained a few weeks; that thereafter, without King's knowledge or consent, appellants took possession of the property, and rented it to the said Gentles. The cause was tried without the intervention of a jury, and was decided in favor of King the plaintiff, whereupon the defendants appealed.

*Webb & Tillman*, for appellants.

STONE, C. J. This is a statutory real action for the recovery of one acre of land in the S. W. corner of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 29, township 17, range 2 W., in Jefferson county. Under a description fatally imperfect, an acre of land, corresponding to this as to section, and somewhat as to its location in the section, was in 1878 conveyed by one Waits to Henderson and Marcus Hamilton, and there is some proof that they occupied it for a time. They then abandoned it, and went to parts unknown. Neither of the parties to this suit is shown to claim under either Waits or the Hamiltons, and neither party connects himself with the title or possession of either of them by any proof shown in this record. The conveyance from Waits to the Hamiltons, and all claim which either of them could assert, we will dismiss from further consideration, as having nothing to do with the case. The common source of title of each of the parties to this suit, both plaintiff and defendants, was Morgan G. Wood. King, the plaintiff, claims that in 1878 Wood and wife conveyed the land in controversy to him. That deed was lost, and testimony was offered of its contents. Strange & White's claim of title was as follows: In 1880, Wood and wife conveyed to Reed & Meade the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of said section 29, less about one acre in the N. E. corner of said quarter-quarter section. Meade conveyed his half interest to Reed in March, 1882, by the same description. In June, 1885, Reed conveyed the one acre of land sued for to Strange & White, the defendants. So each claimant traces his title back to Morgan G. Wood. But it is shown that Morgan G. Wood derived his title from David Pearson. That deed is in evidence, bearing date August, 1878. It does convey the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of said section 29, but it excepts from its operation "one acre in the S. W. corner." That one acre is the land in controversy in this suit. So neither party connects himself with any paper title coming down from Pearson, the first and oldest claimant shown in this record. The case must be disposed of without any

<sup>1</sup>One in possession of land, though he has no title thereto, is entitled to retain possession as against all but the rightful owner. *Harvey v. Harvey*, (S. C.) 2 S. E. Rep. 8. In ejectment, plaintiff must prevail on the strength of his own and not on the weakness of his adversary's title. *Lafauci v. Kinler*, 27 Fed. Rep. 443; *Castor v. Jones*, (Ind.) 6 N. E. Rep. 828; *Boyer v. Thornburg*, (Ill.) 4 N. E. Rep. 263; *Maxwell v. Paine*, (Mich.) 13 N. W. Rep. 646; *Stephenson v. Wilson*, (Wis.) 6 N. W. Rep. 240; *Cox v. Hayes*, (Cal.) 7 Pac. Rep. 761; *Apel v. Kelsey*, (Ark.) 2 S. W. Rep. 102; *Dawson v. Parham*, (Ark.) 1 S. W. Rep. 72; *Kelly v. McKeon*, (Wis.) 81 N. W. Rep. 324; *Martin v. Shipwith*, (Ark.) 6 S. W. Rep. 514; *Hooper v. Clayton*, (Ala.) 2 South. Rep. 24.

reference to documentary title. There was no actual taking of possession by either of the parties to this suit, on which to found a right to sue or defend, until King took possession, and commenced improvements, as after shown. *Doe v. Clayton*, 81 Ala. 391, 2 South. Rep. 24. In 1886, King went upon the disputed one acre, sank a well, erected a house, and placed a tenant in it. On these facts there is neither conflict nor dispute. These were acts of ownership, and *prima facie* gave him a right of possession against any other person who could not show a better title. Such possession will both support and defeat an ejectment against any one who merely shows a later possession, without title to authorize it. *Anderson v. Melear*, 56 Ala. 621; *Mills v. Clayton*, 73 Ala. 359; *Childress v. Calloway*, 76 Ala. 128; 8 Brick. Dig. p. 825, § 47. On the questions discussed above there was no conflict or uncertainty in the testimony. They show clearly that plaintiff was entitled to recover. We need not consider the questions raised on the admissibility of oral proof. They neither did nor could change the result of the trial, for the plaintiff was entitled to a judgment on grounds entirely independent of the testimony objected to. Affirmed.

(84 Ala. 512)

**LEHMAN et al. v. PRITCHETT.**

(Supreme Court of Alabama. June 26, 1888.)

1. **FACTORS AND BROKERS—VIOLATION OF PRINCIPAL'S DIRECTIONS—REMOTE INJURY.**  
Where commission merchants neglect to sell cotton of their principal within a reasonable time after being instructed to sell, and it is destroyed by fire, the delay in selling is not the proximate cause of the loss; and, in the absence of fraud, such commission merchants are not liable therefor.<sup>1</sup>
2. **SAME—GOODS NOT DELIVERED TO FACTOR—WAREHOUSE RECEIPTS.**  
Plaintiff instructed defendants, a firm of commission merchants, to sell certain stored cotton for which she held warehouse receipts, but did not forward them the receipts. Defendants individually owned the warehouse in which the cotton was stored, but their business as warehousemen was transacted separately from their commission business, and under a different firm name. *Held*, that under Code Ala. 1886, §§ 1174-1178, providing that warehousemen, on receiving property for safe-keeping, shall give a receipt therefor, which is made transferable by indorsement unless marked "Not negotiable," and prohibiting them from delivering the property except on the delivery and cancellation of the receipt, defendants, as warehousemen, could not have safely delivered the cotton to a purchaser without the receipts, and therefore were not responsible for its loss by fire, which loss would not have occurred had defendants sold it at the time designated in plaintiff's instructions.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Action by Lucy B. Pritchett against Lehman, Durr & Co., as commission merchants and warehousemen, to recover for the loss of five bales of cotton which defendants kept on hand, after being instructed to sell, until they were destroyed by fire. Judgment for plaintiff. Defendants appeal.

*Troy, Tompkins & London*, for appellants. *Watts & Son*, for appellee.

CLOFTON, J. Appellee seeks by the action, which is brought against appellants, as commission merchants and warehousemen, to recover for the loss of five bales of cotton which they failed to sell in a reasonable time after having been so instructed, and which they kept on hand until they were destroyed by fire. The rulings of the court, in charging the jury, raise the question whether the defendants are liable for the value of the cotton if they failed to sell it after receiving instructions a sufficient time to enable them to sell before the cotton was burned, though the warehouse receipts were not sent to

<sup>1</sup>By "proximate cause" is intended an act which directly produced, or concurred directly in producing, the injury. By "remote cause" is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Troy v. Railroad Co.*, (N. C.) 6 S. E. Rep. 77. The question of proximate cause, when the facts are disputed, is for the jury. When they are undisputed, the court may determine it. *Township v. Watson*, (Pa.) 9 Atl. Rep. 430.

them, and they did not demand them, nor notify plaintiff that they would not sell without them. In October, 1885, tenants of plaintiff stored in her name the cotton in controversy in the Alabama warehouse, and took three separate receipts for the same, which were turned over to her agent. During the same season, the plaintiff shipped and consigned for sale to the defendants, as commission merchants, 14 other bales, the receipts for which were kept by them, and were in their possession when the instructions to sell were given. This cotton the defendants sold. A fair and just consideration of the instructions of the court given and refused, require us to assume that defendants were directed to sell the cotton in dispute, and also that the warehouse receipts were not delivered to them. The business, duties, and liabilities of factors and commission merchants are substantially the same, the terms being ordinarily used interchangeably. A factor, or commission merchant, as generally defined, is an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for reward, usually a commission. The features which mainly distinguish a factor from a broker are the former is intrusted with the possession, disposal, and control of the property, and may sell in his own name, binding the principal, and the latter does not usually have possession, disposal, and control, and should sell in the name of his principal. While, as a general rule, a commission merchant is bound to obey the instructions of his principal, the right to give instructions to sell, and the correlative duty to obey, depend on the existence, in fact and in law, of the relation from which the right and duty arise to the particular party by whom the instructions are given. The relation is only created when the property is consigned or received, or is placed at the disposal or under the control of the commission merchant to be sold. Whenever he receives the property without special directions as to the time, mode, or price, the duty is devolved to use due diligence to sell in a reasonable time; but the duty is not devolved until he receives such possession and power of disposal and control as will enable him to make an effectual sale,—to deliver possession, and to pass title. In *Perkins v. State*, 50 Ala. 154, it is said: "A commission merchant we understand to be one who receives goods, chattels, or merchandise for sale or exchange. Possession of the thing to be sold or exchanged, and authority to sell or exchange or otherwise dispose of it, for a compensation to be paid by the owner, or derived from the disposition, are essential to his character." It follows that, if the cotton had been stored in plaintiff's name in a warehouse with which defendants had no connection, the instructions to sell would have imposed no duty to obey until the warehouse receipts were delivered so as to authorize them to demand and receive possession,—constructive possession. It is not contended that the cotton was consigned to the defendants, or that it was in their possession; but it is insisted that they had possession, and power to dispose and control it, by reason of their connection with the warehouse in which it was stored. The contention is rested on the following facts: The defendants were commission merchants doing business as partners under the firm name of Lehman, Durr & Co. The partners also owned individually the Alabama warehouse, and carried on the warehouse business as partners under the firm name of "The Alabama Warehouse Company." The business and transactions of the two partnerships were kept separate and distinct, but daily reports of the cotton stored in the warehouse were made to Lehman, Durr & Co. The defendants were sued as partners composing the latter firm. In a suit against them as such partners, a recovery cannot be had, founded on a breach of duty and their liability as warehousemen. Each partnership has a distinctive personality, and, for all the purposes of suit, must be regarded the same as if the individual members were different persons. As at common law a bailee may safely restore the subject of bailment, or account for the proceeds thereof to the bailor, when not notified of an adverse right or claim by a stranger, it may be that the defendants having received instructions to sell

from the bailor in one of their partnership capacities, and having possession and control of the cotton as bailees in the other, it would have been, independent of statute, their duty to obey the instructions. This question, however, we do not decide. The statutes intervene to qualify and restrict the common-law right and duty of warehousemen. They provide that warehousemen, on receiving property for safe-keeping, shall give a receipt therefor to the person from whom received. Such receipt is made transferable by indorsement, unless the words "Not negotiable" are plainly written or stamped thereon; and, if these words are not plainly written or stamped on the receipt, the warehouseman is prohibited to deliver the property except on the delivery and cancellation of the receipt, unless it has been lost or destroyed. Code 1886, §§ 1174-1178. Without the delivery and cancellation of the receipts, the Alabama Warehouse Company was without right or authority to deliver the cotton to the plaintiff, and equally to, or on the order of, Lehman, Durr & Co., as her agents and commission merchants. The cotton not being consigned to Lehman, Durr & Co., and the receipts not having been sent or delivered, they had no power to acquire possession, management, disposal, or control of the cotton, and, if they had sold it, could not have safely delivered it to the vendee. Even if the warehouse business had been carried on by Lehman, Durr & Co. as a branch and part of their partnership business, and not by a different partnership and under a different name, they could not, as warehousemen, have rightly and safely delivered the cotton except on delivery and cancellation of the receipts. They might, at their option, have sold it, and incurred the risk of the receipts having been transferred, and of liability to the transferee; but the law does not devolve the duty to sell, in contravention of its provisions, until the receipts are delivered to them as commission merchants. To fasten on them a liability for a breach of their duty as commission merchants there must be something which is an equivalent of a consignment or delivery of the cotton for sale.

The court also instructed the jury that the defendants, if liable, were liable for the value of the cotton. The warehouse, with the cotton, was burned March 10, 1886. It is undisputed that the fire was accidental, and was not caused by any negligence of the defendants, or of the Alabama Warehouse Company. There are classes of cases in which it was ruled that the defendant was liable for the value of the property, though it may have been destroyed by some subsequent accident with which the act of the defendant had no legal connection. In such cases, so far as our examination has extended, the liability was rested on the character in which the defendant was acting, or some act done, by which responsibility for the value of the property was incurred before its destruction; such as that he was a common carrier, and an insurer against such accidents, as in *Railroad Co. v. McGuire*, 79 Ala. 395, or he had interfered with the property so as to constitute his act a conversion, or so as to authorize the plaintiff to elect to treat the property as the defendant's, and claim payment therefor. If it be conceded that it was the duty of the defendants to sell the cotton in a reasonable time after receiving instructions, its subsequent loss by fire cannot be regarded as the natural and proximate consequence of delay in selling, "according to the usual course of things." The burning of the cotton was an accidental or collateral injury, not usually following as the result of such delay. If the defendants were in duty bound as commission merchants to sell the cotton in a reasonable time, and they failed to do so, they would be liable for any injury naturally resulting therefrom, but not for injury suffered from an extraordinary or fortuitous cause, having no relation to the delay except that it was contemporaneous. *Daugherty v. Telegraph Co.*, 75 Ala. 168; *Railroad Co. v. Lockart*, 79 Ala. 315; *Burton v. Holley*, 29 Ala. 318. Counsel cite and rely on *Pattison v. Wallace*, 1 Stew. 48, where it was held that a ginmer who received cotton under an agreement to pick and bale it in preference to all other cotton, but who

ginned the cotton of other persons, leaving plaintiff's cotton unginned, and the gin-house, with the cotton, was subsequently burned, was liable for the value of the cotton, though the burning was without fault on his part. Of that case it may be said that it stands almost, if not quite, alone, is opposed by the overwhelming weight of authority, and has been departed from in principle by this court in all the later cases. It does not seem to have been much considered, and the principle therein asserted is assumed without citation of authority or argument to sustain it. We cannot extend it to other or similar cases, in which there is no fraud, bad faith, or negligence causing the injury. In *Ashs v. De Rossett*, 5 Jones, (N. C.) 299, the owner of a rice-mill agreed with a planter that, if the latter would bring his rice to the mill, it should have priority in being beat, according to a turn to which the owner was entitled. It was not beat according to the agreement, but was kept in the mill, and before being beat the mill and rice were consumed by fire. PEARSON, J., says: "Its being burnt was an accident unlooked for and unforeseen, and can in no sense be considered as having been caused by the fact that it was not beat in the turn promised by the defendant's intestate. Consequently the damages were too remote." In *Daniels v. Ballantine*, 23 Ohio St. 532, the defendant contracted to tow the plaintiff's barge by a steam-tug from Bay City, Mich., to Buffalo, N. Y. The voyage was voluntarily suspended and delayed after having been commenced, and after being resumed a storm was encountered, by which the barge was lost. It was held "that the defendants, by the mere fact of the delay, did not become responsible for the loss of the barge, although the delay was unnecessary and unreasonable, and although, as the event proved, the barge, but for the delay, would probably have been safely towed to its place of destination. In such case the storm must be regarded as the proximate, and the delay as only the remote, cause of the loss." The following cases are cited as sustaining and illustrating the application of this rule of remoteness of damages: *Denny v. Railroad Co.*, 15 Gray, 481; *Morrison v. Davis*, 20 Pa. St. 171; *Railroad Co. v. Reeves*, 10 Wall. 176; *Jones v. Gilmore*, 91 Pa. St. 310; *Smith v. Smith*, 45 Vt. 433; *Railroad Co. v. Burrows*, 33 Mich. 6; *Walrath v. Whittekind*, 26 Kan. 482. In the present case the burning of the cotton was the result of an accidental or collateral injury, between which and the delay in selling there was no necessary or natural connection. The fire must be regarded as the proximate, and the delay as the remote, cause of the loss of the cotton. The damages, for which the jury were instructed the defendants would be liable, were too remote. Reversed and remanded.

(85 Ala. 142)

## CLARK'S COVE GUANO CO. v. DOWLING.

(Supreme Court of Alabama. June 27, 1888.)

## SALE—ACTION FOR PRICE—GUANO—COMPLIANCE WITH STATUTE AS TO TAGS.

Under Code Ala. 1886, § 141, requiring sacks of guano to be tagged when sold, in an action for the price, a charge that, to recover, the sacks must have been tagged when sold, and that if tags are put on in Florida, and torn off or lost before sale in Alabama, plaintiff cannot recover, is correct. Following *Steiner v. Ray*, ante, 172.

Appeal from circuit court, Dale county; J. M. CARMICHAEL, Judge.

This was an action brought by the Clark's Cove Guano Company, and was founded on a promissory note alleged to have been given by the defendant, W. B. Dowling, for the purchase of a certain amount of commercial fertilizer sold to the defendant by the plaintiff corporation. The defendant pleaded, in short, by consent, the general issue, want of consideration, failure of consideration, and that the sacks which contained the fertilizer sold to him by the plaintiff were not tagged as required by law. Issue was joined on these pleas. There was evidence, besides that set out in the opinion, tending to show that when the sacks containing the fertilizer were shipped from Pensacola, Fla.,

consigned to the said Cody, from whom the defendant bought, they were tagged with the proper tags, as required by the law of the state of Alabama. Upon the evidence, as shown, the defendants requested, and the court gave, the charges, abstracts of which are set out in the opinion. To the giving of these charges the plaintiff excepted, and assigns the giving of the same as error.

*Cassady & Blackwell*, for appellant. *W. D. Roberts*, for appellee.

STONE, C. J. Only one witness, the defendant, gives testimony as to the place of sale of the guano which is the consideration of the note sued on. He testifies that he purchased from Cody in Columbia, Ala. He testifies, further, that, when he received four sacks of the fertilizer, they were without tags. There was no testimony directly in conflict with this, and the jury must have believed it. Other four sacks, received at a different time, were tagged; but no ruling of the court raises the question of the right to a partial recovery. Possibly, without a change of the complaint, or a common count, that question could not have been raised. *Irvine v. Stone*, 6 Cush. 508; Bish. Cont. (Enlarged,) § 487; 1 Pars. Cont. (7th Ed.) \*455. This record presents only one question, whether the four sacks of guano, when sold, were tagged as the statute requires. Code 1886, § 141; *Campbell v. Segars*, 81 Ala. 259, 1 South. Rep. 714; *Steiner v. Ray*, ante, 172. It matters not that tags may or may not have been attached in Florida, or when the fertilizer was brought across the line. It is only when sale is made, or offered to be made, that the duty to affix tags attaches. In *Steiner v. Ray*, supra, we discussed the purpose of this enactment, and need add nothing to what was there said. Four several charges were given, and separately excepted to, but none of them can avail the appellant anything. The first asserts only that packages of guano must have been tagged when sold. The second declares that if tags were attached in Florida, and had been torn off before the fertilizer reached Alabama, this would not authorize a subsequent sale in Alabama without tags. Such attaching in Florida would amount to nothing, unless they remained attached when the sale was made. The third is, in substance, a summation of the first and second, though worded differently; and the fourth is not materially different from the third. The gist of the entire charge is that tags attached in Florida, if subsequently, and before sale, removed or lost, do not meet the requirements of the statute. The tags must attend the sale to legalize it. Affirmed.

(35 Ala. 64)

#### MCDONALD v. JACOBS.

(Supreme Court of Alabama. June 27, 1888.)

#### 1. EXECUTORS AND ADMINISTRATORS—ACTIONS—EVIDENCE—RECORDS.

In a proceeding in the probate court, by an administrator *de bonis non* against the representative of the former administrator, to compel a final settlement of the first administration accounts, the records of the court, containing partial settlement of the accounts, are proper evidence; and the fact that some of the papers were recorded without being marked "Filed," and that others did not contain the date as to the month, is immaterial, where all the papers were sufficiently authenticated as proceedings in said settlements.

#### 2. SAME—LIABILITY FOR PROPERTY OF ESTATE BOUGHT BY THEMSELVES.

Where an administrator bought two slaves of the estate at his own sale, in 1864, at \$1,200, he is liable therefor at such price, in the absence of proof that they were worth less in good currency.

#### 3. APPEAL—REVIEW—HARMLESS ERROR.

In a proceeding to settle a deceased administrator's accounts, the introduction of a letter written by him in his life-time, tending to show a liability on him, which was objected to as improper, is without injury, even if it be improper, where the decree of the court is fully sustained by other evidence.

Appeal from probate court, Marshall county; T. A. STREET, Judge.

This was a contest over the final settlement of the estate of Simon Jacobs, deceased. The said Jacobs died in January, 1864, and letters of administration with the will annexed were granted to James H. Moore in March of the same year. Moore died in November, 1881; and in May, 1883, letters of administration *de bonis non* with the will annexed were granted to the appellee, Henry G. Jacobs. Upon the death of Moore, Andrew J. McDonald, the appellant, was duly appointed administrator of the estate of said Moore. In November, 1883, said Henry G. Jacobs, as administrator *de bonis non* with the will annexed, filed his petition in the probate court praying the court to compel the said McDonald, as administrator of the estate of the said James H. Moore, to file his accounts, vouchers, and statements for his decedent, and make a final settlement for his decedent of the estate of the said Simon Jacobs, deceased. In pursuance to this petition and the order of the court thereupon, the appellant filed his application, and gave notice that he had filed such accounts, vouchers, and statements, and a day was set for the final settlement of the administration of the appellant's decedent of the estate of the said Simon Jacobs. Whereupon the appellee filed his petition in said probate court to be allowed to come in and contest the said proposed final settlement; and assigned as ground for such contest that the statement of the accounts of the said estate, as filed by appellant for his decedent, is very imperfect and incorrect; that appellant failed to charge his decedent's account with all of the assets of the estate which went into the hands of the said James H. Moore, as administrator as aforesaid; that in no account as rendered to the probate court, or in any partial settlement attempted to be had, by the appellant's decedent, did the appellant account for all the assets of the said estate which went into the possession of his decedent; and his decedent did not charge himself, or in any way account, for the assets which he disposed of and converted to his own use; that he failed to collect the indebtedness of the estate, and has been guilty of gross mismanagement of the estate. Appellee then prays to have the said McDonald, as administrator of the estate of James H. Moore, charged up with the various items unaccounted for by his decedent, as shown by the schedule filed by the petitioner, together with certain other amounts, and the value of certain slaves sold by the said Moore, and purchased by him at his own sale as administrator of the estate of the said Simon Jacobs. Issue was joined on this contest. The questions for the court on appeal arose on the trial of the contest by the appellee offering in evidence the record proceedings of the probate court pertaining to the partial settlement of the administration of the said James H. Moore, deceased, upon the estate of Simon Jacobs. The appellant objected to the introduction of this record, as not pertaining to this present final settlement; but the court overruled his objection, allowed the proceedings to be introduced, and the appellant excepted. Some of the papers found among the records, and connected with the administration, and which were introduced in evidence likewise, were not marked "Filed," and their introduction was objected to on this ground, but the court overruled this objection, and appellant excepted. As shown by the evidence, a letter, in the nature of a report, which was written by Moore to the probate judge as to matters of the estate, was introduced in evidence against the objection of appellant, to which he excepted. The trial court found the issue in favor of the contestant, and decreed that the estate of the said James H. Moore be charged with the items and assets of the estate of the said Simon Jacobs not accounted for in the settlement, and, according to the evidence as produced, assessed the valuation of the slaves at \$1,200; whereupon the said McDonald, as administrator aforesaid, appealed, and assigns the several rulings of the probate court, and its final decree, as error.

*Hamill & Lusk*, for appellant. *Geo. W. Jones* and *W. L. Martin*, for appellee.

SOMERVILLE, J. The record of the proceedings in the probate court pertaining to the partial settlement of the administration of James H. Moore, deceased, upon the estate of Simon Jacobs, was clearly admissible in this case, which is but a completion of this settlement by the appellant, McDonald, who is the administrator of Moore's estate, and, as such, bound by all the antecedent acts and admissions of his intestate. The purpose and tendency of this record evidence, which was but a history of Moore's administration, as far as he had made it a matter of record, was to fasten a liability upon his estate. The fact that some of the papers connected with the administration of the estate were recorded without being first marked "Filed" was immaterial; nor was the admissibility of these records destroyed by the fact that some of the papers were without particular dates as to the month. They all sufficiently appear to be authentic records of the proceedings of the probate court touching the settlement of Jacobs' estate by Moore as his duly-appointed administrator with the will annexed. If it be conceded that the "letter" of Moore, bearing date November 10, 1866, and in the nature of a report to the probate judge as to the matters of the estate, was improperly admitted in evidence, (which is by no means certain,) this would be error without injury, as the decree of the probate court is fully sustained without this evidence. *Gallard v. Duke*, 57 Ala. 619; *Kirksey v. Kirksey*, 41 Ala. 626. In fact, it could not have availed anything in its bearing on any issue in this case. The valuation fixed by the probate judge upon the two slaves purchased by the administrator at his own sale, in the year 1864, and for which he was clearly liable, seems to us to be sustained by the evidence. This was the price bid by him, and they are not shown to have been worth less in good currency. The assignments of error are not well taken, and the judgment is affirmed.

(85 Ala. 179)

## BIRMINGHAM WATER-WORKS CO. v. HUBBARD.

(Supreme Court of Alabama. June 27, 1888.)

## 1. MASTER AND SERVANT—MASTER'S LIABILITY FOR NEGLIGENCE OF HIS SERVANT.

Defendant's employe placed powder and dynamite, used for blasting, in plaintiff's blacksmith shop, to preserve it from rain, until the following day, against plaintiff's objection. The next day the dynamite exploded, and injured plaintiff, being ignited by sparks thrown from his anvil. In an action to recover for such injuries, held, that an instruction that if the servant was in the employ of defendant, and was by it intrusted with the use and care of the powder and dynamite, in determining whether his act, in placing the combustibles in the shop, was within the scope of his employment, the jury must consider whether the act was done with the bona fide purpose of preserving the powder, and in that way furthering the interest of defendant, and, if so, then the act was within the scope of his authority, was correct.<sup>1</sup>

## 2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In such case it is not error to submit to the jury the question whether plaintiff was guilty of contributory negligence in lighting his forge without ascertaining whether the combustibles had been removed.<sup>2</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This suit was brought by appellee, Armstead Hubbard, against appellant, Birmingham Water-Works Company, a corporation, to recover damages for injuries sustained by the explosion of powder and dynamite placed by an employe of defendant, without permission, in a blacksmith shop where plain-

<sup>1</sup> Respecting the master's liability for negligent and tortious acts of his servants, and what acts of the servant are within the scope of his authority, see *Williams v. Car Co.*, (La.) 3 South. Rep. 681, and note; *Railway Co. v. Savage*, (Ind.) 9 N. E. Rep. 85; *Murphy v. Railroad Co.*, 28 Fed. Rep. 687; *Railroad Co. v. Wood*, (Ind.) 14 N. E. Rep. 572.

<sup>2</sup> As to the province of the court and jury in considering questions of negligence, see *Barnes v. Sowden*, (Pa.) 19 Atl. Rep. 804, and note; *O'Connor v. Railway Co.*, (Mo.) 7 S. W. Rep. 106; *Gleason v. Manufacturing Co.*, Id. 188; *Nugent v. Railroad Corp.*, (Me.) 12 Atl. Rep. 797; *Railway Co. v. Watson*, (Ind.) 15 N. E. Rep. 324; *Drevis v. Woods*, (Wis.) 87 N. W. Rep. 256; *Coal Co. v. McNulty*, (Pa.) 14 Atl. Rep. 887; *Railroad Co. v. Cadow*, (Pa.) Id. 450.

tiff was accustomed to work. Defendant pleaded the general issue and contributory negligence, whereupon issue was joined. Upon the hearing the court submitted the question of contributory negligence to the jury, and, among other things, charged the jury as follows: (1) "If Bennefeld was in the employ of defendant, and was by it intrusted with the use and care of the powder and dynamite, in determining whether his act, in placing and leaving the powder in the shop, was within the scope of his employment, the jury will consider whether it was so done with the *bona fide* purpose of preserving the powder, and in that way furthering the interest of defendant; and, if the jury so find, then the act of Bennefeld, in placing the powder and dynamite in the shop, was within the scope of his employment, and was the act of defendant." (2) "That, if Bennefeld placed the powder in the shop for a purpose of his own, then that would be an individual act, and the jury should find that he was not acting within the scope of his employment." Defendant excepted to the giving of these charges; and also to the following charge, given at the request of plaintiff: (3) "That contributory negligence, in order to avail defendant, must not only be a want of ordinary care on the part of plaintiff, but there must further be a proximate connection between this want of ordinary care and the injury." Defendant then asked the court to give the following charge, and excepted to the court's refusal to give it: (4) "If the jury find from the evidence that plaintiff knew that the powder and dynamite were in the shop, and told Dave Bennefeld to take it away, then, as an ordinarily prudent man, it was his duty to himself to make inquiry and ascertain if the powder and dynamite had been removed, before going into the shop to work with fire." There was judgment for plaintiff, and defendant appealed, assigning the giving, and refusing to give, the above charges as error.

*Ward & Head*, for appellant. *J. M. McMaster*, for appellee.

SOMERVILLE, J. The plaintiff was seriously injured by the accidental explosion of a quantity of powder, dynamite, and powder cartridges which had been stored, without permission, in a blacksmith shop where the plaintiff was accustomed to work for the owner of the shop, one Haynes. The explosive material had been placed there the day previous, for preservation from damage by rain, by the act of one Bennefeld, who was employed by the defendant company as foreman or superintendent of a number of men who were engaged in the company's service to blast stone from a neighboring quarry. The plaintiff had expostulated with Bennefeld about the matter, and he had promised to remove the powder before the commencement of work in the shop that day. The explosion occurred through sparks of fire thrown by scintillation from the anvil during the progress of work in the shop.

It is contended, in behalf of the defendant corporation, against which verdict and judgment for the sum of \$500 were rendered in the court below, that the act of Bennefeld in storing the powder in the shop, without first obtaining the owner's consent, was not within the scope of his employment, and for this reason the defendant would not be responsible for any injury or damage resulting from it. The evidence shows that there was no express authority for doing the act, and no recovery was claimed on this ground. Nor is there any fact tending to show ratification on the part of any superior officer of the company. The question, then, resolves itself into the inquiry whether the act of Bennefeld which produced the injury incidentally grew out of any authority conferred by the defendant, as master, on Bennefeld, as servant. Can the act be fairly and reasonably implied as one authorized to be done by the servant in the master's absence, and in the given emergency, in furtherance of the master's business? Was it, in other words, impliedly authorized as fairly within the scope of the servant's employment, as the trusted custodian of the property, with the duty imposed on him to use all proper and reasonable means for its safe preservation? The master may often be held

liable for the abuse of the authority conferred on a servant or employe, and this liability sometimes extends to trespasses purposely committed. In such cases, especially where the implication of authority is doubtful, the inquiry may well be whether the servant was, on the one hand, acting either maliciously, or in his own individual interest, or, on the other hand, *bona fide* in preservation or furtherance of the master's interests. This test was adopted in *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Amer. Rep. 361, which involved an injury resulting from a trespass incidentally committed by an agent in the prosecution of the business of the principal, a subject on which the law has undergone some modification in comparatively recent years. The doctrine of that case, in our judgment, is both just and sound, and is sustained by authority. Wood, *Mast. & Serv.* (2d Ed.) pp. 534-536, § 284; *Id.* p. 567, § 300; Cooley, *Torts*, 535-538. The charges of the court on this phase of the case fairly stated the law, and were not liable to any criticism.

The court properly submitted the question of the plaintiff's alleged contributory negligence to the jury. The evidence tends to show that Bennefield had promised the plaintiff to remove the explosive combustibles from the shop before the time of needing the premises for work, and we cannot say, in view of this fact, that the conduct of the plaintiff, in failing to ascertain whether the promise had been complied with before proceeding to use the smith-forge on the day of the accident, was *per se* negligence. *Eureka Co. v. Bass*, 81 Ala. 200, 60 Amer. Rep. 152; *City Council of Montgomery v. Wright*, 72 Ala. 411; *Railroad Co. v. Allen*, 78 Ala. 494.

There is, in our opinion, no error in the record, and the judgment is affirmed

(85 Ala. 209)

#### BEATTY v. BROWN.

(*Supreme Court of Alabama. June 23, 1893.*)

##### 1. EQUITY PLEADING—AMENDMENT TO BILL.

Where it does not appear that an amendment to a bill of complaint was called to the attention of the chancellor, complainant cannot assign for error that it was not allowed.

##### 2. SAME.

Under Code Ala. § 8449, authorizing an amendment in a cause to be made at any time before final decree, where the amendment was filed and decree entered the same day, it does not appear that the amendment was filed before rendition of the decree; and its disallowance is not error.

##### 3. SAME.

Code Ala. § 8449, providing that amendments to a bill may be made to meet any state of evidence which will authorize relief, means evidence already taken in the cause; and, there being no evidence in the record to support the facts averred in the amendment, it was properly disallowed.

Appeal from chancery court, Tuscaloosa county; THOMAS CORBBS, Chancellor.

Bill in equity by William M. Beatty against R. B. Brown to have a contract of sale of land declared an equitable mortgage. Complainant appeals.

*Martin & McEachin*, for appellant. *Hargrove & Van De Graaff* and *S. A. M. Wood*, for appellee.

SOMERVILLE, J. The assignment of error most relied on in this case is that the chancellor erred in not allowing an amendment to be made to the bill of complaint. The only amendment anywhere appearing in the record is one marked "Filed in open court" on September 20, 1886, which was the day on which the final decree in the cause was rendered. We assume this to be the amendment to which reference is made. There are three reasons which severally justify us in overruling this assignment of error: (1) It is nowhere made to appear that this amendment was ever brought to the attention of the chancellor, or that he was requested to allow it, or that he in any manner made a ruling on the subject. The right of amendment is a privilege which must be claimed, and this can be done only by motion or suggestion made to

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the court. We cannot put the chancellor in error by presuming that he overruled the motion to amend, if such be conceded to be the effect of such a ruling. (2) The statute authorizes such an amendment to be made "at any time before final decree" in the cause,—not afterwards. Code 1886, § 3449. The date of the filing of the amendment is the same as the date of the final decree, September 20, 1886. It does not appear, therefore, that it was even filed upon the rendition of this decree. Hence, if it be conceded that the duty lay on the chancellor to act on the amendment without special request, the record should show that it was filed before the rendition of his final decree. This it fails to show. (3) For still a third reason the record fails to impute error to the chancellor in reference to this matter. There is no testimony in the record which would support the facts averred in such an amendment, and hence it was properly disallowed. The statute authorizes no amendment to a bill to be made except "by striking out or adding new parties, or to meet any state of evidence which will authorize relief." Code 1886, § 3449. This means, and has been construed by this court to mean, any state of evidence already taken in the cause at the time of the proposed amendment. It does not mean any possible proof which might afterwards be taken in the event of a continuance of the cause. *Smith v. Coleman*, 59 Ala. 260. Such a construction would lead to an interminable procrastination of chancery causes, for which there would be no possible remedy, at least for the party whose rights would be practically denied by such delay. If, moreover, the amendment had been allowed, and the chancellor had proceeded to make a decree, it is manifest that its averments would have been unsupported by proof, and it would have availed the complainant nothing. Allegations without proof are as fatal to a complainant's recovery as proof without allegations. The two must substantially correspond, or no recovery can be had. It is manifest that the register had no authority to take any testimony in support of the facts alleged in the amendment, and he did not err in refusing to do so; the issues raised by it being entirely outside of the inquiry involved in the reference. Nor was any point touching this subject raised by the exceptions taken to the register's report, and brought to the chancellor's attention. We have examined the testimony bearing on the exceptions taken to the register's report, and agree with the chancellor in the conclusion attained by him. The decree is accordingly affirmed.

(35 Ala. 247)

**CARTELOU v. WHITLEY et al.**

(Supreme Court of Alabama. June 28, 1888.)

**JUDGMENT—IN PARTITION PROCEEDINGS—COLLATERAL ATTACK.**

A partition sale of land by order of the probate court, based on a petition under Code Ala. 1886, § 3258, which on its face contains all the requisite jurisdictional averments, will not be set aside, in a collateral proceeding, for mere irregularity in the service of notice of the filing of the petition, which irregularity was not taken advantage of in the original proceeding.<sup>1</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action of ejectment brought by the appellant, R. O. Cartelou, against the appellees, for the recovery of an undivided fourth in a piece of land. Judgment for the defendants, and the plaintiff appeals.

*R. H. Fries*, for appellant. *W. M. Brooks*, for appellee.

**STONE, C. J.** Four persons, all under 21 years of age, two of them married woman, were equal owners and tenants in common of the premises in controversy, being certain lots in the city of Birmingham. One of the ten-

<sup>1</sup>Respecting the grounds on which a judgment may be collaterally attacked, see *Knott v. Taylor*, (N. C.) 6 S. E. Rep. 788, and cases cited in note. See, also, *Sargent v. Mead*, 1 N. Y. Supp. 589.

ants, Mrs. Shepherd, through her husband as next friend, filed her petition in the probate court of the county in which the lots were situated, averring that they "cannot be equitably partitioned or divided without a sale." Code 1886, § 3253. The petition is in all respects regular, gives the names, ages, and residences of the other joint owners, and states which of them are married women, with the names of their husbands. The probate court took jurisdiction of the case, granted an order of sale, and appointed commissioners to make the sale. The commissioners sold the lots. Whitley and another became the purchasers, paid the purchase money, and received a conveyance, after the sale had been reported to the probate court and confirmed. With a single exception, after stated, everything done appears to have been regular; and only the one ground is here urged against the validity of the sale. Notices of the filing of the petition, and of the orders made, were issued to the other tenants in common, of whom Robert C. Cartelon, a minor, was one. He was living with his grandfather, and the notice was served on the grandfather as his custodian. A guardian *ad litem* was appointed for him, and he acted. It is contended for appellant that, because the notice was not personally served on Robert C., the minor, the whole proceedings are void, and the sale conferred no title. If this case had come before us on appeal from the order of sale, a very different question would have been presented. We might have felt it our duty to reverse such order. *Hodges v. Wise*, 16 Ala. 509; *Clark v. Gilmer*, 28 Ala. 265; *Dow v. Whitman*, 36 Ala. 604; *Diston v. Hood*, 33 Ala. 331, 3 South. Rep. 746. In this case, however, the question comes up collaterally, when a different rule prevails. It has long been settled in this state—too long to be open to further controversy—that, when the question comes before us in this form, the prime question is, did the court acquire jurisdiction of the subject-matter, and exercise it? If the petition on its face contains the requisite jurisdictional averments, and does not itself disclose that other parties or other interests are not properly presented, then mere irregularities in the after proceedings do not impair the validity of the sale. *Field v. Goldsby*, 28 Ala. 218; *Landford v. Dunklin*, 71 Ala. 594; *McCorkle v. Rhea*, 75 Ala. 218; *Whitlow v. Echols*, 78 Ala. 206; *Watts v. Frazer*, 80 Ala. 186; *Morgan v. Farned*, 83 Ala. 367, 3 South. Rep. 793; *Lyons v. Hamner*, ante, 26. There is no error in the record. Affirmed.

(24 Ala. 463)

## SOUTH &amp; NORTH ALA. R. CO. v. BRADLEY.

(Supreme Court of Alabama. June 23, 1888.)

## CLERK OF COURT—RIGHT TO SUM FOR FEES.

The provision of Code Ala. 1886, § 2837, authorizing a judgment for costs to be rendered in favor of the successful party in civil actions, is no bar to an action by the clerk of a circuit court against a successful party for fees for issuing subpoenas for witnesses at the request of such party.

Appeal from circuit court, Jefferson county; LEROY F. BOX, Judge.

This was a suit by R. C. Bradley, the appellee, on common counts, for a sum of money due him, as clerk of the circuit court of Jefferson county, for issuing subpoenas for defendant's witnesses, at the instance and request of defendant, in cases brought against defendant in said circuit court by different parties, but in which suits, on the trial, the defendant was the successful party; the costs accruing at the instance of the said defendant in such cases having never been paid to Bradley. Judgment for plaintiff. Defendant appeals.

*Hewitt, Walker & Porter*, for appellant. *Gillespy & Smyer and Webb & Tillman*, for appellee.

SOMERVILLE, J. The fees due the plaintiff as compensation for official services performed by him at the request of the defendant, being such as were

authorized by law, constituted a debt for which an action of debt or *indebitatus assumpsit* would clearly lie; and the provisions of the statute authorizing a judgment to be rendered in favor of the successful party for costs in civil actions (Code 1886, § 2837) is no bar to the maintenance of such a suit, (*Hill v. White*, 1 Ala. 576; *Carville v. Reynolds*, 9 Ala. 969; *Tillman v. Wood*, 58 Ala. 578; *Dane v. Loomis*, 51 Ala. 487; *Bradley v. State*, 69 Ala. 318.) The judgment is affirmed.

(56 Ala. 246)

## PARKER v. EDWARDS.

(Supreme Court of Alabama. June 28, 1888.)

## 1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED.

In an action by a surviving partner on an account due the firm, defendant is not a competent witness to prove the execution and contents of a lost receipt given him by the deceased partner, as Code Ala. 1886, § 2765, prohibits either party to a suit from testifying against the other as to any transaction with a deceased person whose estate is interested in the result of the suit.<sup>1</sup>

## 2. EVIDENCE—OF LOST INSTRUMENT.

In an action where defendant pleads as a set-off a certificate of deposit which was lost at the time the plea was filed, he must prove its contents, where an affidavit is not filed under Code Ala. 1886, § 2597, which provides that where a suit is brought on a lost mercantile instrument, if an affidavit of such loss, and the contents of the instrument, is made and filed with the complaint, such affidavit shall be presumptive evidence of such facts.

Appeal from circuit court, Dale county; H. L. MARTIN, Special Judge.

Action by H. Z. Parker, as surviving partner of H. Z. Parker & Son, against Le Roy M. Edwards. Defendant claimed a set-off, which was sustained; and from the judgment entered in the case plaintiff appeals. Code Ala. 1886, § 2597, provides that when a suit is brought on a lost bond, note, or other mercantile instrument, and an affidavit of such loss, and the contents of such instrument, accompanies the complaint, it shall be presumptive evidence of such facts.

H. H. Blackburn, for appellant. W. D. Roberts and W. E. Mauldin, for appellee.

CLOPTON, J. Against the demand to recover which the appellant, as surviving partner of H. Z. Parker & Son, brings the action, the defendant offered by plea to set off an indebtedness for money deposited, evidenced by a receipt signed by the firm, a copy of which is set out in the plea. The evidence *prima facie* shows that the deposit was made with S. D. Parker, a member of the partnership, who was deceased at the time of the trial. The defendant was permitted, against the objection of the plaintiff, to testify to the existence, loss, and contents of the receipt; the objection being made separately to each part of the testimony. It may be that the receipt should be regarded in the nature of a certificate of deposit, and, being offered in evidence under a plea of set-off, proof of its execution was not necessary, as the execution was not put in issue by replication verified by affidavit. Code 1886, § 2771. But as the receipt was lost at the time the plea was filed, and it was not accompanied by the statutory affidavit, which is made presumptive evidence of the contents and loss, the defendant was required to make proof thereof. Code 1886, § 2597. The exception in the statute making parties competent witnesses, which prohibits either party to testify against the other as to any

<sup>1</sup>As to the admissibility of evidence relating to transactions with deceased persons, see *Insurance Co. v. Watson*, 80 Fed. Rep. 658, and note; *Hinckley v. Hinckley*, (Ma.) 9 Atl. Rep. 897, and note; *Witthaus v. Schack*, (N. Y.) 11 N. E. Rep. 649; *Duryea v. Granger's Estate*, (Mich.) 83 N. W. Rep. 780, and note; *Shipp v. Davis*, (Ga.) 2 S. E. Rep. 649, and note; *Harris v. Bank*, (Fla.) 1 South. Rep. 140, and note; *Smith v. Caswell*, (Tex.) 4 S. W. Rep. 848, and note; *Adams v. Hardware Co.*, (Ga.) 2 S. E. Rep. 420; *Smith v. James*, (Iowa.) 84 N. W. Rep. 309; *Auchampauch v. Schmidt*, Id. 469; *Fritchard v. Fritchard*, (Wis.) 84 N. W. Rep. 506.

transaction with or statement by a deceased person whose estate is interested in the result of the suit, (Code 1886, § 2765,) embraces a transaction with or statement by a deceased partner in a suit by or against the surviving partner, (*Hussey v. Peebles*, 58 Ala. 432; *Jackson v. Clopton*, 66 Ala. 29.) The defendant was competent to prove the loss of the receipt; but to prove its execution and contents is to testify to a transaction with and statement by a deceased partner, and so connected with him that the presumption is, if living, he could deny, qualify, or explain the receipt. The defendant was, under the statute, incompetent to prove the existence or contents of the receipt. Reversed and remanded

(35 Ala. 41)

GLOVER *et al.* v. HILL.

(Supreme Court of Alabama. July 9, 1888.)

1. **EXECUTORS AND ADMINISTRATORS—ACTION ON BOND OF DECEASED ADMINISTRATOR.**  
In an action by a sole surviving heir against the sureties on the bond of the deceased administrator of the estate for settlement of his administration, the appointment of an administrator *de bonis non* of such estate is unnecessary where it appears that all decedent's debts are paid or barred by limitation, and therefore that no administrative duties remain except settlement and distribution of the estate.
2. **SAME—WHEN ADMINISTRATOR NEED NOT BE APPOINTED.**  
In such action it appeared that plaintiff's brother, the only other heir of decedent, had died while a minor, owing no debts, and leaving plaintiff his sole heir. *Held* that, as the only duty of administration on such brother's estate would be distribution, equity would not require the appointment of an administrator of his estate.
3. **SAME—ACTION ON BOND—PARTIES.**  
In such action a personal representative of neither such administrator nor of such deceased heir is a necessary party.
4. **SAME—POWERS AND DUTIES—MAINTENANCE OF INFANT DISTRIBUTEE.**  
In such action it appeared that plaintiff and his deceased brother had no means of maintenance and education other than what was received from the administrator, and that they lived with him during most of the time. *Held* that, under Code Ala. 1876, § 2644, providing that when the estate of a deceased person is solvent, and there are minors entitled to distribution therein, who have no legal guardian, it shall be lawful for the administrator to defray, out of the assets of the estate, the necessary and reasonable expenses for the maintenance and education of such minors, and upon the final settlement he shall be allowed credit for such expenses, defendants were entitled to a credit for the reasonable value of the board of plaintiff and his deceased brother during the time they lived with the administrator.
5. **SAME—APPRAISEMENT OF ESTATE—ACCEPTANCE BY ADMINISTRATOR.**  
Where an administrator's petition for sale of the personal property of the estate states that the estate had been duly appraised, and the appraisement returned to court, the administrator thereby adopts such inventory as his own; and, it not appearing that any other inventory was returned, the same is *prima facie* evidence, against his sureties, of the assets of the estate, for which such administrator is responsible.
6. **SAME—SETTLEMENT—APPRAISEMENT OF ESTATE—ADOPTION BY ADMINISTRATOR.**  
In such action an appraisement of the estate, which the administrator had adopted as his own, showed that there were 890 bushels of corn more than were reported sold. *Held*, that no mistake having been shown in the appraisement, and no account being given of the distribution of the corn, defendants were chargeable with its value.
7. **SAME—SETTLEMENT—EVIDENCE—CERTIFIED COPY OF APPRAISEMENT.**  
Under Code Ala. a certified copy of an appraisement of a decedent's estate is admissible in evidence, with the same effect as the original, as the appraisement is returned to the probate court, and there recorded and kept on file.
8. **SAME—SETTLEMENT—DEGREE.**  
In such action it appeared that the administrator and plaintiff had a settlement some years before, which was not binding on the latter, he being then a minor; that the administrator was dead, and many years had elapsed, thus diminishing the means of proving disbursements on account of the estate and of the distributees. Plaintiff's declarations, made at the time of the settlement, and his subsequent admissions, tended to show that he had received his portion of the personal assets. The amount of the personal property with which the administrator was chargeable approximated the aggregate of the items of his disbursements, with an allowance for board, which was improperly disallowed, added thereto. Defendants admitted that they were chargeable with the surplus proceeds of lands sold under a mort-

page given by plaintiff's decedents; and the difference between such amount and the amount with which the chancellor's decree charged defendants was only a few dollars. *Held*, that the result of the decree was substantially correct, and that the same would be affirmed.

**9. SAME—SETTLEMENT—APPEAL—SET-OFF OF ERRORS.**

In such action the length of time plaintiff and his deceased brother had lived with the administrator, and the amount which should be allowed for their board, could not be definitely ascertained; but the evidence warranted the inference that a proper allowance would be approximately equivalent to such 890 bushels of corn, with which defendants were chargeable. The chancellor erroneously refused to credit defendants with the value of such board, and erroneously refused to charge them with the value of the corn. *Held* that, under Code Ala. 1886, § 678, providing that, in deciding appeals from the chancery court, the supreme court shall weigh the evidence, giving no weight to the chancellor's decision of facts, and give such judgment as it shall deem just, the supreme court would set off such errors against each other, and regard neither in taking the account.

**10. APPEAL—REVIEW—ASSIGNMENTS OF ERROR—PROBATE PRACTICE.**

Where the decree in such action includes the rulings on the exceptions to the report of the register to whom the cause was referred, such rulings will be reviewed, though there were no assignments of error based specially thereon, but simply an assignment going to the decree generally, without specifying any particular provisions.

Appeal from chancery court, Jackson county; THOMAS COBBS, Chancellor.

The bill in this case is filed by the appellee, George W. Hill, as the sole surviving heir at law of Bird Hill, deceased, against William C. Glover, M. P. James, and William Spiller, as the sureties on the administration bond of William J. Bennett, as the administrator of the estate of said Bird Hill, deceased, and seeks, at the hands of said sureties, an account and settlement of said Bennett's administration of said Bird Hill's estate. The bill alleges that Bird Hill died intestate in Jackson county, in November, 1876, leaving surviving him, as his heirs at law, the complainant, then an infant of 15 years of age, and his brother, Harrison Hill, who died in infancy in 1878, owing no debts, and leaving complainant as his sole heir at law; that administration on the estate of said Bird Hill was committed to said William J. Bennett in December, 1876, about a month after the death of the said Bird Hill; that said Bennett gave bond in the sum of \$3,000, with the defendants as his sureties, and took possession of the assets of the estate, and that thereafter, in the year 1880, the said Bennett died insolvent, without having settled his said administration of the estate of said Bird Hill, deceased. The original answer filed by the defendants admitted all the facts above stated,—the contention being as to the amount of assets received by Bennett, and the credits to which he was entitled; and the answer was prayed to be taken as a cross-bill, so as to obtain credit for certain alleged expenditures made by said Bennett for the maintenance of the said heirs at law of Bird Hill, deceased, the complainant and his brother, Harrison Hill, deceased. At the November term of the chancery court for the county of Jackson a decree of reference was rendered in the cause, directing the register to state an account against the defendants, as the sureties of said Bennett, as administrator of the estate of Bird Hill, deceased; and the decree further directed the register to state an account of all valid and subsisting claims against the estate of said Bird Hill. On execution of this reference the register reported a balance of \$1,691 due from Bennett, as administrator, to the estate; and further reported "that there are no valid and subsisting claims against the estate of said Bird Hill, deceased." To this report of the register the defendants filed exceptions, but that part of the report ascertaining no indebtedness against the estate of Bird Hill was not excepted to, or in any manner questioned. The chancellor sustained a part of the exceptions reserved by the defendants to the report of the register, but no errors are assigned on this ruling of the chancellor.

*R. C. Hunt and W. L. Martin*, for appellants. *Brickell & Brown*, for appellee.

CLOPTON, J. The bill is filed by George W. Hill, as sole surviving heir and distributee, against the sureties on the administration bond of William J. Bennett, who is also deceased, and seeks a settlement of his administration of the estate of Bird Hill, who died intestate. There are cross-appeals. The register reported that there were no valid claims outstanding against the estate of Bird Hill, and his report was not excepted to in this respect. All his debts having been paid, or presumed to be paid or barred, no administration duties remained but a settlement and distribution of the estate. There is no necessity of an administrator *de bonis non*. Harrison Hill, the only heir and distributee other than complainant, died while a minor, owing no debts, and leaving complainant his sole heir. As, in such case, the only office of administration would be distribution, a court of equity will not put complainant to the unnecessary costs and expenses of an administration. A personal representative of neither Bird Hill nor Harrison Hill is a necessary party. *Bainee v. Barnes*, 64 Ala. 375; *Alexander v. Alexander*, 70 Ala. 212; *Fretwell v. McLemore*, 52 Ala. 124.

Appellee insists that the court should not consider the rulings on appellants' exceptions to the report of the register which were overruled by the chancellor, there being no assignments of error based specially on such rulings. Appellants' only remaining assignment of error goes to the decree generally, without specifying any particular provisions; but the decree includes the rulings on the exceptions to the report. In the settlement of administrations, especially when the liability of sureties is involved, we are not disposed to pass unnoticed rulings on exceptions to the report of the register, if error has intervened in stating the account, when there is a general assignment of error in the decree, the correctness of which is necessarily affected, though there may be no assignment based specially on such rulings.

The statute provides that when an estate of a deceased person is solvent, and there are minors entitled to distribution therein, who have no legal guardian, it shall be lawful for the administrator to defray, out of the assets of the estate, the necessary and reasonable expenses for the maintenance and education of such minors, and, upon the final settlement, he shall be allowed credit for such expenses, to be charged against the share of such minors, and deducted therefrom on any distribution of the estate. Code 1876, § 2644. The evidence satisfies us that complainant and his brother, Harrison Hill, had no means of maintenance and education other than what was received from the administrator, and that they lived with him, except during the time they were in Arkansas, or temporarily at other places. The defendants were entitled to, and should have received, credit for the reasonable value of their board during the time they lived with the administrator.

The original appraisal of the estate was introduced in evidence by complainant without objection. It having been lost or mislaid during the progress of the reference, a certified transcript thereof was offered in evidence, to which defendants objected. The specified ground of objection is that it is secondary evidence, and that no sufficient predicate was laid for its introduction. All other objections to its admissibility are considered as waived. If it be regarded as secondary evidence, a sufficient predicate was laid when it was shown that the original was lost or mislaid. But we do not so regard it. The appraisal is returned to the probate court, and there recorded and kept on file. Under the statute, a certified copy is presumptive evidence, and has the same effect as if the original were produced and proved. Code 1876, § 3047.

The appraisal of an estate being an *ex parte* statement of third persons, may not be evidence against the administrator unless he connects himself with it in some way. The petition for the sale of the personal property states that the estate had been duly appraised, and the appraisal returned to court. This was a sufficient adoption of it as his inventory, it not being shown that any other inventory was returned, to make it *prima facie* evidence, against

his sureties, of the assets of the estate, for which the administrator is responsible. The appraisement shows that there were 890 bushels of corn more than were reported sold. No attempt was made to show any mistake in the appraisement, and no account was given of the disposition of the corn. The defendants should have been charged with its reasonable value.

In deciding appeals from the chancery court, we are required to weigh the evidence, giving no weight to the decision of the facts by the chancellor, and give such judgment as we deem just. Code 1886, § 675. Having regard to the requirements and policy of the statute, and as all parties should desire that this litigation should not be protracted, with increased expenses, longer than may be necessary to do substantial justice, we have examined the proof with a view to determine what judgment should, under the circumstances, be deemed just. While it is impracticable to ascertain with definiteness and exactness the length of time during which the complainant and his brother lived with the administrator, and the amount which should be allowed for their board, we may reasonably conclude, from the whole evidence, that a proper allowance for board would be approximately an equivalent of the sum with which defendants should be charged for the corn unaccounted for. Therefore the errors above mentioned may be set off against each other, and neither regarded in taking the account. *Lyon v. Foscoe*, 60 Ala. 468. It satisfactorily appears from the evidence that a settlement was made between the administrator and complainant in October, 1879, before the latter went to Texas, where he has remained ever since. It is true, this settlement does not bind him, being then a minor, and he has a right to have a full and fair settlement of the administration. The administrator is dead, many years have elapsed, and the means of proving the disbursements on account of the estate and the distributees necessarily diminished. Under these circumstances, the settlement, and the complainant's contemporaneous declarations, and his subsequent admissions, are entitled to consideration and weight in the endeavor to reach a right conclusion. The facts and circumstances authorize the inference that complainant, by way of advances for his and his brother's maintenance and education, and otherwise, had at that time received the portion of the personal assets of the estate, in the hands of the administrator, to which he was entitled, as then ascertained by them. This conclusion is supported by its correspondence with the report of the register as to the difference between the amount of the personal property received by the administrator, and the aggregate of the items of his disbursements on account of the distributees, as ascertained by him, when an allowance for board is added. The surplus of the proceeds of the land sold under the mortgage made by Bird Hill was not accounted for to the administrator, and did not go into his hands. The defendants admit that they are chargeable with the amount of the surplus. The difference between this amount, with interest thereon, and the sum decreed by the chancellor, is small,—only a few dollars. On the whole record and evidence, it appears to us that the result of the decree is substantially right, and it is therefore affirmed on both the original and cross appeals.

(35 Ala. 284)

SMITH *et al.* v. PEARCE.

(Supreme Court of Alabama. July 9, 1888.)

**HOMESTEAD—CONVEYANCE OF—FAILURE OF WIFE TO ACKNOWLEDGE DEED.**

The deed of a husband conveying a homestead, which his wife signs, but fails to acknowledge as the statute requires, conveys no title; and the land may be taken in execution, and sold, under a judgment obtained against the husband after the making of his deed, and delivery of possession thereunder, and the title of the purchaser at the execution sale will not be affected by a proper acknowledgment by the wife after the sale.<sup>1</sup>

<sup>1</sup>As to the necessity of the wife joining her husband in a conveyance of a homestead, see *Conway v. Elgin*, (Minn.) 38 N. W. Rep. 370, and note.

Appeal from circuit court, Calhoun county; JOHN B. TALLEY, Judge.

Ejectment by John T. Pearce against John F. Smith and others for the recovery of a certain lot. Defendants pleaded the general issue, and issue was joined thereon, and the case was submitted to the court upon an agreed state of facts. Both plaintiff and defendants claimed title to the land from one common source, William M. Taylor. Taylor purchased the land from one Martin in 1878. After the purchase of the land from Martin, Taylor lived on it, with his family, until about Christmas of the year 1880. Some time in the fall of that year, Taylor had a verbal agreement with one De Arman that he would convey to him the land; and in January following, (1881,) upon De Arman paying part of the purchase money, he made a deed purporting to convey the land; but the signature of the wife was not properly acknowledged, as required by the statute,—the acknowledgment of the wife being made with the husband, and irregular in other respects. Taylor continued to live thereon, claiming to be a renter from De Arman of three rooms in the house wherein he lived, and for which he paid De Arman rent, until some time in February, 1881, when he left, with his family. In November, 1881, De Arman sold and conveyed the lot to defendant John F. Smith; and it was under this deed that he claimed the lot when it was levied on by the sheriff, and which he relied on as a defense to plaintiff's action. In February, 1882, plaintiff, Pearce, recovered judgment against said W. M. Taylor and one George M. Taylor. Execution issued thereon March 27, 1885, and was levied on the lot, which was sold thereunder, and was bought by plaintiff, who obtained a deed therefor from the sheriff, which was duly recorded. There was no evidence that the said Taylor had ever filed in the probate office, or lodged with the sheriff, any declaration claiming said property as exempt to him from levy and sale at any time before the levy and sale of the same by the sheriff. The court gave the affirmative charge to the jury in favor of plaintiff, and defendants appealed.

*Bishop & Hanna, C. C. Whitson & Bros., and Willett & Willett, for appellants. Kelly & Smith, for appellee.*

SOMERVILLE, J. The present case must turn on one question, was the house and lot in controversy the homestead of Taylor, owned and occupied by him as such, at the time of the attempted conveyance of the premises by him to De Arman on January 5, 1881? If it was his homestead, this deed is admitted to be void on account of a manifest defect in the certificate of the wife's acknowledgment. *Motes v. Carter*, 73 Ala. 553; Code 1876, § 2822. The legal title of the premises, being unaffected by the void conveyance, which is a mere nullity, would remain in the grantor, and be subject to the lien of the plaintiff's execution issued March 27, 1885, under which the premises were sold and purchased by plaintiff on June 29, 1885; the defendant in execution, Taylor, having then abandoned the premises, and ceased his occupancy. *Striplin v. Cooper*, 80 Ala. 256; *Alford v. Lehman*, 76 Ala. 526. If De Arman acquired no title under his deed, the defendant in this action, who claims under him, obviously acquired no better estate or title than his vendor had. The controversy is simply one as to the relative superiority of the title supposed to be acquired by De Arman under his deed, and that acquired by plaintiff under his execution sale. The record, we may add, shows that the deed from Taylor to De Arman was acknowledged by the wife on July 21, 1885, so as to correct the imperfections of the former certificate. This was nearly a month after the sale of the property under plaintiff's execution. But it is too obvious for argument that this fact can exert no influence on the case, because the new acknowledgment could not operate retrospectively to take away intervening rights vested before it was perfected. The contention of appellant, seeking to sustain De Arman's title, is based on the following facts: Taylor, while owning and occupying his homestead, with his wife and

children, made a verbal contract with De Arman, in October or November of the year 1880, to sell the premises to him; a part of the purchase money being then paid by the vendee. He then permitted De Arman to move on the premises, and occupy all the rooms in the dwelling-house except three, which he (Taylor) continued to occupy for the usual purposes of a homestead, with his family, agreeing to pay rent for them. This was his *status* at the time he executed the deed of January 5, 1881, to De Arman. The inquiry is, had he then abandoned the premises so as to have ceased his occupancy of them as a homestead? We think not. The verbal agreement to sell was absolutely void, conferring no right whatever, notwithstanding the payment of a part or even the whole of the purchase money. If a deed by the husband alone to the homestead, without the voluntary assent and signature of his wife, or his written agreement to sell, is a nullity, as often decided, *a fortiori* a verbal agreement to sell must likewise be void, as if it had never been. We may therefore discard this incident from the case as entirely immaterial. It is plain that Taylor had never left or quit the premises: He was still in the actual use and occupancy of the three rooms as a home, residence, or dwelling-place of himself and family, and had no other. He certainly owned the place, because he had never parted with the title. He also occupied it as fully as if he had let to De Arman, or any other lodger, all of the premises except the three rooms retained. In the latter case even, it could scarcely be maintained that such letting of a part would be an abandonment of the whole. The contrary has often been held. *Prior v. Stone*, 70 Amer. Dec. 350, note; *Phelps v. Rooney*, 76 Amer. Dec. 244. The renting of the premises by Taylor from De Arman did not operate either to create an abandonment, or to estop him from showing that in reality the relation of landlord and tenant did not exist between them. We have held that a verbal promise of the owner of a homestead to pay rent to the grantee under a deed void for the want of the voluntary assent and signature of his wife, no actual change of possession being shown, was without consideration, and did not create the relation of landlord and tenant so as to estop the real owner of the premises from denying the title of his alleged landlord. Such an arrangement, it was suggested, could not be allowed to defeat the purpose and policy of the homestead law as expressed in our statutes and constitution. *Crim v. Nelms*, 78 Ala. 604. In principle, the present case is scarcely distinguishable from that deliverance. If a homestead can be verbally rented to a lessee, and he be allowed entrance, it may be, to a single room of the dwelling, and a deed afterwards made by the husband alone, against the protest of the wife, can operate to convey a good title to the grantee, a wide door would be open for the nullification of the salutary restrictions thrown around the alienation of homesteads by the law. It would enable husbands easily to do by indirection, without the knowledge or even suspicion of the wife, what they are prohibited positively by law from doing directly. *Alford v. Lehman*, 76 Ala. 529; *Taylor v. Hargous*, 4 Cal. 268, 60 Amer. Dec. 606, and note. In arriving at the conclusion that there had been no abandonment or forfeiture by Taylor of his right of homestead at the time of the attempted sale of the premises, we but adopt that construction of our laws on this subject which, in our opinion, will best promote the wise and liberal policy in which they had their origin.

The circuit court did not err in giving the general affirmative charge in favor of the plaintiff, upon the agreed statement of facts contained in the bill of exceptions, and the judgment must be affirmed.

(84 Ala. 140)

MEMPHIS & C. R. CO. v. WOMACK.

(Supreme Court of Alabama. July 10, 1888.)

1. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE. In an action against a railroad company for negligently killing plaintiff's intestate, it appeared that deceased, who was intoxicated, was last seen walking towards

home on the track, near the public road; that he was killed at night-fall, at a curve in the track not near a public crossing, and at the entrance to a cut; and that he was not seen by the engineer until the train was within 60 or 70 feet, when it was impossible to stop the train in time to avoid striking him. *Held*, that deceased's own negligence contributed to his death, and that plaintiff should not recover.<sup>1</sup>

STONE, C. J., dissenting.

2. SAME—EVIDENCE—CUSTOM TO WALK ON TRACK.

Evidence, in such case, of a custom to walk on defendant's track at the place of the accident, is incompetent because calculated to induce the inference that defendant was required to exercise greater care to prevent accidents there than at other points not so used.

3. SAME—EVIDENCE—RES GESTÆ.

In such case, evidence that, immediately after the stoppage of the train in consequence of the accident, one of the train-men said, "We have run over a man, and killed him dead as hell," is not part of the *res gestæ*, and is inadmissible.

4. SAME—EVIDENCE—VERDICT OF CORONER'S JURY.

In such case the verdict of a coroner's jury, that deceased was accidentally run over by defendant's train, is inadmissible.

5. EXECUTORS AND ADMINISTRATORS—MARRIAGE OF ADMINISTRATRIX PENDING ACTION.

Upon the marriage of an administratrix, the action in which she is plaintiff does not abate, but her husband, being administrator in the right of his wife, should be joined as co-plaintiff; Code Ala. 1886, § 2632, providing that actions by or against an unmarried woman shall not abate by her marriage, which shall be suggested upon the record, whereupon the action shall proceed in her new name, having no application to such case.

Appeal from circuit court, Jackson county. H. C. SPEAKE, Judge.

This suit was brought against the railroad by Martha Compton, as administratrix of her husband, Charles Compton, who was run over and killed by a train of cars on the defendant's road. During the pendency of the suit, the plaintiff married one Womack, and, on suggestion of this fact to the court, the suit was ordered to proceed in the name of Martha Womack, administratrix, etc. Defendant set up by plea this marriage as a bar to the continuance of the suit, to which plea a demurrer was sustained. One of plaintiff's witnesses testified that, after the killing and stoppage of the train, she overheard one of the train-men say, "We have run over a man, and killed him dead as hell." The court excluded any evidence of the verdict of the coroner's jury, that the deceased was accidentally run over by the defendant's train of cars.

*Humes, Walker, Sheffey & Gordon*, for appellant. *Brown, Brickell & Hunt*, for appellee.

CLOPTON, J. The declaration of one of the train-men, testified to by the witness Larkin, should have been excluded, on the authority of the following cases: *Railroad Co. v. Hawk*, 72 Ala. 112; *Tanner v. Railroad Co.*, 60 Ala. 621. The declaration was not sufficiently connected with the main fact, or contemporaneous therewith, to constitute a part of the *res gestæ*. Without serving to explain or elucidate its character, it was merely a heartless narration of a transaction really and substantially past, only tending to prejudice the minds of the jury, and which should not and does not bind the defendant.

It is the settled doctrine in this state, supported by the great weight of authority in England and America, that ordinarily the right of way of a railroad company is its exclusive property. Its free and unobstructed use is essential to the transaction of the business of the company in transporting freight and passengers, and to the safety of its trains. Mere acquiescence in the use of such right of way does not confer on the public a right to use it, nor create any obligation to look out for persons using it, other than the general duty of lookout for obstructions. In the absence of law making such acts punishable, railway companies are powerless to prevent such use of their

<sup>1</sup>As to the duty which railroad companies owe to trespassers on their tracks, and their liability for injuries to such trespassers, see *Railroad Co. v. Colman's Adm'r*, (Ky.) 8 S. W. Rep. 875, and note; *Troy v. Railroad Co.*, (N. C.) 6 S. E. Rep. 77, and note; *Remer v. Railroad Co.*, 1 N. Y. Supp. 124, and note.

tracks. Under the conditions in which they are situated, physical prevention is impracticable, and acquiescence is morally compulsory. Mere acquiescence, under such circumstances, is not permission. *Coal Co. v. Davis*, 79 Ala. 308; *Frazer v. Railroad Co.*, 81 Ala. 185, 1 South. Rep. 85; *Tanner v. Railroad Co.*, *supra*. The evidence of the custom of persons to walk on the track was calculated to mislead the jury by inducing the inference that the defendant owed deceased a greater and other duty, at the place of the accident, because of such custom, than to intruders at other places not so used. It should have been excluded.

As the judgment must be reversed, and only two inquiries are involved, a consideration and discussion in detail of the charges given and refused by the court would be an unnecessary and tedious extension of this opinion. It will better suffice the purposes of another trial, and a correct determination of the case, to state the principles of law which are applicable and should govern its decision, on the undisputed facts, and the tendencies of the evidence as to any facts controverted. The following facts cannot be disputed: The deceased left Larkinsville about sundown, intoxicated, to go home, about half a mile distant. There was a dirt road running parallel with the railroad. The deceased, the last time he was seen alive, was walking on the railroad track, and was killed about night-fall at the entrance of what is called the "Little Out," where there is no public crossing. He was clearly a trespasser on the right of way of the defendant. Persons in charge of a train are not required to anticipate wrongful intrusion on the track. They have a right to presume, and act on the presumption, that intelligent beings will leave it free and unobstructed for passing trains. The law does not impose any obligation to use special precaution against possible, but unanticipated, injuries to trespassers. A railroad company does not owe to an intruder the duty to keep a vigilant lookout for obstructions when such lookout is only rendered necessary by his wrongful act. As there is no duty to anticipate wrongful acts in others, the omission to keep a vigilant lookout for trespassers is not a failure in duty to such wrong-doers. Any person who enters and walks at places where the public have no right, unless by the invitation or license of the company, is a trespasser, and assumes the peril of the position in which he has voluntarily placed himself. These views are not intended to antagonize or impair the rule that a failure to keep a lookout when a train of cars is being moved within the limits of a town or city, or passing a public crossing, fixes the charge of negligence, as held in *Railroad Co. v. Shearer*, 58 Ala. 672; *Railroad Co. v. Sullivan*, 59 Ala. 272; and *Railroad Co. v. Donovan*, 84 Ala., *ante*, 142. Under the circumstances of this case, the intoxication of the deceased does not exempt him from the consequences of his contributory negligence. His intoxication was unknown to the persons in charge of the train, and they had no reason to anticipate that he was on the track in such condition. On the undisputed facts, the court should instruct the jury that the contributory negligence of the deceased disentitles the plaintiff to recover, unless the defense is overcome by the failure of the defendant to perform a duty subsequently arising and imposed by law. *Railroad Co. v. Cope land*, 61 Ala. 376; *Frazer v. Railroad Co.*, *supra*; 6 Amer. & Eng. R. Cas. note 19. From a regard for human life, the law imposes the duty of due precaution and reasonable effort to prevent unnecessary injury. Having said that there was no special obligation to discover the deceased, unless, it may be, that the agents or employees of the defendant had information which should lead them to anticipate he was on the track, no special duty to him arises until he is discovered; and, when discovered, if his intoxication was unknown, those in charge of the train had a right to presume that he would extricate himself from the danger of an impending collision. The nature and extent of the duty is that no injury shall be produced by wanton or reckless or intentional negligence. If, after the deceased was seen, and his peril discov-

ered, or the train was in a position that those in charge ought to have discovered his peril,—that is, if it would be manifest to a vigilant observer that he was unaware of his danger, or unable to extricate himself,—it became then their duty to use proper skill and diligence to make reasonable and necessary efforts to avoid injuring him. The omission to do so, when such injury might have been prevented by a prompt resort thereto, constitutes wanton or reckless or intentional negligence. This rule, however, does not apply if, when the deceased and his peril were discovered, the train was so near that preventive effort could not have availed to avert the catastrophe. *Frazer v. Railroad Co., supra*. The inquiry in such case is, could the injury have been averted by the use of reasonable skill and diligence after, not only the deceased was seen on the track, but also his peril discovered? It only remains to apply these principles to the aspects of the case presented by the tendencies of the evidence. The deceased was killed at a place where the track curves, and where he could not have been seen at as great a distance as on a straight track. The only reasonable inference is that he was lying down, either asleep, or insensible to danger from drunkenness. If the evidence of the engineer be believed, who is the only witness testifying to the immediate facts of the accident, the deceased, at the place and in the position in which he had placed himself, could not have been seen until the train approached to within 60 or 70 feet of him. When the engineer first discovered some object on the track, which he could not have done sooner, the train could not have been stopped, in time to prevent striking it, by the use of all the appliances at hand. If these be the facts, no skill and diligence, and no preventive effort, could have averted the accident, and the defense of contributory negligence is not overcome. The court should so instruct the jury.

There is no error in excluding the verdict of the coroner's jury.

By the marriage of the plaintiff during the pendency of the suit, she did not cease to be administratrix. Her mere marriage is not the proper subject of a plea against the further continuance of the suit. But, as her husband became administrator in the right of his wife, the suit should not be allowed to proceed in the name of the plaintiff acquired by the marriage, without joining her husband as co-plaintiff. Section 2602, Code 1886, does not apply to such case. Reversed and remanded.

STONE, C. J., (*dissenting*.) The authorities are in conflict on the question whether railroad officers owe any duty of watchfulness or care to trespassers on their track at places other than cities, towns, and public crossings. I think the spirit of our decisions leads to an affirmative answer to this inquiry. *Tanner v. Railroad Co.*, 60 Ala. 621; *Railroad Co. v. Sullivan*, 59 Ala. 272; *Gothard v. Railroad Co.*, 67 Ala. 114; *Cook v. Railroad Co.*, Id. 533; *Frazer v. Railroad Co.*, 81 Ala. 185, 1 South. Rep. 85. So I think humanity and the known habits of the public impose the duty of ordinary care in such cases. I cannot agree to the rule declared by my brothers, but would be willing to hold that when a trespasser, under such circumstances, complains of an injury, the burden is on him to establish want of diligence on the part of those in charge of the train.

(84 Ala. 154)

#### GEORGIA PAC. R. CO. v. BLANTON.

(*Supreme Court of Alabama. July 10, 1888.*)

**RAILROAD COMPANIES—INJURIES TO PERSON ON TRACK—SIGNALS ON ENTERING A TOWN.**  
Civil Code Ala. 1886, § 1147, as amended by the act of February 28, 1887, (Acts 1887, p. 146,) provides that, in actions for injuries resulting from failure to comply with the requirements of section 1444, requiring the engineer or other person in charge of a locomotive to ring the bell, or whistle, at least one-fourth of a mile before entering any village, town, or city, and to continue to do so at intervals while running within the limits of the same, the burden of proof is upon the company to show such compliance. In an action by a father for the killing of his infant child,

about two years old, within the corporate limits of a town, it appeared that the train was moving up grade at the rate of 12 or 15 miles per hour; that the road was straight for about 60 yards from where the child was killed, and then curved to the left; that the engineer had the cab-window on his right closed, but kept a lookout through the front window, but did not ring the bell or blow the whistle on entering the town, nor while passing. *Held*, that the facts shown do not exonerate defendant from liability; there being no evidence as to within what time the train could have been stopped with the means at hand.<sup>1</sup>

Appeal from circuit court, Cleburne county; LEROY F. BOX, Judge.

Action by Richard D. Blanton against the Georgia Pacific Railroad Company for damages for the killing of his infant child. Judgment for plaintiff. Defendant appeals.

*James Weatherly and Aiken & Burton*, for appellant. *Kelly & Smith and Smith & Lowe*, for appellee.

CLOFTON, J. In April, 1887, appellee's infant son was killed by the locomotive and cars of appellant. The father brings the action to recover for the injury. When first seen, the child was standing on the outside of the railroad track, but near enough to be struck by the pilot in passing. The special defenses are that the defendant fulfilled its duty to the child in the matter of lookout and preventive effort, and contributory negligence on the part of the parent.

The first question raised, relates to the character and measure of duty of the defendant at the time and place and under the circumstances of the accident. In *Railroad Co. v. Womack*, ante, 618, (present term,) we announced, as the rule of liability, that, at localities where a railroad company has the right to the exclusive use of its roadway, it does not owe to a trespasser on its track the special duty to look out for and discover him,—the necessity therefor being produced by his own wrongful act, which the company was not bound to anticipate; but, when those in charge of the train discover him while observing the general duty of lookout for obstructions, it is incumbent on them to use reasonable care to prevent injury. The corollary is that a trespasser cannot maintain a claim against the company for injuries suffered while trespassing on its road-bed, unless caused by wanton, reckless, or intentional negligence, as defined in *Frazer v. Railroad Co.*, 81 Ala. 185, 1 South. Rep. 85. It was not intended to apply the rule thus stated to localities where public roads, streets, or highways cross the railroad track,—places at which both the company and the public have a right of way for their respective and appropriate purposes. Railroad corporations are authorized by statute to use, cross, or change public roads when necessary in the construction or maintenance of their roadways, but are required to place the roads in a condition satisfactory to the authorities of the county having the control thereof,—a condition safe and convenient for use by the public. Code 1886, § 1581. Municipal authorities have power to regulate the running of trains or engines within the corporate boundaries, and to prohibit the standing thereof on or across the streets or highways,—to protect the public use by preventing unnecessary and dangerous obstructions. Section 1519. The use of public roads, streets, and highways obtained by railroad corporations is subject to their proper and lawful use by the public; the latter, however, being the servient use, yielding precedence to use by the company. The duties are mutual and reciprocal, and the same degree of care is exacted of both. It is incumbent on those in charge of a train to regulate its movements, and to exercise reasonable care and precaution, so as to prevent injuring any person who may be rightfully using a highway at a place where it crosses the railroad track. Such persons cannot be regarded as trespassers or intruders. Those having the control of a mov-

<sup>1</sup>As to liability of railroad companies for injuries caused by running their trains at an illegal rate of speed within corporate limits, see *Strong v. Railroad Co.*, (Miss.) 3 South. Rep. 465, and note; *Railroad Co. v. Donovan*, (Ala.) 4 South. Rep. 142, and note.

ing train are cognizant of the accustomed and authorized use of such localities by any of the public, are apprised that its movement, under such circumstances, is attendant with danger, and are bound to anticipate it, which devolves the correlative duty to use reasonable preventive care. Section 1699, Code 1876, which governs this case, prescribes positive regulations, imposing specific duties, in addition to those enjoined by the common law, which the engineer, or other person having control of the running of the locomotive on any railroad, is required to observe at specified times and places, and the failure to observe which subjects him to indictment and punishment. He is required to blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road crossing, or any regular depot or stopping place; and to continue to do so, at intervals, until such crossing is passed, or such depot or stopping place is reached; and also to blow the whistle or ring the bell on entering the corporate limits of any town or city, and to continue to do so until he has reached his destination, or passed through such town or city. It may be here remarked that section 1144, Code 1886, extends the requirement so as to make it his duty to blow the whistle or ring the bell, at short intervals, on entering into or moving within or passing through any village, town, or city, whether incorporate or unincorporated. Section 1700, Code 1876, declares a railroad liable for damage done to persons, stock, or other property, resulting from a failure to comply with the requirements of the preceding section, or from any negligence on the part of such company or its agents. The statutes have been construed to render the company liable, not only for a failure to observe the statutory regulations, but, in addition, for any negligence on the part of such company or its agents; and it is said: "If these words were not found in the statute, it would not be a fair construction that would absolve the company from responsibility because it observed the statutory regulations, and yet neglected other precautions which ordinary prudence would suggest as necessary to avoid casualties." *Railroad Co. v. Thompson*, 62 Ala. 494. This construction of the statutes makes it the duty of those in charge of the train to keep a proper lookout, and give the requisite signals of warning at the specified times and places; and accordingly we have held that the failure to keep such lookout, and to give the cautionary signals at such times and places, is negligence *per se*, which entitles the party injured, if using due care to escape injury, to a claim for damages. *Railroad Co. v. Sullivan*, 59 Ala. 272; *Railroad Co. v. Shearer*, 58 Ala. 672; *Railroad Co. v. Donovan*, 84 Ala. —, ante, 142.

Section 1700, Code 1876, further provides: "When any stock is killed or injured, or other property damaged or destroyed, by the locomotive or cars of any railroad, the burden of proof in any suit brought therefor is on the railroad company to show that the requirements of the preceding section were complied with at the time and place when and where the injury was done." The construction which this provision of the statute has received is that when stock or other property is injured or damaged by the locomotive or cars, which could be reasonably traced to a non-observance of the statutory regulations, the burden of proof is shifted on the railroad company to repel the imputation of negligence by showing compliance. *Railroad Co. v. Mo-Apine*, 75 Ala. 118. In *Railroad Co. v. Bees*, 82 Ala. 340, 2 South. Rep. 752, the plaintiff having proved that his mare was killed by the train of defendant, it is said: "The burden was then cast on the railroad company of showing that it has employed that measure of diligence which the law exacts of railroad companies, and that the injury was not caused by failure to do so, or it must show that the injury could not have been averted by the employment of such diligence. Injury being proved, and no explanatory or exculpatory testimony being offered, the case is left with the burden unlifted, and the fault is imputed to the railroad company." This provision of the statute, by its terms, was restricted to the case of stock killed or injured, or other

property damaged or destroyed. By the act of February 28, 1887, this section of the Code was amended so as to include in the provision, as to the burden of proof, the case when any person is killed or injured. The evident intention of the amendatory act is to remedy the evil manifested by the judicial construction which limited the provision to suits brought for injury to stock or other property. The amendatory act having been enacted after the original section had received a known judicial construction; and containing no words indicating a contrary intention, the presumption is that the legislature intended that it should, as amended, receive the same construction in cases where persons are killed or injured as when stock is killed or injured. Of course, the rule, when applied to persons, is qualified by the presumption that intelligent beings will take steps in time to escape injury.

The plaintiff's child was killed within the corporate limits of the town of Heflin, and after the enactment of the act amending section 1700. The plaintiff having shown that his child was killed at such time and place, the burden is cast on the defendant to show that the care, precaution, and diligence which the law exacts was exercised, or that the injury was not caused by a failure in these respects, or that it could not have been prevented by the use of such diligence. There was a disregard and non-observance of the statutory regulations. The engineer did not blow the whistle or ring the bell on entering the corporate limits, or while passing through the town. The train was going east. The road was straight for about 60 yards from the place where the child was killed westward, and then curved gradually to the left. The engineer had the window on his right closed, because it was cool, and he had rheumatism, and kept a lookout through the front window. After the train passed the public crossing a short distance west of Heflin, the fireman was engaged in putting coal in the furnace, and sweeping the floor of the engine, until the whistle blew for brakes. The train consisted of the locomotive, tender, three box cars, two flats, and the caboose. It was running at the speed of 12 or 15 miles an hour on an up-grade. There were two brakemen on the box cars, one of whom was sitting on the end of the car, 30 feet distant from the brake, which he failed to reach before the child was run over; he having been thrown down by the jostling of the car. There is no evidence whether or not the cars were loaded, nor within what distance the train could have been stopped by the use of all the brakes and other appliances at hand. Such is the character of the explanatory or exculpatory proof offered on the part of the defendant. It fails to negative all negligence, or to show a compliance with all the requirements of the statute, or that the conditions were such that the train could not have been stopped in time to prevent injury if a proper lookout had been kept, and all the means at hand had been promptly used to stop the train. We are forced to hold that it is insufficient to establish a *prima facie* case of due and reasonable care, skill, and diligence, or to repel the imputation of negligence, or to rebut the presumption of negligence raised by the injury. *Railroad Co. v. McAlpine*, 80 Ala. 78. The record eliminates from the case the question of contributory negligence. The child was about 21 months old, and incapable of discretion and judgment; and there is no proof whatever tending to show negligence on the part of either of the parents. Conceding all adverse inferences which could be drawn from the evidence, the court would not have erred if, on the undisputed facts, the affirmative charge in favor of the plaintiff had been given without hypothesis. We need not, therefore, inquire into the correctness of the rulings of the court. Though several of the charges given are subject to criticism, they could have done no injury. Affirmed.

(85 Ala. 95)

## WILSON v. HOLT.

(Supreme Court of Alabama. July 17, 1883.)

## PARTIES—JOINDER OF DEVISEES—MANDAMUS TO STRIKE OUT ORDER.

In a bill for an accounting and partition of land, by an heir of a husband claiming under an antenuptial contract, against purchasers at a sale by the administrator of the deceased wife, the devisees of the wife are necessary parties, and *mandamus* will not lie to compel the chancellor to strike out an order requiring an amendment of the bill making them parties to the suit.

Application for *mandamus*.

This was an application by James L. Holt for a *mandamus* to the chancellor of the Montgomery county chancery court to strike out an order theretofore made, joining the devisees of Mrs. Emeline Wilson as parties to the bill. For opinion on former appeal, see 3 South. Rep. 321.

*Tompkins, London & Troy*, for the motion. *Brickell, Semple & Gunter*, contra.

SOMERVILLE, J. This case has heretofore twice been before this court on appeal. 75 Ala. 58, 83 Ala. 528, 3 South. Rep. 321. The application is now for the writ of *mandamus* to compel the chancellor to strike out an order requiring an amendment of the bill so as to make the devisees of Mrs. Emeline Wilson parties to the suit on the ground that, as holders of the legal title to the property in controversy, they are indispensable parties. It is manifest from the last decision made in the case, (83 Ala. 528, 3 South. Rep. 321,) which resulted in the reversal and remandment of the cause, that the legal title was never divested out of such devisees by reason of the fact that the order of the sale made by the probate court was held to be absolutely void. The question as to the introduction of necessary parties is one which may be raised by demurrer, motion to dismiss, plea, or answer, according as the defect may appear on the face of the bill, or be made to appear extrinsically. If the absent parties are indispensably necessary, so that the cause cannot properly be disposed of on the merits without their presence, the objection may be made at the hearing, or on error, or it may be taken by the court *ex mero motu*. 8 Brick. Dig. p. 373, § 98. The record shows that these parties were at one stage of the proceeding introduced in the bill by the complainant, and on demurrer by the defendant, making the objection that there was a misjoinder, were ordered to be stricken out by the court. The sustaining of this demurrer was an interlocutory ruling, liable to be reviewed by the chancellor at any time before final judgment. *Brock v. Railroad Co.*, 65 Ala. 79. When the decree was reversed, and the cause remanded, the decision of the court made the error of the ruling obvious; and the chancellor could properly have ordered the amendment to be made *ex mero motu* upon the facts appearing in the averments of the amendment originally proposed, and ordered to be stricken out. If he had failed to take this step, the decree would probably have been reversed by this court on appeal, as was done in *Lawson v. Warehouse Co.*, 73 Ala. 289, because of the absence of parties whose presence is necessary to quiet litigation. The ruling sustaining the demurrer for want of proper parties was erroneous for two reasons: *First*, when parties who have no interest in a suit (admitting that the devisees of Mrs. Wilson had none, as claimed) are improperly joined as defendants, the other defendants cannot take advantage of the misjoinder, (*Horton v. Sledge*, 29 Ala. 479;) *second*, the devisees were not only proper but necessary parties, on the ground, as we have above said, that the legal title of the land devised was vested in them, and was not affected by the void sale attempted to be made by the probate court, (*Wilson v. Holt*, 83 Ala. 528, 3 South. Rep. 321.) No element of estoppel enters into this case; and the case is clearly distinguishable from *Ex parte Cresswell*, 60 Ala. 378, where the chancellor had made an order setting aside and vacating a final

decree rendered by him at a former or adjourned term. The applicant fails in showing a specific legal right, and the writ prayed for will be refused on that ground, without deciding the question of the appropriateness of the remedy in this case. Application denied.

(84 Ala. 127)

**CITY COUNCIL OF MONTGOMERY v. LOUISVILLE & N. R. Co.**

(*Supreme Court of Alabama. July 9, 1888.*)

**1. MUNICIPAL CORPORATION—CONTROL OF BUILDING WITHIN FIRE LIMITS—INJUNCTION.**

Where city authorities threaten to arrest and fine any person engaged in the construction of an addition to a depot, the erection of which is claimed to be a violation of the city ordinance against erecting wooden buildings within certain designated limits, and also threaten to destroy the building if erected, equity will assume jurisdiction to protect the corporate franchise of the railroad company building such depot from invasion by such enforcement of an ordinance asserted to be void, or to have no application.<sup>1</sup>

**2. SAME—FIRE LIMITS—WHAT BUILDINGS ARE PROHIBITED.**

City Code of Montgomery, § 182, providing that "no person shall build any wooden house, shed, or other structure of wood within the above-described fire limits, or repair with wood or other combustible material the roof of any building within the fire limits, or enlarge or elevate a wooden building of any kind within the fire limits, and any person who shall violate any of the provisions of this section shall be fined \$10 on conviction thereof, and \$5 for every day thereafter that the violation shall be continued," does not apply to an addition to a brick depot, which addition rests on a solid brick foundation, and is intended to be incased with corrugated iron, and covered with sheet-iron roofing, and therefore the court did not err in refusing to dissolve an injunction restraining its enforcement in such case.<sup>1</sup>

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

This is an action for an injunction by the Louisville & Nashville Railroad Company against the city council of Montgomery. Preliminary injunction issued, and from an order refusing to dissolve the same defendant appeals. The Louisville & Nashville Railroad Company, operating the South & North Alabama Railroad Company, and in charge of the Union passenger depot of the last-named company in the city of Montgomery, undertook to make an addition, demanded by the public convenience, and necessary for the proper transaction of the business of said companies, to the said depot, which depot is a brick building, and within the fire limits of the city of Montgomery. This addition, one side of which is an end side of said depot building, was to be 80 by 42 feet long and wide, and 24 feet high, cased on the outside with corrugated iron, and covered on the top with sheet-iron roofing; the structure to rest upon a solid brick foundation 8 or 4 feet deep, and raised several inches from the ground. The wood to be used was to be pieces of studding 14 inches apart, a sill resting on the brick foundation, and a plate at the top, with floors in the lower and upper story, and a stairway. The doors, sashes, and blinds were to be of wood, as is usual in all buildings. The addition was to be plastered on the inside. While engaged in the erection of this structure, the workmen were stopped, and the railroad superintendent was arrested and fined, by the city authorities. A resolution in reference to this building was passed by the city council of Montgomery in these words: "Resolved, that the chief of police be directed to take steps at once to enforce the city ordinance against all persons in any manner concerned in erecting the two-story wooden building near the Union depot in this city, and to arrest and bring before the recorder all parties engaged in working on said structure, or connected therewith, including the superintendent of the L. & N. R. B. Company." The city authorities threatened to arrest and fine any person engaged in the erection of the said addition, or any part thereof, if erected, and to re-

<sup>1</sup>An injunction will lie to restrain a threatened invasion of private rights by official action. See *Thornton v. Roll*, (Ill.) 8 N. E. Rep. 145, and note.

move the whole, if erected. The railroad companies filed this bill in the chancery court, seeking to enjoin any interference on the part of the city authorities in the erection and completion of said addition, and any attempt to remove the same after completion, and to enjoin the enforcement of the above-copied ordinances.

*W. S. Thornton*, for appellant. *Thos. G. Jones*, for appellee.

**SOMERVILLE, J.** The principles settled in the case of *Port of Mobile v. Railroad Co.*, 4 South. Rep. 106, (decided at the present term,) may be fairly considered as settling the right of a court of chancery to assume jurisdiction of the present case, the purpose of which is to protect an alleged corporate franchise from repeated and embarrassing disturbances, resulting from the threatened enforcement of a municipal ordinance of the city of Montgomery, which is asserted either to be void, or else to have no application to the case of the complainants, although the recorder's court of said city has construed it otherwise, and the city council have announced their intention to execute its penalties against the complainant, and its authorized agents. It is obvious that, upon the facts stated in the bill, which are to be taken as true, so far as well pleaded, on the motion to dissolve the injunction, the enforcement of the ordinance in question, with or without the demolition of the new extension of the depot in process of construction, presents a strong case of complicated and irreparable injury to the complainant, followed by a grave interference with public interests. The duty of the complainant railroad company to supply suitable depot accommodations to the traveling public is imposed by statute. The right to do so is as much a part of its corporate franchise as the right to construct its road, and to carry passengers for hire, subject, of course, to be regulated by the exercise of the lawful police power of the state, whether directly by the sovereign power speaking through the public statutes, or indirectly through the agency of the municipality of Montgomery, expressed in the form of a lawful and valid ordinance. The case, then, resolves itself into an inquiry as to the validity of the ordinance in question, or its application to the act of the complainant in the enlargement of its depot building, as described in the bill, and admitted by the appellant on this motion. This ordinance, as found in the City Code of 1879, is as follows: "Sec. 132. No person shall build any wooden house, shed, or other structure of wood, within the above-described fire limits, or remove any structure from a place beyond to a place within the fire limits, or remove any wooden structure from any place within the fire limits to any other place within the fire limits, or repair with wood or other combustible material the roof of any building within the fire limits, or enlarge or elevate a wooden building of any kind within the fire limits; and any person who shall violate any of the provisions of this section shall be fined ten dollars on conviction thereof, and five dollars for every day thereafter that the violation shall be continued." The ensuing section, numbered 133, purports to define what shall be deemed a wooden building, and does not affect the case in the aspect in which we propose to decide it. We assume that the ordinance is authorized by the amended charter of the city, approved February 26, 1887, under the power therein given "to determine within what limits wooden buildings shall not be erected, and to prevent the reconstruction in wood of old buildings within such limits, and to condemn buildings and verandas, and parts thereof, which are dangerous or insecure." Acts 1886-87, pp. 488, 489. We may admit, also, for the sake of argument, that this power is as broad as section 21 of the original city charter, which authorized the city council "to regulate or prohibit the erection of wooden buildings in any part of the city they may deem proper and necessary," under the authority of which the ordinance under consideration was passed. The contention is pressed with earnestness that the depot extension or enlargement, which is minutely described in the bill, is not a wooden building,

because it rests on a solid brick foundation, is intended to be incased on the outside with corrugated iron, and to be covered on top with sheet-iron roofing, in such manner as to make it practically fire proof. For this reason it is insisted that the city council had no authority, under its charter, to prohibit the erection of such a structure. If we conclude that the legislature used the words "wooden building" in the sense in which they are ordinarily used in common parlance and usage, and that the city council could not attach to them any other or different signification, it becomes exceedingly difficult for a court or even a jury to say precisely how much wooden material, in a given case, will operate to bring a structure within this designation or class of buildings. This is manifest from the most casual reflection. The issue is one which might well have been referred by the chancellor to a jury; and had he done so, in a proper case, and retained the injunction in force until its determination after the answer on the final hearing, we are not prepared to say that his action would have been erroneous in this particular. 2 High, Inj. §§ 1508, 1509. Without undertaking, therefore, to determine whether the structure in question is a wooden structure, we are satisfied that the extension or enlargement of the complainant's brick depot building, in the manner described, does not fall within the prohibitions of the ordinance. The first paragraph of the ordinance merely prohibits the building, as an entirety, of any wooden house or structure. There is another clause regulating enlargements of old buildings. The second and third have reference only to the removal of wooden and other structures within the fire limits. The fourth prevents repairs of certain kinds on the roof of any building within the fire limits; and the fifth prohibits the enlargement or elevation of a wooden building of any kind within the same area. The ordinance is penal in its nature, we may say highly penal, in view of the daily recurring fines for the continuance of the *quasi* nuisance intended to be prohibited and punished. It must therefore be strictly construed against the municipal authorities. It is not sufficient for an act to be brought within the spirit of a highly penal statute; it must come within the letter, ordinarily, to authorize its inclusion within the terms of such statute. Adopting such a construction, we think that the act of the complainant corporation does not fall within the terms of the ordinance, and is not violative of its provisions. This conclusion is sufficient to authorize us to hold that the chancellor did not err in refusing to dissolve the injunction granted to prevent the threatened enforcement of the ordinance against the complainants, or its authorized agents, who were concerned in making the depot enlargement. We wish to be understood, in what we have above said, as intentionally leaving the question undecided as to whether the extension or enlargement of the depot building, as described in the bill, is a wooden structure or not, such as it was within the power of the city to prohibit by virtue of the authority conferred in its charter. This point we leave open. What we do decide is that the ordinance of the city which has been enacted on this subject does not meet the case in hand. The decree of the chancellor, refusing to dissolve the injunction, is accordingly affirmed.

(84 Ala. 457)

**MORRIS *et al.* v. STATE.**

(*Supreme Court of Alabama. July 9, 1898.*)

**1. DISTURBANCE OF PUBLIC WORSHIP—WHAT IS—RIGHT OF EXPELLED MEMBERS.**

After a minority of the members of a religious society have been excluded from church membership, they have no right to use the church edifice; and, being assembled for worship, the officers of the church may remonstrate against such use of the church edifice, and use such means, not amounting to needless force, as is necessary to prevent it, without being guilty of disturbing public worship.

**2. SAME—EVIDENCE—WHAT CONSTITUTES DISTURBANCE.**

On an indictment for disturbing religious worship, the witnesses for the prosecution may state the facts constituting the alleged disturbance, but cannot state that they were disturbed thereby, as that is the conclusion for the jury.

**8. DEED—DESCRIPTION OF GRANTEE—WHEN VOID FOR UNCERTAINTY.**

A deed conveying a lot of land "to the members of the New Judson Church" is void for want of a grantee, and is not admissible in evidence to show title to the property.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

Defendants, Alexander Morris and others, indicted for disturbing religious worship, were members of the "majority" fraction of a negro church known as the "New Judson Church." This "majority" had expelled from membership the "minority." On the occasion of the alleged disturbance, defendants went into the church where services were being conducted by one Cobb, a minister of the "minority," and notified him that he could not preach there that day. The court excluded testimony which tended to show that defendants and one Ethridge, a "majority" minister, had assembled at the same place and time for the purpose of religious worship. Certain of the state's witnesses who were in the congregation, and members of the "minority," were asked if "they were disturbed by the conduct and actions of the defendants," and answered that they were. The court overruled defendants' objection to the question, and motion to exclude the answer. Defendants offered in evidence a deed conveying a certain lot of land "to the members of the New Judson Church," without further identification of the grantees, which the court excluded. Defendants appeal.

*Thos. N. McClellan*, Atty. Gen., for the State.

STONE, C. J. There was testimony offered tending to show that Cobb, the minister, and those attending for worship under his ministration, had been expelled from membership in the church in which they were worshipping at the time the alleged disturbance took place. Testimony was also offered tending to show that the non-expelled members, with their minister, were also in attendance for a like purpose. This testimony was ruled out at the instance of the prosecution. In this we hold that the circuit court erred. Under our constitution and laws, while we accord toleration and protection to all religions which do not offend the morals of the commonwealth, we have no such thing as an established religion. Every sect or denomination of religionists is the arbiter of its own doctrinal tenets. Questions of orthodoxy or heterodoxy are determined by church judicatories, with or without appeal, as each denomination may prescribe for its own government; and whatever is determined by the church adjudication must be regarded by the civil tribunals as rightly decided until it is reversed by a higher ecclesiastical judicatory, if the rules of the denomination have provided such higher tribunal. This must needs be so; for civil authority cannot intervene in matters of faith, unless, perhaps, measures have been resorted to or methods adopted which are subversive of the laws or established customs of the society or denomination. We mean, not questions of faith; for the church judicatory is the arbiter of these. We refer to the procedure and modes of trial. Civil authority can possibly be invoked for the protection of any one who is denied a trial according to the rules of the association. In reference to this, however, we wish to be understood as simply leaving the question open, should it ever come before us. *Weatherly's Case*, 75 Ala. 248. Church edifices are property; generally the property of the persons by whom they are erected or purchased, or the worshipping society, or the denomination to which the worshipers belong. They are consecrated to public worship, and the right to their occupancy and use must, of necessity, be vested somewhere. In the absence of a higher or larger jurisdiction, it pertains to the officers or members, one or both, who, with the consent, express or implied, of the persons who erect or purchase the building, obtain control of it as a place of worship. They, as a society or organization, according to its methods of government, can open or close it at their pleasure; and no one, unless there is a paramount authority or property somewhere,

can control their discretion. And this entire right of control and government must be in the officers and membership, as the rules of the church may declare, and no part of it can be exercised by persons not members of the church. If Cobb, and those who sympathized with him, had been excommunicated, they had no right in the church, other than mere strangers could assert. They could not hold services in it without the consent of the church, or its governing body; and, if they attempted to do so, they were intruders. The officers of the church had the clear right to remonstrate against such use of their church, and to use such means, not amounting to needless force, as should be necessary to prevent it; and if the meeting was being held in the church by excommunicated members, without the consent of the ruling authorities of the church, there was nothing done by the officers or members of the church, so far as this record discloses, which they had not a right to do. It is not for us to determine whether the expelling majority, or the excommunicated minority, or whether either, professed the orthodox faith. The repose of society, and the harmony of the church organization, require this much.

The deed offered in evidence was void for want of a grantee, and the circuit court did not err in rejecting it.

Witnesses should not have been allowed to testify that they were disturbed. That was the inquiry the jury had to make. Facts should have been put before them, and the conclusion should have been left with them. It would seem very clear, however, that what was done must have disturbed the worshippers if they were rightly assembled in that house for worship. What we have said, will be a sufficient guide on another trial. Reversed and remanded.

(84 Ala. 469)

#### CITY OF BIRMINGHAM v. MCCRARY.

(Supreme Court of Alabama. July 10, 1888.)

##### 1. MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREETS—NEGLECT OF CONTRACTOR.

A city is liable to a person injured by the negligence in improving the streets when the work is necessarily and intrinsically dangerous, or when it is the duty of the city to keep the streets in repair, though the work is done under contract, the city having nothing to do with the employment of the laborers, or the direction of the work, except to locate, inspect, and accept the same by its engineer.<sup>1</sup>

##### 2. SAME—DANGEROUS CONDITION OF STREET—CONTRIBUTORY NEGLIGENCE.

In an action against a city for injuries sustained from falling into an excavation made for a sewer, it appearing that the excavation, which had been made that day, extended across a sidewalk, and was left open at night, without lights or guard, and that plaintiff should have known of its existence from having stepped across it on the sidewalk on the opposite side of the street, plaintiff could not be said, as a matter of law, to have been guilty of contributory negligence; that being a question of fact for the jury.<sup>2</sup>

##### 3. SAME—DANGEROUS CONDITION OF STREETS—NOTICE TO CITY.

In such case, special notice to the city of the dangerous condition of the street is unnecessary, as, the work being under its authority and the supervision of its agent, notice is therefore imputed to its officers.<sup>3</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

J. H. McCrary brought suit against the mayor and aldermen of the city of Birmingham to recover damages for injuries sustained by reason of a ditch

<sup>1</sup>See *Turner v. City of Newburgh*, (N. Y.) 16 N. E. Rep. 848, and note; *Klein v. City of Dallas*, (Tex.) 8 S. W. Rep. 90, and note; *Chapman v. Town of Milton*, (W. Va.) 7 S. E. Rep. 22.

<sup>2</sup>As to the province of the court and jury in determining negligence, see *Barnes v. Bowden*, (Pa.) 12 Atl. Rep. 804, and cases cited in note; contributory negligence *per se*, see *Gleason v. Excelsior Manufg. Co.*, (Mo.) 7 S. W. Rep. 188, and note; *Nugent v. Boston, C. & M. E. Corp.*, (Ma.) 12 Atl. Rep. 797, and note; *Railway Co. v. Watson*, (Ind.) 15 N. E. Rep. 824; *Drevis v. Woods*, (Wis.) 37 N. W. Rep. 253.

Respecting contributory negligence in the use of defective highways, see *Village of Ponca v. Crawford*, (Neb.) 37 N. W. Rep. 609, and note; *Bridge Co. v. Bevard*, (Pa.) 11 Atl. Rep. 575, and note; *Kendall v. City of Albia*, (Iowa,) 34 N. W. Rep. 833, and note; *Troy v. Railroad Co.*, (N. C.) 6 S. E. Rep. 77, and note.

across one of the streets, including the sidewalks, of said city of Birmingham, being left open without proper lights, or other warning of danger, and into which the plaintiff fell the night of November 25, 1885, and broke his arm. The several defenses offered to the action sufficiently appear in the opinion. The contributory negligence charged on plaintiff was that he did know, or ought to have known, of the existence of the ditch, and consequently ought to have been looking out for the same at the time of his fall; he having passed along the street, on the opposite sidewalk, the afternoon of the same night the accident occurred, the 25th of November, and having had to step over the same ditch on the opposite side of the street. The ditch or excavation had been opened the afternoon of the day the injury was received. The merits and demerits, respectively, of the charges given and refused, are set out in the opinion, and it is not necessary to here give the said charges in full. There was judgment for plaintiff, and defendant appealed.

*Webb & Tullman*, for appellant. *Mountjoy & Tomlinson and Smith & Lowe*, for appellee.

SOMERVILLE, J. The present action is based upon the alleged negligence of the corporate authorities of the city of Birmingham in allowing a ditch or excavation made across a sidewalk, incident to the construction of a sewer, to remain open during the night-time, without covering, guards, or lights, in consequence of which the plaintiff fell in, and was injured by the breaking of his arm. The main defense relied on by the city is that the wrong act complained of was the act of one Stonestreet, to whom the city had lawfully let the contract of constructing the sewers, and that, under the terms of the contract, Stonestreet was an independent contractor, and, as such, was alone liable to the plaintiff for the damages claimed, if any one was so liable. Contributory negligence on the part of the plaintiff, and want of notice of the defect or excavation in the street, were also relied on by the defendant. The contract between the city and Stonestreet provided that the work was to be done according to certain plans and specifications, and under the supervision of the city engineer, so far as to make it his duty to inspect the laying of the sewer-pipes, and to accept and receive the work when completed; but neither the engineer, nor other city officers, had anything to do with the employment or direction of the hands, or of superintending the work while it was in progress, except that it was the engineer's duty to lay out the work, set the stakes fixing the depth the sewer-pipes were to be laid, and to see that they were laid at proper depth or grade.

The general rule is well settled, and not denied by appellee's counsel, that one person is not ordinarily liable for any injury produced by the negligence of another, unless the relation of master and servant exists between them; and that where such injury is done by an independent contractor, or one who reserves the general control over the work, with the right to direct what shall be done, and the manner of doing it, the *quasi* employer or contractee cannot be held liable for an injury resulting from the negligence of such contractor, or of his servants, and collaterally to the work contracted to be done, such work not being a nuisance *per se*. In all such cases the rule *respondet superior* applies. Wood, Mast. & Serv. (2d Ed.) p. 608, § 314 *et seq.*; Id. p. 598, § 313; *Cuff v. Railroad Co.*, 35 N. J. Law, 17, 10 Amer. Rep. 205. But there are two established classes of exceptions to which this general rule has no application. It does not apply (1) where the work contracted to be performed will, in its progress, however skillfully done, be necessarily or intrinsically dangerous; and (2) where the law imposes on the employer the duty to keep the subject of the work in a safe condition.

The first exception applies where the obstruction or defect which produced the injury results directly and necessarily from the acts which the contractor agreed and was authorized to do; the person authorizing and the person au-

thorized each being equally liable to the injured party, the relation of principal and agent, *pro hac vice* at least, existing between them, notwithstanding the employment may in other respects be independent. "It would be monstrous," said Lord CAMPBELL, in *Ellis v. Gas Co.*, 2 El. & Bl. 767, "if the party causing another to do a thing were exempted from liability for that act merely because there was a contract between him and the person immediately causing the act to be done." The rule is said by Mr. Justice CLIFFORD, in *Water Co. v. Ware*, 16 Wall. 566, to be based on common justice, that, "if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work [act] to be done." It is observed by Mr. Dillon, in his work on Municipal Corporations, that while the principal of *respondeat superior* does not generally extend to cases of independent contracts, where the party for whom the contract is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of the workmen, and no control over the manner of doing the work, it is important to bear in mind that this general rule "does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed." "In such a case," he adds, "the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself, or lets it out by contract." 2 Dill. Mun. Corp. (8d Ed.) § 1029. A fair illustration of this principle is found in the case of *City of Joliet v. Harwood*, 86 Ill. 110, 29 Amer. Rep. 17, where a city employing a contractor to construct a sewer, where the work necessarily involved the blasting of rock, was held liable for the damage resulting from a rock thrown by the blast against the plaintiff's house. The right of recovery was held not to rest on the charge of negligence by the contractor, who used all proper diligence in his work, but upon the fact that "the city caused work to be done which was intrinsically dangerous, the natural, though not the necessary, consequence of which was the injury to plaintiff's property." So, in the case of *McCafferty v. Railroad Co.*, 61 N. Y. 178, we have an example of the principle that there is no liability where the injury is collateral to the work done by an independent contractor, and not a necessary result of its execution. There a railroad company lawfully let the work of constructing its road to a contractor, who sublet a part of the work to others. The employees of a subcontractor, by negligently overcharging a blast of powder, caused rocks to be thrown against the plaintiff's premises, resulting in the damage complained of in the action. The railroad company was held not to be responsible. In cases of this kind it has been held that the injury is presumed to be a necessary incident of doing the work, unless the defendant shows that it resulted from some act of negligence on the part of the contractor or his servants. *Sabin v. Railroad Co.*, 25 Vt. 363. Mr. Wood, in his work on Master and Servant, thus formulates the principle: "When the work cannot be done at all, in the ordinary modes of executing it, without producing injury and damage, the contractor is liable; but when the injury and damage result simply from the careless or improper mode of executing the work, and the contractee has been guilty of no negligence in selecting a contractor, there is no principle of law which casts upon the contractee the burden of responsibility;" "and," he adds, "a contrary doctrine would be disastrous in its consequences, and serve seriously to embarrass and retard the proper use and healthy development of property, and the growth of cities and towns." Wood, Mast. & Serv. p. 609 *et seq.*; Id. p. 608, § 314. Such is the rule governing the first class of excepted cases above enumerated, where the work contracted to be performed is intrinsically dangerous, or arises from the very nature of the improvement, which is said

by Mr. Dillon to be applicable to work done by independent contractors, according to the later and better considered cases in this country. This doctrine he states to be that "where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel unless properly guarded or protected, the employer, (equally with the contractor,) where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street, causing the injury, is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case, the immediate author of the injury is alone liable." 2 Dill. Mun. Corp. (3d Ed.) § 1030. The rule, as thus carefully formulated by Judge Dillon, is fully supported by the adjudged cases, at least in the American courts; and seems to us to be the correct one. *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Amer. Rep. 780; *City of Erie v. Caulkins*, 27 Amer. Rep. 647, note; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Amer. Dec. 437, and note, 441; *Sulzbacher v. Dickie*, 51 How. Pr. 500.

The second class of excepted cases, or those where the law imposes on the employer the duty to keep the subject of the work in safe condition, especially include those municipal corporations upon which the duty is imposed, directly or impliedly, by statute, to keep their streets in a safe condition for the traveling public. It is not denied that the charter of the city of Birmingham devolves upon it this obligation, impliedly at least, as a necessary result from the corporate powers given and the corporate duties imposed. Acts 1880-81, pp. 471, 480, § 20; *Albrittin v. Mayor, etc.*, 60 Ala. 486, 31 Amer. Rep. 46; *City Council v. Wright*, 72 Ala. 411. This fact brings the case within the rule under consideration, which is quite distinct from the last rule above discussed by us. It depends on the principle that, where the statute thus imposes a duty upon a corporation, its faithful discharge cannot be evaded by any effort to cast this duty on another by contract or otherwise. This the law will not permit, nor can liability for damages resulting from the neglect of such duty be avoided in any such way. "Therefore, according to the better view," says Mr. Dillon, "where a dangerous excavation is made, and negligently left open, (without proper lights, guards, or coverings,) in a traveled street or sidewalk, by a contractor under the corporation for building a sewer or other improvements, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect." 2 Dill. Mun. Corp. (3d Ed.) § 1027. There is a general consensus of authority in support of this view; the leading case on the subject being that of *Storrs v. City of Utica*, *supra*, decided by the New York court of appeals in 1858. That case, like this, was based on the negligence of the city in allowing an excavation in the street, made in the construction of a sewer, to remain open and unguarded during the night-time, in consequence of which the plaintiff fell in and was hurt. The city was held liable apparently on each of the grounds above discussed. "The cause of the accident," said Judge COMSTOCK, "was not in the manner in which the work was carried on by the laborers. If it had been, their immediate employer, and he only, was liable for the injury." "But," he continues, "in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street, and left open and unguarded at night, without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract? If by contract, then I admit that the contractor must respond

to third parties if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night, by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative." In the same case, this principle is applied to a municipal corporation which owes to the public the duty of keeping the street in safe condition for travel; and the proposition is asserted that this duty cannot be thrown off or devolved on another who contracts for the construction of sewers or other improvements in the public streets. "Although," it is said, "the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborer employed by the contractor. The danger arises from the very nature of the improvement; and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation, which has authorized the work is plainly bound to take these precautions. The contractor may very probably be bound by agreement, not only to construct the sewer, but also to do such other acts as may be necessary to protect travel. But a municipal corporation," he concludes, "cannot, I think, in this way, either avoid indictment in behalf of the public, or its liability to individuals who are injured." *Storrs v. City of Utica*, 72 Amer. Dec. 437, 440. We make no apology for quoting so much at length from this case, where the subject under consideration is so ably and learnedly discussed. That case is strictly analogous to the one in hand, and has been followed by the United States supreme court, as well as by nearly all of the state courts, except in Pennsylvania, and a single case in Missouri, which seems, however, to have been impliedly overruled by a later decision in the same state. *Blake v. St. Louis*, 40 Mo. 569; *Barry v. St. Louis*, 17 Mo. 121; *Painter v. Mayor*, 46 Pa. St. 213. The decisions of these states, relied on in the argument of this cause by the appellant's counsel, have been generally condemned in this country, and we are unwilling to follow them. *Storrs v. City of Utica*, 72 Amer. Dec. 437, note, 441, and cases cited; *City of Erie v. Caulkins*, 85 Pa. St. 247, 27 Amer. Rep. 642, and note, 647-650; *Robbins v. Chicago*, 4 Wall. 657; *Chicago v. Robbins*, 2 Black, 418; *Water Co. v. Ware*, 16 Wall. 566; *City of Springfield v. Le Claire*, 49 Ill. 476; *City of Detroit v. Corey*, 9 Mich. 165; *Circleville v. Neuding*, 41 Ohio St. 465; *City of St. Paul v. Seitz*, 3 Minn. 297, (Gil. 205); *Nashville v. Brown*, 9 Heisk. 1, 24 Amer. Rep. 289; *Wilson v. City of Wheeling*, 19 W. Va. 823, 42 Amer. Rep. 780; *Mayor, etc., v. O'Donnell*, 53 Md. 110, 86 Amer. Rep. 395; *City of Logansport v. Dick*, 70 Ind. 65, 86 Amer. Rep. 166; *City of Buffalo v. Holloway*, 57 Amer. Dec. 550; 2 Dill. Mun. Corp. (3d Ed.) §§ 1027, 1029, 1030; Wood, Mast. & Serv. (2d Ed.) p. 616, § 816.

The city court substantially conformed its rulings to the foregoing principles. The excavation made across the sidewalk of the city, in the process of constructing the sewer, was made by the express authority of the city in the exercise of a purely ministerial power. Stonestreet, notwithstanding the general independent nature of his employment as a contractor, was a *quasi* agent of the municipal authorities for this purpose. If he had been indicted for creating a nuisance, he could only have defended under the right conferred by them, and as their agent *pro hac vice*. *City of Detroit v. Corey*, 9 Mich. 164; *Nashville v. Brown*, 24 Amer. Rep. 289. The excavation was one which in its nature would be intrinsically or necessarily accompanied with danger to pedestrians if left uncovered or unguarded, and without proper lights, in the night-time. The duty of the city, imposed by its charter, was to see to

It that its sidewalks were kept in a reasonably safe condition for ordinary use by the public. This duty it could not escape by letting out the work to a contractor. The authorities should have seen to it that the contractor performed this duty; and for this act of negligence they are liable for any injury and damages proximately resulting from it, to which the plaintiff did not contribute by his want of ordinary care. The court, in effect, so charged. In cases of this nature, it is manifest that special notice to the city of the dangerous condition of the street where the excavation is made, is not a prerequisite to liability. The work being done by the express authority of the city, and, in a measure, under the eye of its engineer, and necessarily dangerous, in its nature, the municipal authorities are charged with notice of its existence. *Brusso v. City of Buffalo*, 90 N. Y. 679; *City of Springfield v. Le Claire*, 49 Ill. 477. There is a class of cases where the liability of the city is made to depend on its negligence to keep its streets in repair, and the question of negligence is dependent on notice to the city of the existence of some defect or obstruction causing the injury. But where an agent or quasi agent of the city creates the defect by an authorized act, as here, the law imputes notice to the employer. 2 Dill. Mun. Corp. (3d Ed.) § 1025, note 1. In this case different conclusions may well and reasonably have been drawn, from the evidence, on the question of contributory negligence *vel non* on the part of the plaintiff; and for this reason the court properly submitted this inquiry to the jury, and declined to determine it as a matter of law. *City Council v. Wright*, 72 Ala. 411; *Eureka Co. v. Bass*, 81 Ala. 200, 60 Amer. Rep. 152.

We find no error in any of the rulings of the court, and the judgment is affirmed.

(85 Ala. 158)

#### TUSCALOOSA COTTON-SEED OIL CO. v. PERRY.

(Supreme Court of Alabama. June 27, 1888.)

##### 1. CORPORATIONS—POWER OF OFFICERS TO EXECUTE NOTE—ESTOPPEL TO DENY.

A promissory note was executed by defendant's president in his own favor, by him discounted, and the proceeds used for defendant's benefit. Such president had no interest in the note, indorsed it merely for the accommodation of defendant, on whose books it was carried. Held, that defendant, having retained the benefit of the transaction, was estopped to deny, as against the administratrix of such president, who had paid the note, the authority of the president to execute and its liability on the same.<sup>1</sup>

##### 2. TRIAL—OBJECTIONS TO EVIDENCE—DEPOSITIONS.

Under Code Ala. 1886, § 2810, providing that "all objections to the admissibility of the entire deposition in evidence must be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial," an objection to a deposition that the commissioner's certificate is defective, made after the commencement of the trial, was properly overruled.

##### 3. SAME—OBJECTIONS TO EVIDENCE—WHEN DISREGARDED.

A general and undefined objection to documentary evidence is properly disregarded.

##### 4. EXECUTOR AND ADMINISTRATOR—POSSESSION OF INTESTATE'S NOTE—PRESUMPTION.

When a note payable to the order of an intestate, and bearing his indorsement, is found in the possession of his administratrix, the presumption is that the note was regularly returned to her, and she is entitled to maintain an action thereon.

##### 5. NEGOTIABLE INSTRUMENTS—PAYMENT BY INDORSER—RIGHT TO MAINTAIN ACTION.

The payee and first indorser of a note may pay it at any time after maturity, and maintain an action thereon against the maker.

##### 6. SAME—ACTIONS—PROOF OF EXECUTION—WHEN REQUIRED.

Where a complaint on a promissory note contains a special count, averring that the note was made by defendant, and its execution is not put in issue by a verified plea, preliminary proof of execution is not requisite under the statute.

<sup>1</sup>On the subject of estoppel by silence and acquiescence, see *Koopman v. Blodgett*, (Mich.) 88 N. W. Rep. 649, and note.

**7. SAME—PAYMENT—AGREEMENT TO RECEIVE CORPORATE STOCK OF MAKER.**

An oral agreement that a promissory note is to be discharged by receiving corporate stock of the maker in payment, so long as it remains neither wholly nor partially performed, is inoperative, and no defense to an action on the note.

**8. SAME—ACTIONS—PLEADING—VARIANCE.**

In an action on a promissory note, defendant alleged that plaintiff's intestate agreed to take stock in the defendant corporation in payment of all his claims against the same. The evidence showed that he agreed to subscribe for additional stock, and pay for the same by satisfying accounts which he held, or might thereafter hold, against the corporation, and that the note in question was executed subsequent to such agreement. *Held*, that the allegations were not supported by the evidence.

**9. SAME.**

Such agreement does not apply to a note of defendant made in favor of the intestate, which with others made at the same time, in the same manner, and for the same purpose, aggregated more than the amount of the stock subscription, and was by him indorsed for defendant's accommodation; it not appearing that, at the time the notes were executed, there was any understanding that they were to be paid in stock, and it appearing that there were other sources from which defendant was likely to become indebted to such intestate.

**10. SAME—EXTENSION OF TIME AS A DEFENSE—PLEADING.**

The defense that the intestate arranged with the holder of the note for an extension of the time of payment is not available as a defense when it is not set up by plea.

**11. SAME—PROMISE TO PAY—DISCONTINUANCE OF ACTION—DEFICIENT EXECUTION.**

Where defendant, after the administratrix has paid the note, promises to pay the same if suit be suspended for a certain time, which is done, it cannot thereafter take advantage of defects in its execution, or of an agreement by which the intestate was to receive capital stock in payment.

**12. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS.**

Errors, except want of jurisdiction, will not be considered on appeal unless assigned, though apparent on the record.

Appeal from circuit court, Tuscaloosa county; S. H. SPROTT, Judge.

This was an action by the appellee, Medora Perry, as administratrix of the estate of her husband, W. H. Perry, deceased, against the appellant, the Tuscaloosa Cotton-Seed Oil Company, to recover the amount due her intestate on a note made by the plaintiff's intestate, as president of the defendant company, to himself as an individual. There was a verdict and judgment for the plaintiff, and the defendant appealed. Code Ala. § 2810, provides that "all objections to the admissibility of the entire deposition in evidence must be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial."

*Martin & McEachin*, for appellant. *Hargrove & Van De Graaff*, for appellee.

CLOPTON, J. There is no assignment of error which requires us to consider the rulings of the court in respect to the admissibility in evidence of the declarations and promises of Caswell, the president of the defendant. Unless it be want of jurisdiction of the subject-matter, which cannot be waived by the parties, errors, though they may be apparent in the record, will not be regarded if not assigned. *Lehman v. Meyer*, 67 Ala. 896.

The objection to the documentary evidence is general and undefined, and, for this reason alone, could properly have been disregarded by the court. *Dryer v. Lewis*, 57 Ala. 551.

The objection to the deposition of Williams is that the commissioner's certificate is fatally defective. The defect was disclosed in the deposition; and the objection, which goes to the admissibility of the entire deposition, was made after the trial was commenced. The statute is imperative that all objections to the admissibility in evidence of the entire deposition must be made before entering upon the trial, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial; and prohibits such objections being made afterwards. Code 1886, § 2810.

Appellee's intestate was president of the defendant corporation at the time of the execution of the note which is the foundation of the suit, and, as such officer, signed the corporate name thereto. The note is payable to his order, and was indorsed by him, and after his death was paid by appellee as the administratrix of his estate. She now seeks by this action to recover the amount so paid. The indorsement of the name of her intestate on the note does not of itself disentitle the plaintiff to sue thereon. Being payable to his order, and found in her possession, the presumption is that the note was regularly returned to her as his personal representative. *Herndon v. Taylor*, 6 Ala. 461. Independent of the presumption, the evidence incontestably shows that she obtained the note by paying the amount due in discharge of the indorsement. The payee and first indorser of a note which has been put in circulation may pay it, and maintain an action on the note against the maker. *Pinney v. McGregory*, 102 Mass. 186.

The next assignment of error refers to the competency of the note as evidence to go to the jury. The complaint contains a special count on the note, which avers that it was made by defendant. Its execution was not put in issue by plea verified by affidavit. In such case preliminary proof of execution is not requisite under the statute. *Wimberly v. Dallas*, 52 Ala. 196. Also, if the plaintiff had been entitled to recover only on the common counts, the proof of execution and authority is sufficient to admit the note in evidence. It is not controverted that it was the usual course of business, in the management of the affairs of defendant, that notes for money borrowed should be signed by the president without previous order of the board of directors, and that many notes made by plaintiff's intestate, and particularly two other notes of the same tenor, made in the same manner, about the same time, and for the same purpose as the note in suit, had been paid by the defendant. These acts of the president, in connection with such recognition and acquiescence of the corporation, are competent and sufficient evidence of the fact and scope of the agency. *Insurance Co. v. Peacock*, 67 Ala. 253. But the objection is not rested on a general want of authority to make notes binding on the corporation, but on the invalidity of the note on which the suit is founded. The specific objection now made is that the note was executed by an officer of the corporation, payable to his own order,—a contract with himself personally. The objection seeks to have the question whether it is a binding obligation on defendant determined by the court, without submitting it to the jury on the whole evidence. This cannot properly be done. If there had been a special plea, verified by affidavit, setting up the matter of the objection, the note, and the evidence relating to the purpose, facts, and circumstances of its execution, all should have gone to the jury, and the validity of the note determined by them under proper instructions from the court. The note is not void merely because it appears on its face to have been made by the president, payable to his own order, and indorsed by him. As, however, the question of its validity largely involves the merits of the controversy, we shall consider it as if properly raised. The general rule will be conceded that an officer of a corporation cannot use his official position for his own advantage, can make no valid contract with himself personally, and cannot represent the corporation in any transaction in which he has a personal interest. The question is, does the note, on the undisputed facts, fall within the principle? There is no disputation that the note was given for money loaned or advanced by the First National Bank, at which bank it is payable. The money thus borrowed was used by the corporation in the purchase of cotton seed, and other material necessary to the operation of its business. The note was carried as a liability on the books of the company; and that it was indorsed by plaintiff's intestate for the accommodation of the corporation, in order to enable it to obtain the money. It is manifest, from these facts, that the plaintiff's intestate had no interest in the note, or in the money procured thereby;

that it was not a contract made with him personally, but with the bank; and that it was not for his benefit or advantage. The note having been made to borrow money for the corporation, which it received, and having retained for its own benefit the fruits of the transaction, the defendant is estopped to deny, as against the holder from whom the money was borrowed, the binding character of the obligation, and the authority of the president in the transaction, and equally against the accommodation indorser.

It is manifest that the plaintiff is entitled to recover unless the special defense set up avails to defeat the suit. The special plea avers that plaintiff's intestate contracted with the company to take stock for all his claims and demands against the corporation, which the defendant has always been willing, and is now willing, to deliver, but that neither plaintiff nor her intestate has ever demanded the stock. A demurrer to the plea having been overruled, we must on this appeal, which is taken by defendant, treat it as a defense to the action, if sustained by proof. The only evidence which was offered to support the plea is that in a conversation in the summer of 1885 between plaintiff's intestate and Caswell, then the general manager of the company, the former agreed to subscribe for additional stock to the amount of \$5,000, and to pay for such stock by satisfying the accounts which he held, or might thereafter hold, against the company. The contract, as set forth in the plea, is to take stock for claims and demands which plaintiff's intestate then had, and has no reference to demands subsequently acquired, or to a subscription for stock. It is clear there is a material variance between the averments of the plea and the evidence, and the court might properly have instructed the jury that the truth of the plea was not proved. But, passing the consideration of the effect of this variance, the agreement as proved is executory,—to subscribe for stock in the future, and to pay for it by satisfying claims and demands against the company. No subscription for stock was made, and the agreement was not even partially performed. An oral agreement that a promissory note is to be discharged by doing something other than paying money, so long as it remains executory, is inoperative, and no defense to a suit on the note. *Patrick v. Petty*, 88 Ala. 420, 3 South. Rep. 779. It is neither payment nor accord and satisfaction until performed. On a failure to perform such executory agreement the corporation can only recover the damages suffered by its breach. It should further be observed that the agreement was made in the summer of 1885, and that the note was not executed until the 1st of October thereafter, which, with the other two notes of the same tenor, and executed in the same manner and for the same purpose, heretofore referred to, aggregated the sum of \$6,000. It is not pretended that, at the time the notes were made, anything was said or understood as to either of them being solvable in stock. The plaintiff's intestate was a manufacturer and repairer of machinery, and had furnished machinery to defendant, for a part of which it was indebted to him at the time the agreement was said to have been made, and, no doubt, it was anticipated that he would have to repair and furnish other machinery. It would be an unauthorized extension of the agreement to include within its terms demands which accrued by the subsequent indorsement of a note of defendant for its accommodation, and to enable it to borrow money from another, on which the defendant was primarily liable, and which was to be paid in money. If, therefore, plaintiff's intestate had subscribed for stock in pursuance of the agreement, which the defendant was ready and willing to issue, it would be no defense to this suit. And, besides, the evidence shows that, after plaintiff had paid and held the note, the president and general manager of defendant promised the attorney of the plaintiff that it should be paid on or before September 1, 1886, if suit was suspended until that time, which was done.

The defense that an arrangement was made by the president of the defendant with the holder of the note for an extension of the time of payment is not

set up by plea; and, if it was, an indefinite arrangement, unsupported by a valuable consideration, was a mere gratuity, which bound neither the holder nor the indorser. It was the right of plaintiff to pay the note after maturity, without demand or suit, and resort to the maker for reimbursement. On the undisputed facts, and the indisputable conclusions from the evidence, the court would not have erred had the affirmative charge in favor of the plaintiff been given. Consequently there are no errors which could have worked injury. **Affirmed.**

(35 Ala. 19)

**ALABAMA FERTILIZER CO. v. REYNOLDS et al.**

(*Supreme Court of Alabama. March 22, 1885.*)

**1. PARTNERSHIP—WHAT CONSTITUTES.**

Where two persons associate themselves together in the sale of commercial fertilizers on commissions, the only interest of one of the persons in the business being that he should have what fertilizers he desired for his own use, with a discount from the price of any commissions for selling, no partnership *inter se* exists.<sup>1</sup>

**2. SAME—POWER OF PARTNER TO BIND FIRM—SCOPE OF BUSINESS.**

One of such persons has no authority to bind the other for fertilizers purchased by him on credit in the firm name, such transaction being outside the scope of that particular kind of business.<sup>2</sup>

**3. SAME—NOTICE OF WANT OF AUTHORITY.**

One of such persons purchased fertilizers on credit in the firm name without the knowledge of the other, and the evidence tended to show that the seller had notice of his want of authority to make the purchase. About 14 months thereafter he made a second purchase of fertilizers in the firm name, giving the firm note for the purchase price; all without the knowledge of the other party. *Held*, that the latter was not estopped to deny his liability on the note by remaining silent, as he was ignorant of the transaction, and that the seller, having notice of want of authority to make the first purchase, was put upon inquiry in the second transaction.<sup>3</sup>

**4. TRIAL—INSTRUCTIONS—MISLEADING JURY.**

In an action on the note, instructions that the burden of proving notice to plaintiffs that such latter party was not to be bound as a purchaser is upon him; and if the witnesses are equally credible, and their evidence at direct variance as to whether notice was given or not, then he has not proved notice, and plaintiffs are entitled to recover; and that if the witnesses testifying as to whether or not notice was given are equally credible and honest, and their evidence on that point in direct conflict, then notice cannot be said to be proved,—are properly refused, as calculated to confuse and mislead the jury.

**5. EXCEPTIONS, BILL OF—CONTENTS—INSTRUCTIONS.**

Only charges to which exception was taken are properly inserted in a bill of exceptions.

Appeal from circuit court, Barbour county; J. M. CARMACHAEL, Judge. This action was brought by the appellant, a domestic private corporation, against John A. Reynolds and R. M. Lee, as partners, doing business under the firm name of Reynolds & Lee. The action was founded on three promissory notes, and was commenced on March 31, 1885. The defendants jointly pleaded the general issue, and Reynolds filed a special plea of *non est factum*, verified by affidavit, averring that the note was not signed by him, nor by any one who was authorized to bind him; and the cause was tried on the issue joined on these pleas. Judgment for defendant Reynolds, and plaintiff appeals. The charges, which were in writing, to which reference is made in the opinion, as requested to be given by the plaintiff, and refused by the court,

<sup>1</sup> As to what constitutes a partnership, see full note to Railroad Co. v. Johnson, (Tex.) 7 S. W. Rep. 833, and note; Mallory v. Oil Works, (Tenn.) 8 S. W. Rep. 396, and note; Riedeburg v. Schmitt, (Wia.) 38 N. W. Rep. 336; Grapfel v. Hodges, 1 N. Y. Supp. 323.

<sup>2</sup> As to what acts are within the general authority of a partner so as to bind the firm, see note to Goodbar v. Cary, 16 Fed. Rep. 316; Bank v. Alburger, (N. Y.) 4 N. E. Rep. 341; Bays v. Conner, (Ind.) 5 N. E. Rep. 13.

The liability of one partner for the contracts made by his copartner without his knowledge or assent is a question of agency. Third persons are not bound by special limitations in the articles of partnership of which they have no notice. Gruner v. Stucken, (La.) 3 South. Rep. 338, and note.

to which refusal the plaintiff separately and severally excepted, are as follows: "(1) The burden of proving notice to the plaintiff that Reynolds was not to be bound as a purchaser of the fertilizer is upon him, (Reynolds;) and if the witnesses are equally credible, and if their evidence is at direct variance as to the fact whether such notice was given or not, then he (Reynolds) has not proved such notice, and the plaintiff are entitled to recover in this action. (2) If the jury believe from the evidence that the firm of Reynolds & Lee had been engaged for two years, under the active management of Lee, in buying and selling guano on the firm account, it is too late for Reynolds to allege that the legitimate business of the firm was confined to selling on commission, and that guano had been bought without his knowledge or consent. (3) If the jury believe from the evidence that Reynolds, by design or negligently, allowed the use of his name in the firm of Reynolds & Lee by R. M. Lee, in the business of buying and selling guano in Clayton for one or two years, and that the plaintiff was induced to give credit to such firm because Reynolds was a member of it, then Reynolds is liable for the debt plaintiff claims of the firm, although the jury may find from the evidence that Reynolds had at one time notified plaintiff that he was not to be bound for liabilities of the firm incurred in a commission guano business. (4) If the witnesses who gave testimony as to whether or not notice was given limiting Reynolds' liability are equally credible and honest, and they are in direct conflict in their evidence on that point, the defendant Reynolds cannot be said to have proved that such notice was given to the plaintiff; the burden of proving such notice being upon Reynolds. (5) To establish a fact in a civil cause, the proof of it must not merely slightly overbalance the proof against it, but it must so greatly overbalance it as to reasonably and fairly show that it outweighs it. And if the testimony of Reynolds' not being a partner does not clearly outweigh the testimony that he was, and leave the minds of the jurors satisfied that he was not a partner of Lee when he signed the notes sued on, the verdict must be for the plaintiff." The defendant requested the court to give the following charges, which were in writing, and referred to in the opinion, which the court gave, and the plaintiff separately and severally excepted to the giving of each. "(1) If the jury believe from the evidence that the contract or agreement between Reynolds and Lee was that fertilizers should be sold by them solely on commissions, and that neither Lee nor Reynolds, nor Reynolds & Lee, should have power to make any purchase, and that the only benefit or interest Reynolds had in the adventure of Reynolds & Lee was that he (Reynolds) should have what fertilizers he desired for his own use, with a discount, from the price, of the commissions, then there was no partnership in fact as between Reynolds and Lee or *inter sese*. (2) If the jury believe from the evidence that the Alabama Fertilizer Company, through its agent, Storrs, or its president, Rogers, either of them, received notice from Reynolds and Lee, one or both, before the sale of the fertilizers which constitute the consideration of the notes sued, that Reynolds had no interest or benefit in the adventure of Reynolds & Lee except that he (Reynolds) should have or get what fertilizers he desired for his own use, with a discount, from the selling price, of the commissions, and that the adventure of Reynolds & Lee was wholly for selling fertilizers on commissions, and not otherwise, then the jury cannot find their verdict for the plaintiff as against Reynolds, but must find for the defendant Reynolds. (3) If the business of Reynolds & Lee was formed to carry on the sale of guano on commission alone, and Capt. Storrs, as the agent of plaintiff, received notice from Reynolds of the character of the business, and the extent of Reynolds' interest, before he sold the guano to Lee, and that Lee bought the guano without Reynolds' knowledge or consent, the plaintiff cannot recover of Reynolds, if they find that the notes sued on were signed by Lee in the firm name, without Reynolds' knowledge or assent. (4) If Storrs was informed by Reynolds on the train that the business was only a commie-

sion business, this was notice to Storrs of the character of the partnership; and, in dealing with the firm afterwards, Storrs had notice of the character of the business, if the evidence shows that the business was held out and published in the same manner as before. (5) If, at any time previous to the purchase of the guano, Storrs received notice of the character of the business, this notice continued, if the business was carried on in the same general manner as before."

*Jere N. Williams*, for appellant. *J. M. White* and *H. D. Clayton, Jr.*, for appellees.

SOMERVILLE, J. One may become liable to third persons as a partner in either of two ways: (1) He may actually be a real partner by express agreement; or (2) he may, although no actual partnership exists, permit himself to be held out to the public as a partner by the use of his name. In the former case he is liable on all contracts made by any individual member of the firm in the partnership name, and coming within the partnership business. *Clark v. Taylor*, 68 Ala. 453; *Fertilizer Co. v. Reynolds*, 79 Ala. 497. In the latter case, whether the use of the name is permitted expressly or by culpable negligence, he is liable, as a partner, for all debts contracted, within the scope of the partnership business, by persons who deal with the firm upon the faith of this fact, and in reasonable reliance upon the honest belief of the authority of the contracting partner to bind the firm. *Humes v. O'Bryan*, 74 Ala. 64, 82; *Nicholson v. Moog*, 65 Ala. 471. The principle upon which the latter class of liabilities is permitted to be fastened upon one who is in fact not a partner is analogous to that of an estoppel *in pais*; and "there can be no such estoppel in the absence of one's being misled, to his prejudice, by a supposed fact, either positively asserted or tacitly admitted by the party whom he seeks to hold liable." *Marble v. Lyles*, 82 Ala. 322, 2 South. Rep. 701. From these settled principles it necessarily follows, where there is no actual partnership, and no express authority to bind on, as defendant, sought to be charged by a given contract, it becomes entirely immaterial that he may have negligently permitted himself to be held out as a partner in a certain business, if the person extending credit to the firm had timely notice of the fact that the defendant was not really a partner, and he did not, therefore, deal with the alleged firm in ignorance of the true relationship of its members. Where such notice exists, there can be no estoppel, because the plaintiff cannot be presumed to have been misled or injured by contracting the debt upon the faith of a supposed fact which he had been notified did not exist. *Marble v. Lyles*, 82 Ala. 324, 2 South. Rep. 703; *Fertilizer Co. v. Reynolds*, 79 Ala. 504. The evidence shows, without conflict, that the defendants, Reynolds and Lee, in the year 1880, associated themselves together in the sale of commercial fertilizers, on commissions, and that the only benefit or interest Reynolds had in the business was that he should have what fertilizers he should desire for his own use, with a discount, from the price, of any commissions for selling. There was on his part no community of losses and profits. When the case was last before us on an appeal, we held that, under this state of facts, there was no partnership *inter se* between the defendants; and we also decided that the authority to carry on the business of commission merchants, engaged only in the business of selling for others, would not, as between themselves, confer the power on one partner to bind the partnership by purchasing fertilizers on a credit in the firm name; such a transaction being outside of the scope of that particular kind of business. *Fertilizer Co. v. Reynolds, supra*. It is shown that the commission business was carried on, under this arrangement, until November 17, 1882, when Lee made the first purchase of fertilizer from the plaintiffs in the partnership name. There is no evidence that Reynolds had any knowledge of this transaction, which, as we have said, was a departure from the recognized scope of the ordinary business of commis-

sion merchants. But the evidence tends also to show that, prior to this, the plaintiff had notice of the fact that the business authorized to be carried on by Lee was only selling on commissions, and that Reynolds had no interest in it as an actual partner. As to the fact of notice, however, the evidence is conflicting. The indebtedness arising from this purchase was settled by Lee, without the knowledge of Reynolds, except a small balance, which was carried forward, and included in the amount here sued for. This amount is for a second purchase of commercial fertilizer from the plaintiff, made January 1, 1884, for which Lee, as before, executed the notes of Reynolds & Lee. The undisputed evidence is that Reynolds knew nothing more of this transaction than he did of the first; that he had never authorized the purchase; and that he had no knowledge of the fact that the goods thus bought were afterwards sold in the partnership name as their property, and not on commission.

It is insisted that the notice given in 1882 to the plaintiff, through its agent, Storrs, was notice only of the business then being carried on, and of Reynolds' limited interest in the firm at that time; and, admitting that it was given as alleged, it could not operate as notice in the matter of the second purchase, which occurred more than 18 months after the first purchase. This contention is untenable. It is undisputed that there was no actual partnership of any kind between the defendants themselves, and that Lee had no actual authority to make either of these purchases from the plaintiff on partnership account so as to bind Reynolds. The only ground upon which the liability is attempted to be sustained is an apparent authority inferable from the culpable silence, and the presumed knowledge, of Reynolds touching these transactions with the plaintiff, by reason of which the plaintiff was misled into making the sale under the mistaken belief that Reynolds was legally responsible as a partner, express or implied. It does not appear that any purchases besides these two—the one in November, 1882, and the other in January, 1884—were ever made at any time, either from the plaintiff, or from any other dealer. If the plaintiff had notice of Lee's want of authority to make the first purchase, this was sufficient to put its officers and agents on inquiry, if not to impute to them knowledge as to the non-existence of such authority; and this inquiry, if followed up with proper diligence, must have disclosed the fact that there was equally an absence of authority to make the second purchase here in controversy. Under a proper application of these principles, it is obvious that the circuit court did not err in giving the written charges, numbered from 1 to 5, requested by the defendants; nor in refusing the charges No. 2, 3, and 5, requested by the plaintiff.

The first and fourth charges requested by the plaintiff called on the jury to institute a comparison between the probative force of the testimony of different witnesses examined on the trial, who were assumed to be equally credible, and they were properly refused, because calculated to confuse and mislead the jury. We emphasized our disapprobation of such charges when this case was last before us. *Fertilizer Co. v. Reynolds*, 79 Ala. 504.

The 17 charges given by the court at the request of the appellant have no proper place in this record. Only those charges should be inserted in bills of exceptions to which an exception was taken. We have often before had occasion to condemn this practice as one tending to render the record confused and unnecessarily voluminous. The rulings of the circuit court are free from error, and the judgment must be affirmed.

CLOPPON, J., not sitting.

(35 Ala. 179)

**SOUTHERN WAREHOUSE CO. v. JOHNSON.***(Supreme Court of Alabama. July 10, 1888.)***DETINUE—VERDICT—ASSESSMENT OF DAMAGES—SEPARATE VALUE OF ARTICLES DETAINED.**

The complaint and affidavit for seizure in detinue described the property demanded as "one red sorrel mule," and "one dark mare mule," and the verdict assessed the value of the mules together, and not the value of each separately. *Held*, that under Code Ala. § 2719, providing that, upon the trial of such action, "the jury must \* \* \* assess the value of each article separately, if practicable," it would be presumed, there being no proof to the contrary, that it was practicable to assess the value separately, and that the verdict was erroneous.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

This was an action of detinue, brought by the appellant, the Southern Warehouse Company, against the appellee, Isham Johnson, for the recovery of certain specified personal property, which, with other animals and stock, was described as stated in the opinion. There was verdict and judgment for the defendant, and in the judgment entry the value of the two mules was assessed together at \$140. The plaintiffs appealed, and assign the rendering of judgment on the verdict as done, and the verdict as rendered, as error. Code Ala. § 2719, provides that, upon the trial of an action of detinue, "the jury must \* \* \* assess the value of each article separately, if practicable."

*Tompkins, London & Troy*, for appellant. *Arrington & Graham*, for appellee.

STONE, C. J. The complaint in this case claims "one red sorrel mule" and "one dark mare mule." The affidavit for seizure gives the same description. In the absence of proof to the contrary, we must presume it was practicable to assess their value separately. Code 1886, § 2719. This is a statutory requirement, whose policy is obvious. The party cast in the action may be able to deliver a part of the property, and not the residue. Our rulings are all to the effect that a failure to assess the separate values, when practicable, is a reversible error. *Jones v. Anderson*, 76 Ala. 427; *Townsend v. Brooks*, *Id.* 808; *Tait v. Murphy* 80 Ala. 440, 2 South. Rep. 317; *Jones v. Anderson*, 82 Ala. 802, 2 South. Rep. 911; *Savage v. Russell*, *ante*, 235. *Eslava v. Dilthunt*, 46 Ala. 698, was correctly decided on the facts presented. The chattels were of a kind which showed on their face that their separate valuation was not practicable. The other reasons given for the ruling have not been observed in our later decisions cited above. Reversed and remanded.

(35 Ala. 274)

**WOLLNER et al. v. LEHMAN et al.***(Supreme Court of Alabama. June 27, 1888.)***1. SALE—RESCISSI0N—FRAUD.**

Where the purchasers of goods on credit are at the time insolvent, and have the intention of securing certain creditors by a sale of a large part of their goods, thus breaking up their business facilities, and they afterwards execute this intention, without having notified their vendors of the intention when they ordered the goods, the latter may rescind the sale and recover the goods from the possession of an attaching creditor of the purchasers.<sup>1</sup>

**2. SAME—VALIDITY—FALSE REPRESENTATIONS.**

Where goods are sold upon a misrepresentation by the purchaser in reference to the quantity of goods of that kind purchased by him, the misrepresentation does not prevent the title from passing, though, if intentionally made, it would be a fraudulent circumstance to be weighed by the jury in an action by the vendor to recover the property.<sup>1</sup>

**3. ATTACHMENT—INTERVENTION—BURDEN OF PROOF.**

Under Code Ala. § 8007, providing that, in the trial of an issue formed upon the claim of title by a third person to personal property taken in execution, the burden

<sup>1</sup>See note stand of case.

of proof shall be upon plaintiff in execution, plaintiff need only show that the goods were in the possession and under the control of the defendants at the time of the levy, whereupon the burden shifts to the claimant to establish his right.

**4. SAME—VALUE OF PROPERTY.**

Under Code Ala. §§ 8004-8012, providing for the claim by a third person of personal property taken in execution, and delivery thereof to him upon the execution of a bond, although the amount of goods claimed, as fixed by the claim affidavit and bond, is conclusive, the value of the goods is one of the facts to be found by the jury.

**5. SAME—PROOF OF TITLE.**

Claim of title by a third person to goods taken in attachment need not be proven beyond a doubt.

**6. SAME—EVIDENCE—RELEVANT.**

In attachment a claim by one who alleges that he sold the goods attached to defendant on fraudulent representations as to his ability to pay, questions by claimant as to whether it is usual or safe to invest so largely in such goods, considering the bad crop year, in the absence of evidence to support the hypothesis, are properly excluded.

**7. SAME.**

Collections made, and disposition of assets, by defendant prior to levy of the attachment, are competent evidence, but transactions subsequent thereto are not.

**8. SAME.**

The question whether certain notes given by defendant "were waiver exemption notes," being collateral to the issue, may be asked of a witness without producing the notes.

**9. SAME—INSTRUCTIONS.**

An instruction that claimant cannot recover if there had been a sale of the goods by the defendant in the attachment to an innocent purchaser without knowledge of the claim, is improper; the question being no part of the issue in the case.

**10. SAME.**

An instruction that, if a sale by defendant to a certain outside party was without delivery, it passed no title, and claimant was entitled to recover, not only presents an immaterial issue, but does not state the elements essential to claimant's right to recover, and is properly refused.

Appeal from circuit court, Lowndes county; S. H. SPURR, Judge.

Appellants, Wollner & Lowenstein, who are wholesale dealers in boots and shoes, sold to the firm of Weil & Stern, through their traveling salesman, one Feibleman, a bill of boots and shoes, which it appears were shipped to the said Weil & Stern on September 17, 1886, and which were received by said Weil & Stern some time prior to October 9th following. The goods were sold on September 9, 1886. At this time it is claimed by the appellants that the firm of Weil & Stern were insolvent; that they knew of their insolvency, but designing to perpetrate a fraud on their creditors by a sale of their stock, and in furtherance of this fraud, they purchased an unusual quantity of goods, and particularly boots and shoes. It is also claimed by the appellants that, at the time when the said firm of Weil & Stern purchased the goods as stated, they made certain representations and statements to Feibleman, the agent of the appellants, who sold them the goods, which were false, but which were an inducement to the credit which was given to them. The goods were sold to Weil & Stern on time. The misrepresentations which were made were in reference to their solvency, the quantity of boots and shoes purchased from other parties, and their ability to pay for the goods when the bill matured. On October 9th following the said purchase, Weil & Stern sold their entire stock of goods, by separate bills of sale, to V. Steiner & Bro. and to a Mrs. Kohn. The day following such sale, and before, as appears from the testimony, the said Steiners or Mrs. Kohn had been put into possession of the property, (the day following such sale being Sunday, and the sale taking place at Montgomery, and the business of Weil & Stern being located in Benton, Ala.,) an attachment was levied upon the property in the storehouse at Benton at the suit of Lehman, Durr & Co. and others, which attachment was levied, as appears by the testimony of the sheriff, while the store was still in possession of Weil & Stern, and before the agents of either Steiner & Bro. or Mrs. Kohn

had taken possession, or there had been any separation of the goods. This attachment was levied a few minutes after 12 o'clock on Monday morning, October 11th. The alleged sale had taken place at Montgomery on the 9th, which day was Saturday. Plaintiffs objected, and the court sustained the objection, to claimants' proving, by the said Feibleman, "the amount of goods, and value, returned by the sheriff under the claim bond and affidavit," whereupon claimants excepted. The second exception referred to in the opinion was reserved by the claimants upon the court refusing to allow the claimants to ask a witness upon the stand if the bills of shoes bought by the defendants in attachment, Weil & Stern, from the three wholesale houses named in the question, "were not more boots and shoes than it was usual for a business like that of defendants to carry, taking into consideration the poor crop year?" The third exception referred to in the opinion was the one reserved by the claimants to the refusal by the court to allow them to ask a certain witness, examined in their behalf, if from his knowledge of the business done at Benton, "would a merchant at Benton be justified in laying in a large stock of goods in the fall of 1886, it being a bad crop year?" Upon the examination of one of the defendants in attachment as a witness, and after his testifying that the liabilities of the firm of Weil & Stern, on September 9, 1886, were \$20,000, and the assets of the said firm, in the shape of notes, mortgages, and accounts, were the same, the claimants then asked the witness: "How much of this \$20,000 of assets was collected by your firm?" The plaintiffs objected to the question. The court sustained the objection, whereupon the claimants excepted, which constituted the sixth exception. The same witness was then asked by the claimants: "Have you paid, or made any effort to pay, the debts you owed on the 9th of September, 1886?" to which question the plaintiff objected. The court sustained the objection, whereupon the claimants excepted, which was the seventh exception. On the further examination of the same witness, the plaintiffs asked him whether the notes referred to by him during his examination "were waiver exemption notes?" to which question the claimants objected on the ground that the notes in the possession of the plaintiffs were the best evidence; but the court overruled this objection, and the claimants duly excepted, which constituted the eighth exception. Upon the introduction of all the evidence in the case, the court charged the jury, among other things, as follows: "If the jury find that Steiner, in good faith and without any knowledge of the claim of Wollner & Lowenstein, or any one else, to the goods in controversy, purchased said goods from defendants, and the said Steiner was by and through his agent, Robinson, put in possession of said goods under said purchase, then the claimants cannot recover in this action." The claimants excepted to the giving of this charge. Among the charges requested by plaintiffs, and given, was the following: "(4) If the evidence in the case leaves any fact which it is necessary for the claimants to establish, in a state of doubt or uncertainty, then the jury must find a verdict for plaintiffs." The claimants reserved an exception to the giving of this charge. The claimants then requested the court to give the following charges, which the court refused to give, whereupon the claimants excepted separately to each refusal: "(1) If the jury are satisfied that the firm of Weil & Stern were guilty of a misrepresentation in reference to the quantity of boots and shoes purchased by them, then this was a positive fraud, and no title passed to Weil & Stern, and claimants are entitled to a verdict." "(6) In order to constitute a sale to Steiner, there must have been a delivery of the goods to pass the title; and, if you find that the goods had not been delivered, then there has been no transfer to anybody, and the claimants are entitled to recover." There was a verdict for the plaintiffs in attachment, and a judgment, lengthy in detail, was entered up for the said plaintiffs, without setting out the value of the property attached in detail, according to their separate values, but by only affixing the aggregate value of all the goods levied upon. The claimants take

this appeal. Code Ala. § 3007, cited in the opinion, provides that, in the trial of an issue formed upon the claim of title by a third person to personal property taken in execution, the burden of proof shall be upon the plaintiff in execution.

*Pillans, Torrey & Hanaw*, for appellants. *Troy, Tompkins & London*, for appellees.

STONE, C. J. Lehman, Durr & Co. sued out an attachment against Well & Stern, which was levied on a stock of merchandise in the store-house in which the debtor firm had been and were doing a retail mercantile business. Wollner & Lowenstein made the statutory affidavit of claim, and gave the necessary bond to inaugurate a trial of the right of property,—a statutory action provided for in our judicial system. Code 1886, §§ 8004-8012, inclusive. The property claimed was delivered to the claimants. An issue was made up as provided by law; the attaching creditors averring that the property was subject to their attachment, and the claimants taking issue on the averment. The burden of proof was on the plaintiff in attachment. Code, § 3007. The question of the burden of proof, and the extent of it, has been many times before this court. Our ruling has been that the plaintiff need only make a *prima facie* case, which he does by proving that the goods were in the possession and under the control of the defendant at the time of the levy. The burden then shifts to the claimant to establish his right. 3 Brick. Dig. 776, § 7; *Loeb v. Manasses*, 78 Ala. 555; *Jones v. Franklin*, 81 Ala. 161, 1 South. Rep. 199; *Foster v. Goodwin*, 82 Ala. 384, 2 South. Rep. 895. And the claimant, in defense of such action, cannot set up outstanding title in a stranger, in which he has no interest, and with which he does not connect himself. 3 Brick. Dig. 776, §§ 5, 6, 9. The bill of exceptions, after stating the case, and when it was tried, describes the real issue in the following language: "Issue being made up by the parties under the direction of the court, the question presented to the jury was whether the purchase by Well & Stern of the goods in controversy was made under such circumstances as authorized the claimants, who were the vendors, to rescind the trade, and reinvest themselves with the title." Wollner & Lowenstein were wholesale merchants doing business in Mobile, and Well & Stern were retail merchants doing business in Benton, Lowndes county, Ala. On September 9, 1886, Well & Stern purchased from Wollner & Lowenstein, through their traveling salesman, a bill of goods of about \$600. The goods were purchased on time, and were shipped about September 18th, afterwards. The ground on which Wollner & Lowenstein rested their right to interpose their claim was that, at the time their salesman made the sale, Well & Stern were insolvent, or in failing circumstances; that they had, at the time of the purchase, no intention of paying for the goods, or no reasonable expectation of being able to do so, and that there was, on their part, an intentional concealment of these facts, or a fraudulent representation in reference to them. If these facts existed, under our decisions, Wollner & Lowenstein had the undoubted right to rescind as against Well & Stern, and against any other person not a *bona fide* purchaser from Well & Stern without notice. *Loeb v. Flash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 187; *Hornthall v. Schonfeld*, 79 Ala. 107; *Robinson v. Levi*, 81 Ala. 134, 1 South. Rep. 534; *Le Grand v. Bank*, 81 Ala. 128, 1 South. Rep. 460. Lehman, Durr & Co. are not purchasers in any sense. They are only attaching creditors. Save as creditors at large, they can assert no rights or equities in or upon the goods which antedates the levy of their attachment, October 11, 1886; and, when the claim was interposed in this case, October 12th, they had acquired no new right or interest which would prevail over the right of Wollner & Lowenstein to reclaim the goods, if otherwise they had such right. The category necessary to the maintenance of Wollner & Lowenstein's claim was, as we have seen, that, when the goods

were purchased, Weil & Stern were insolvent or in failing circumstances; that they either did not intend to pay for the goods, or had no reasonable expectation of being able to do so; and that there was, on the part of Weil & Stern, either a fraudulent concealment of or a fraudulent representation in reference to one or more of the above facts. All these qualifying conditions were indispensable to Wollner & Lowenstein's right of recovery. It is not enough that Weil & Stern were unable to pay all their debts. Insolvents may intend to pay, and often do pay, debts they contract. There must have been, at the time of the purchase, either an intention not to pay, or no reasonable expectation of being able to pay, to constitute this second element in the claimant's right of recovery. If, at the time, Weil & Stern intended to continue business, and expected, out of their collections and sales, to pay for the goods, then this indispensable element of the claimants' right of recovery is wanting. On the other hand, if, when the order was placed, they had the intention of securing certain preferred creditors, or favorites, by a sale of their goods, or a large part of them, thus breaking up their assortment, and their business standing and facilities, this would be such fraudulent intention not to pay as would establish this second element of claimants' case, unless they retained other sufficient means to meet their liabilities. And if such was their intention, and they subsequently carried it out, then, unless they notified Wollner & Lowenstein's salesman of this intention when they gave him the order, this would constitute the third element of claimant's right of recovery. So the most important inquiry in this case is whether, at the time the order was given, Weil & Stern intended, and had reasonable expectation of being able, to pay for the goods. Or, did they intend to disable themselves by transferring the goods in making preferences? On each of these necessary constituents of their right to recover the burden was on the claimants. All these inquiries were and are questions for the jury under proper instructions, to be determined by the weight of the evidence. It will have been noted, in what has been said above, that Weil & Stern's intentions and business prospects, when they purchased the goods, must exert a controlling influence in the determination of this case. This opens a wide field of investigation; and, the question of fraud being involved, their conduct, dealings, and conversation about the time of the purchase, within a reasonable time before, and afterwards, until the levy of the attachment, are legitimate subjects of proof, with proper restrictions as to parties not being allowed to make testimony for themselves, and that matters foreign to their business shall not be received. 2 Brick. Dig. 21, §§ 98, 100; Id. 15, §§ 81, 82; 3 Brick. Dig. 430, §§ 846, 847. A very material inquiry is the time when the purpose to convey to Steiner and Mrs. Kohn was formed.

If the claim affidavit and bond fix, as they should, the amount of goods claimed and delivered to claimant, that is conclusive, and cannot be disproved. *Jemison v. Cozens*, 3 Ala. 636; *Braley v. Clark*, 22 Ala. 361; *Munter v. Leinkauff*, 78 Ala. 546. The value, however, is one of the facts to be found by the jury, and evidence of that should always be received. *Roswald v. Hobbs*, ante, 177.

The second and third exceptions may be considered together, as each contains an hypothesis of fact of which there was then no testimony. Other objections might be stated. There is nothing in these exceptions. The ruling in regard to the question put to Woolfolk is so expressed as not to be intelligible. We suppose there is a mistake. It was certainly for the claimants to prove the amount of Weil & Stern's indebtedness when they bought the goods in dispute, and the record states this witness answered the question.

Under the rules declared above, the trial court erred in ruling out all testimony of indebtedness created, collections made, and disposition of assets by Weil & Stern, between their purchase from claimants and the levy of plaintiffs' attachment. It was not competent to prove in this trial, against plain-

tiffs, any of the transactions of Well & Stern after the levy of plaintiffs' attachment. This disposes of exceptions 6 and 7.

There is nothing in exception 8. The question arose collaterally, and it was competent to speak of the notes, without their production. *Graham v. Lockhart*, 8 Ala. 9; 3 Brick. Dig. 439, § 486.

The first charge given by the court of its own motion mistook the law. Whether or not the sale to Steiner was valid or invalid was no part of the issue in this case. If valid, so as to cut off claimants' claim, it would equally defeat plaintiff's right of recovery. Neither of the parties to this proceeding can succeed by showing outstanding title in a stranger, without connecting themselves with such outstanding title. *Starnes v. Allen*, 58 Ala. 316; 2 Brick. Dig. 480, § 67; 3 Brick. Dig. 776, §§ 5, 6.

The fourth charge given at the instance of the plaintiffs should not have been given. The claimants were not required to prove any one of the essentials of their claim beyond doubt. We have frequently had occasion to consider and condemn similar charges. *Adams v. Thornton*, 78 Ala. 489; *Polak v. Searcy, ante*, 137.

The first charge asked by the claimants was rightly refused. An intentional misrepresentation would be a fraudulent circumstance, to be weighed by the jury. If it was intentionally made, was calculated to deceive, and did deceive, and cause the sale, that would be a fraud, and would supply the third element in claimants' right of recovery.

Charge 6 asked by claimants was correctly refused—*First*, because the completeness *vel non* of the sale to Steiner was immaterial in this case; and, *second*, because it ignored all the elements essential to claimants' right to reclaim the goods. The claim in this case was for several cases of shoes, each having a different case number marked on the box, and a majority of them unopened. It would seem that it was practicable to assess the separate values of the different cases, or a large part of them. *Warehouse Co. v. Johnson, ante*, —, and citations. The judgment entry is informal in setting out more than was necessary. It can be corrected on another trial. *Gray v. Raiborn*, 53 Ala. 40; *Langworthy v. Goodall*, 76 Ala. 325. Reversed and remanded.

#### NOTE.

**SALE—FRAUD.** A sale procured by fraud or misrepresentation may be avoided by the seller, and the property retaken by him as his own; *Sleeper v. Davis*, (N. H.) 6 Atl. Rep. 201; *Ensign v. Hoffield*, (Pa.) 4 Atl. Rep. 189; *Neff v. Landis*, (Pa.) 1 Atl. Rep. 177; *Hanchett v. Kimbark*, (Ill.) 7 N. E. Rep. 491, 2 N. E. Rep. 512; *Doane v. Lockwood*, (Ill.) 4 N. E. Rep. 500; *Goodwin v. Wertheimer*, (N. Y.) 1 N. E. Rep. 404; *Bussinger v. Bank of Watertown*, (Wis.) 30 N. W. Rep. 290; *Lee v. Simmons*, (Wis.) 27 N. W. Rep. 174; *Carl v. McGonigal*, (Mich.) 25 N. W. Rep. 516; *Oswego Starch Factory v. Lendrum*, (Iowa,) 10 N. W. Rep. 900; *Amer v. Hightower*, (Cal.) 11 Pac. Rep. 697; *Taylor v. Mississippi Mills*, (Ark.) 1 S. W. Rep. 283; unless it was subsequently sold by the fraudulent vendee to one who purchased in good faith, and for a valuable consideration, *Sleeper v. Davis*, (N. H.) 6 Atl. Rep. 201; *Neff v. Landis*, (Pa.) 1 Atl. Rep. 177; *Hanchett v. Kimbark*, (Ill.) 7 N. E. Rep. 491, 2 N. E. Rep. 512; *Goodwin v. Wertheimer*, (N. Y.) 1 N. E. Rep. 404; *Perkins v. Anderson*, (Iowa,) 21 N. W. Rep. 696; *Oswego Starch Factory v. Lendrum*, (Iowa,) 10 N. W. Rep. 900.

It may be retaken from the possession of an officer who holds it under an attachment or execution against the fraudulent purchaser, *Ensign v. Hoffield*, (Pa.) 4 Atl. Rep. 189; *Oswego Starch Factory v. Lendrum*, (Iowa,) 10 N. W. Rep. 900; *Taylor v. Mississippi Mills*, (Ark.) 1 S. W. Rep. 283. The assignee for benefit of creditors is not a *bona fide* purchaser for value, and takes no better title than his assignor, the fraudulent vendee, *Goodwin v. Wertheimer*, (N. Y.) 1 N. E. Rep. 404; *Lee v. Simmons*, (Wis.) 27 N. W. Rep. 174.

The purchase of goods with the intention of not paying for them is a fraud which will justify the avoidance of the sale, *Sleeper v. Davis*, (N. H.) 6 Atl. Rep. 201; *Farwell v. Hanchett*, (Ill.) 9 N. E. Rep. 53; *Hanchett v. Kimbark*, (Ill.) 7 N. E. Rep. 491, 2 N. E. Rep. 512; *Lee v. Simmons*, (Wis.) 27 N. E. Rep. 174; *Carl v. McGonigal*, (Mich.) 25 N. W. Rep. 516; *Oswego Starch Factory v. Lendrum*, (Iowa,) 10 N. W. Rep. 900; *Taylor v. Mississippi Mills*, (Ark.) 1 S. W. Rep. 283; *Kyle v. Ward*, (Ala.) 1 South. Rep. 463. So are misrepresentations as to solvency, and the concealment of insolvency, *Ensign v. Hoffield*, (Pa.) 4 Atl. Rep. 189; *Hanchett v. Kimbark*, (Ill.) 7 N. E. Rep. 491;

*Lee v. Simmonds*, (Wis.) 37 N. W. Rep. 174; *Oswego Starch Factory v. Landrum*, (Iowa,) 10 N. W. Rep. 900. But the mere fact of the purchaser's insolvency does not render the purchase fraudulent, unless it was made with no intention or expectation of paying for them, *Dalton v. Thurston*, (R. I.) 7 Atl. Rep. 112; *Mack v. Adler*, (Ark.) 2 S. W. Rep. 345. See, on the general subject of fraud and false representations as grounds for rescission of sales, *Bank v. Gas Co.*, (Minn.) 30 N. W. Rep. 440; *Hays v. Midas*, (N. Y.) 11 N. E. Rep. 141; *Jaffrey v. Brown*, 39 Fed. Rep. 476, and note.

(35 Ala. 260)

WOODS v. CRAFT *et al.*

(*Supreme Court of Alabama*. July 10, 1888.)

1. EQUITY—CANCELLATION OF DEEDS—INADEQUACY OF CONSIDERATION.

A conveyance of land will not be set aside for inadequacy of consideration where the price paid was \$1,000, and the proof failed to show that the cash value of the land exceeded \$1,200, or that more than \$1,000 could have been obtained for it at that time.<sup>1</sup>

2. SAME—DURESS BY THIRD PERSONS—KNOWLEDGE OF GRANTEE.

On a bill to set aside a conveyance of land alleged to have been executed to defendants by plaintiff through duress at the hands of her son, of which defendants had knowledge, it appeared that the price paid for the land was \$1,000; that defendants denied any knowledge of any duress or undue influence on the part of plaintiff's son; that plaintiff had voluntarily offered the land to two other persons for \$1,000 before the sale to defendants; that plaintiff acknowledged that she executed the same voluntarily, and, after payment of the price, moved off the premises; that the magistrate taking the acknowledgment saw no evidence of coercion by the son, or reluctance or hesitation on the part of plaintiff. *Held*, insufficient to overturn the presumption of validity arising from the execution and acknowledgment of the deed.<sup>2</sup>

Appeal from chancery court, Madison county; THOMAS COBBS, Chancellor.

The bill in this cause was filed by Mary A. Woods, and sought to have a conveyance of certain lands described in the bill, and which had been conveyed by her to the defendants, Angeline Craft, the wife of Alex. Craft, and William T. Braham, canceled and set aside. The *gravamen* of the bill was that the price paid for the said lands (\$1,000) was grossly inadequate; that Walter Woods, plaintiff's son, by undue influence, threats, harsh conduct, and fraud, coerced and compelled plaintiff to sell and convey the said lands to defendants; and that the grantees were parties to and had knowledge of such duress and undue influence on the part of the said Walter, her son, or had knowledge of such facts, in reference thereto, as would charge them with notice. Plaintiff appeals from an order denying the relief prayed for and dismissing the bill.

John D. Brandon, for appellant. D. D. Shelby and R. De Walker, for appellees.

STONE, C. J. It is contended for appellant that the consideration (\$1,000) paid for the land involved in this suit is so disproportionate to its real value as to require the sale to be set aside. To justify the setting aside of a conveyance solely on the ground of inadequacy of consideration, it must be very marked,—so gross as to strike the understanding with the conviction that the

<sup>1</sup> In *Graffam v. Burgess*, 6 Sup. Ct. Rep. 686, the court say: "The rule has become almost universal that a sale will not be set aside for inadequacy of price unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness." See the same case in 10 Fed. Rep. 316. But inadequacy of price may be shown in evidence as tending to establish fraud. *Douthitt v. Applegate*, (Kan.) 6 Pac. Rep. 578; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; and, where such inadequacy is gross, the burden of explanation is on the vendee, *Id.*; *Thorn v. Thorn*, (Mich.) 16 N. W. Rep. 824. Courts of law or equity are not inclined to disturb contracts for mere inadequacy of consideration. *Manufacturing Co. v. Laus*, (Wis.) 23 N. W. Rep. 17; *McKinney v. Crady*, (Ky.) 1 S. W. Rep. 402.

As to what is not an inadequate consideration, so as to avoid a contract, see *Waterman v. Waterman*, 27 Fed. Rep. 827; *West v. Russell*, (Mich.) 11 N. W. Rep. 812.

<sup>2</sup> As to when equity will grant relief on the ground of fraud, confidential relations, or undue influence, see *Norton v. Norton*, (Iowa,) 37 N. W. Rep. 129, and note.

transaction was not fair and *bona fide*. *Pope v. Brandon*, 2 Stew. 401; *Bozman v. Draughan*, 3 Stew. 243; *Borland v. Mayo*, 8 Ala. 104; *Maull v. Vaughn*, 45 Ala. 134; *Bunch v. Hurst*, 3 Desaus. 273; *Butler v. Haskell*, 4 Desaus. 651; *Nelson v. McDonald*, 6 Johns. Ch. 201; *Dunn v. Chambers*, 4 Barb. 376; *Gartside v. Isherwood*, 1 Brown, Ch. 558; *Heathcote v. Paig-non*, 2 Brown, Ch. 167. In *Underhill v. Horwood*, 10 Ves. 211, Lord ELDON said: "If the terms are so extremely inadequate as to satisfy the conscience of the court that there must have been imposition, or that species of pressure on the party's distress which, in the view of the court, amounts to oppression, the court will order the instrument to be delivered up." This is a very accurate statement of the principle. Testimony as to the value of the property such as this is in its nature opinion evidence. There is, perhaps, no subject on which witnesses differ more widely. The testimony fails to convince us that the cash market value of the land, at the time the sale was made, exceeded \$1,200, if, indeed, it reached so much. The testimony tends strongly to show that \$1,000 was the highest price that could be obtained for it. The inadequacy of price is not so marked as to justify us in setting aside the sale on that ground.

The doctrine of presumed undue influence, growing out of confidential relations, is invoked by appellant in this case. That doctrine has been maintained by this court in all its integrity. *Juzan v. Toulmin*, 9 Ala. 662; *Boney v. Hollingsworth*, 23 Ala. 690; *Thompson v. Lee*, 31 Ala. 292; *Daniel v. Hill*, 52 Ala. 430; *Dickinson v. Bradford*, 59 Ala. 581; *Waddell v. Lanier*, 62 Ala. 347; *Shipman v. Furniss*, 69 Ala. 555; *Noble v. Moses*, 81 Ala. 530, 1 South. Rep. 217; *Fish v. Miller*, 1 Hoff. Ch. 267; *Riddle v. Murphy*, 7 Serg. & R. 230; *Voltz v. Volts*, 75 Ala. 555; *Bergen v. Udall*, 31 Barb. 9. We think, however, this case must be decided on other principles. There is much testimony in this record tending to show that Mrs. Wood, the complainant, did not willingly part with her lands, but that she did so under duress at the hands of her son. The proof on this point is very strong, and shows not only great depravity on the son's part, but shows equally that both in conduct and words he terrorized his mother, and put her in great fear of personal violence if she did not sell and convey the land. This feature of the case is well made out. 2 Lead. Cas. Eq. (4th Ed.) pt. 2, p. 1245 *et seq.*; *Brown v. Pierce*, 7 Wall. 205; *Baker v. Morton*, 12 Wall. 150; *U. S. v. Huckabee*, 16 Wall. 414. If this were a controversy between mother and son, we would not hesitate to vacate any deed he may have obtained under such influences. The present controversy is between Mrs. Wood, and Craft and Branham, purchasers from her. They are not akin to her, nor to her son. They present a deed of bargain and sale from her to them, in usual form, duly executed, acknowledged before a magistrate, and certified in statutory language, "that, being been informed of the contents of the conveyance, she acknowledged she executed the same voluntarily." The purchase money (\$1,000) was paid, and she moved off the premises. There is testimony in the record to the effect that Mrs. Wood informed Craft, while the trade was being negotiated, that she did not wish to sell her land; and there is also testimony tending to show that Craft, before purchasing, knew that Mrs. Wood was making the sale through fear of her son, inspired by his threats. This, however, is most positively contradicted, and many circumstances are testified to which very materially impair the testimony given for complainant. Of these circumstances we mention the following: Two witnesses testify that, before the sale was made to Craft and Branham, Mrs. Wood proposed to them separately to sell them the land, asking \$1,000 for it. A third witness, a land-buyer on speculation or as an investment, hearing the land was for sale, examined it with a view to its purchase, but was not willing to give \$1,000 for it, although he thought it was worth \$1,200. He wanted a better paying speculation. The magistrate who certified the deed wrote it, Mrs.

Wood being present. He saw no evidence of coercion by the son, or of reluctance or hesitancy on the part of Mrs. Wood. We consider the testimony insufficient to overturn the presumption arising from the execution and acknowledgment of the deed. *Barnett v. Proskauer*, 62 Ala. 486; *Smith v. McGuire*, 67 Ala. 34; *Moog v. Strang*, 69 Ala. 98; *Van Cleave v. Wilson*, 78 Ala. 887; *Miller v. Maro*, 55 Ala. 322; *Coleman v. Smith*, Id. 868.

Affirmed.

(85 Ala. 100)

LEHMAN *et al.* v. CLARK.

(Supreme Court of Alabama. July 10, 1888.)

1. GARNISHMENT—DISCHARGE OF GARNISHEES—RES ADJUDICATA.

In garnishment proceeding by C. on a judgment recovered in the name of W. for the use of C., defendants, without denying their liabilities, set up as a defense that the right to sue existed alone in C., and that he should have brought the action in his own name. On issue joined on this plea, the garnishees were discharged, and C. brought suit directly on the note by virtue of being the holder of it as collateral security for his judgment. *Held*, that the judgment discharging the garnishees is no defense to the action by C., since his election to sue on the note, instead of condemning it by garnishment, was induced by plea of the garnishees themselves.

2. ASSIGNMENT—ACTION ON ASSIGNED NOTE—TITLE OF HOLDER.

In an action on a note by an assignee thereof, defendant cannot set up as a defense that the assignment was obtained by fraudulent devices. As between the parties, the title to the note is good until set aside by proceedings instituted for that purpose.

Appeal from city court, Montgomery county; T. M. ARRINGTON, Judge.

This suit was brought by the appellee, Henry W. Clark, on two promissory notes executed by the appellants, defendants below, to the Masonic Temple Association in payment of a subscription to its capital stock. These notes were transferred by the Masonic Temple Association to the Southern Life Insurance Company as collateral to secure the payment of a loan of \$40,000. The Southern Life Insurance Company became bankrupt, and one Wooldridge and others were made its assignees in bankruptcy. These assignees, after exhausting the mortgage security, which was insufficient to satisfy the debts of the Masonic Temple Association, sold and transferred to Henry W. Clark, the appellee, the claim against the Masonic Temple Association, and also the collaterals, including the notes which are the foundation of this action. Thereupon a suit was brought in the name of Wooldridge and others, assignees, for the use of said Clark, in the city court of Montgomery, against the Masonic Temple Association, and a judgment recovered for a large amount. Upon this judgment a writ of garnishment was issued against the defendants, (appellants here,) and a number of other persons who were indebted to the Masonic Temple Association in the same way. This garnishment was issued March 22, 1881, and, like the judgment on which it was founded, was in the name of Wooldridge and others, assignees, for the use of Clark. Afterwards, and pending that garnishment suit, on the 29th day of December, 1882, this suit was commenced by a summons and complaint in the name of Henry W. Clark, as transferee of the notes, and against the defendants as makers. At the February term, 1883, the defendants pleaded in abatement the pendency of the garnishment suit; but, on motion of the plaintiff, this plea was stricken from the file on the ground that it was filed too late. Afterwards, at the fall term, 1884, the garnishment suit was tried, the issue was found in favor of the garnishees, and they were discharged. When this present case was tried at the October term, 1887, the defendant endeavored by plea to set up the judgment in the garnishment suit as a bar to a recovery in this action. Issue was made up, and upon a trial of the cause there was a verdict and judgment for the plaintiff. The defendants appealed, and the sole question presented for decision in the case is whether the judg-

ment discharging the defendants as garnishees bars the right of plaintiff to a judgment on the notes sued on in this action.

*W. H. Graves and Watts & Son*, for appellants. *Tompkins, London & Troy and Lester C. Smith*, for appellee.

SOMERVILLE, J. The main point raised by the present record is one involving the question of *res adjudicata*. It is contended by appellants that their discharge as garnishees in the garnishment proceeding brought by Wooldridge on the judgment obtained by him, for the use of Henry W. Clark, against the Masonic Temple Association, is a full defense to the present suit, which is one brought in the name of Clark himself, claiming to be the holder and quasi owner of the notes due by the garnishees, Lehman, Durr & Co., for their unpaid stock subscriptions to said Masonic Temple Association. The facts in the garnishment suit were, in substance, precisely those that existed in the case of *Wooldridge v. Holmes*, 78 Ala. 568; the defendant Holmes and the appellants occupying analogous positions as garnishees and stock subscribers in the same corporation. In that case, as here, it appeared that the judgment on which the garnishment issued had been recovered in the name of Wooldridge for the use of Clark as beneficiary. Clark was considered, therefore, by the terms of the statute, as the sole party plaintiff on the record. Code 1886, § 2595. The defense set up to that suit by Holmes was that the plaintiff held the stock subscription note due by the garnishee as collateral security for the judgment on which the garnishment proceeding was based. It was said by the court that this fact was no answer to the garnishment suit, and constituted no reason why Wooldridge could not condemn the debt for the use of Clark, although the latter could have elected to sue in his own name on the note for the purpose of enforcing his lien on it. If he desired to waive this lien, and condemn the note by garnishment, he could do so. The effect of this decision, in substance, was to hold that Clark had open to him a choice of two separate proceedings: (1) He could sue directly on the Holmes note by virtue of his being a holder of it as collateral security for his judgment against the Masonic Temple Association; or (2) he could waive this lien or right, and proceed to condemn it by garnishment based on this judgment. In this case, Clark at first elected to proceed in the second of the above-mentioned modes. This he could have done under the authority of the case above cited. 78 Ala. 568. But the garnishees, Lehman, Durr & Co., without denying their liability for the debt evidenced by the notes, asserted that the right to sue existed alone in Clark, and that he held the title to the notes, and that he should have brought the action in his own name as collateral holder of these notes. On this issue the garnishees were discharged. Thereupon the present suit was brought in the mode in which the garnishees had insisted that it should be brought. Under this state of facts, we think the city court correctly decided that the rule of *res adjudicata* did not apply. It is true that in ordinary cases a judgment in favor of a garnishee, discharging him from all liability, is conclusive against the plaintiff in another action between the same parties, although the judgment of discharge was erroneous. This is so, at least, where the same issue on the merits was actually decided in the former suit, or necessarily involved, or might and ought to have been there litigated or decided. *Tankersly v. Pettis*, 71 Ala. 179; *McCall v. Jones*, 72 Ala. 368; 3 Brick. Dig. p. 580, § 75 *et seq.* Here, however, another principle prevails to take this case out of the operation of that rule. The liability of the garnishees was not one of the issues involved in the former suit. Such liability was never controverted. The only issue was the right of the plaintiff to waive his lien on the note, and to condemn it in the mode attempted. This plea induced Clark to abandon that right, which he lawfully had, and to submit to the discharge of the garnishees on the suggestion that he should adopt the other remedy given by law. In other words, he elected

to sue on the note due by garnishees, instead of condemning it by garnishment. This election was induced by the plea of the garnishees themselves. We hold that the rule applies that "a party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another in a suit founded on the same subject-matter." 1 Herm. Estop. § 288, p. 342, and note 1; *Hill v. Huckabee*, 70 Ala. 183; *Caldwell v. Smith*, 77 Ala. 157.

It would be no defense to this action that Clark obtained the assignment to himself of the note by fraudulent devices. The debtor cannot set up such a defense in bar of the action. Only the assignee in bankruptcy, or the creditors of the bankrupt, could assail the validity of Clark's title. It is good between the parties until set aside in some proceeding instituted for that purpose. *Wood v. Steele*, 65 Ala. 436; *McCausland v. Drake*, 3 Stew. 344. We discover no error in the record, and the judgment is affirmed.

CLOPTON, J., not sitting.

(85 Ala. 301)

CHANDLER v. WYNNE *et al.*

(Supreme Court of Alabama. July 11, 1888.)

EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—OBJECTION TO CLAIMS—RIGHTS OF HEIRS.

The validity of a claim for a balance on an unsettled partnership account filed by a surviving partner against his deceased partner's insolvent estate cannot be determined by the probate court on an issue "between the claimant and the objector" under Code Ala. § 2245; nor does it become a *quasi* judgment when not objected to by the administrator or a creditor within 12 months after the estate is declared insolvent, as provided by section 2244, such claim being exclusively of equitable cognizance; but heirs may plead the statute of limitations against the claim on an application by the administrator to sell decedent's real estate to pay it.—Acts Ala. 1878, p. 69, allowing heirs to object to claims against insolvent estates having been enacted more than 12 months after the estate in question was declared insolvent, and hence not applying.

Appeal from probate court, Montgomery county; F. C. RANDOLPH, Judge. The appellant, Willis L. Chandler, as administrator *de bonis non* of the insolvent estate of Bartholomew Boyle, deceased, filed his petition to the probate court for an order to sell the lands of the estate of the deceased for the payment of debts against the estate. The widow of the deceased, now Helen N. Wynne, and the children of the deceased, as his heirs, were made parties defendant to the proceedings, and filed their answer, containing pleas and demurrers, as the basis of objections to an order by the court for a sale of the lands sought to be so sold. The administrator *de bonis non* moved the court to strike the answer of the contestant, and their pleas and objections, from the file, which motion was overruled; the court holding that the heirs were at liberty to make any defense to the claims which could have been made at any time.

W. H. Graves and Brickell, Semple & Gunter, for appellant. Watts & Son, Garrett & Underwood, Senn & Bethea, and Dickey & Gillespie, for appellees.

STONE, C. J. Bartholomew Boyle died intestate in 1875, and Needham Lee became his administrator. On petition and schedules filed by him, the estate was decreed insolvent October 7, 1877. On April 7, 1878, B. H. Kelly filed a claim against the insolvent estate for over \$9,000, and on June 26, 1878, John T. Milner filed a claim for over \$24,000. Each of these claims was in form an account, and each was claimed as a balance due to the claimants, respectively, as surviving partners of partnerships which had existed between them and Boyle in his life-time. It is not pretended that either of the partnerships has ever been finally settled, or any balance ascertained.

The accounts purport to set forth moneys of the respective firms received and converted by Boyle in his life-time, and payments alleged to have been made by the survivors, on firm account. Neither account purports to set out a full and detailed statement of the partnership dealings. No exceptions or objections were filed to either of these claims within 12 months after the decree of insolvency, nor at any time until the institution of the present proceedings. No decree of the court approving the claims has ever been rendered, no payments have ever been made on them; no partial disbursements ordered, and it is not shown that any assets have come to the administrator's hands for disbursement. It is averred in the petition, after shown, that whatever of personal assets the decedent left has been expended by the administrator in chief in the payment of expenses and costs of administration; and, on coming to a settlement in 1887, nothing was found in his hands. The present proceeding was instituted January 20, 1888. It is a petition by the administrator *de bonis non*, addressed to the probate court in which his administration is pending, and makes the heirs of said Boyle, the intestate, parties defendant. Its prayer is to have certain lands, property of decedent, decreed to be sold for the payment of said alleged debts to Kelly and Milner, there being no personal property for their payment. No objection has been taken to the mere form of these proceedings, and we have discovered no ground for such objection. Many defensive reasons are urged why the prayer of the petition should not be granted. The probate court held the defense good, and dismissed the petition.

The first defense relied on is the statute of limitations of six years, and laches, under which it is contended that the claims for the payment of which a sale of the lands is sought, are barred, and furnish no ground for such sale. To this it is replied that, under the influence of our statutory system, the Kelly and Milner claims have become fixed debts and *quasi* judgments against Boyle's estate, and the statute of limitations of six years operates no bar. Code 1886, §§ 2238, 2244, 2245. At the time Boyle's estate was declared insolvent, October 7, 1877, the statute on the subject of filing claims against such estates was the same as it is now. Nine months were allowed for filing, and claims not so filed, with certain exceptions, were forever barred. Code 1876, § 2568; Code 1886, § 2238. Three additional months, making twelve, were allowed to file objections to such claims; but at that time only the personal representative, or some creditor of the estate, was authorized to file objections. Code 1876, § 2575. The act approved December 4, 1878, (Sess. Acts, 69,) extended the privilege to heirs, legatees, devisees, and distributees; but this was more than 12 months after the estate was declared insolvent. Code 1886, § 2245. This enactment does not affect this case. The statute, Code 1886, § 2244, (2574,) declares that, "if no opposition is made, \* \* \* within twelve months after the time when the estate was declared insolvent, such claim must be allowed against the estate without further proof." The opposition here meant includes any and all objections to the claim which might be filed under section 2245 of the Code of 1886. The particular contention of appellant, as we have shown, is that inasmuch as the claims of Kelly and Milner were filed verified before the expiration of the nine months allowed for filing claims, and no objections were interposed within 12 months,—thus establishing their claims "against the estate without further proof,"—they thereby became *quasi* judgments, and cut off all defenses to them: as such, no matter from what quarter such defenses may come. It is certainly true that when a claim has been filed against an insolvent estate, and not objected to in time, it becomes an ascertained and fixed debt against the personal representative, and against the personal assets in his hands; and, to that extent, it is no longer open to defenses which merely assail its justness as a proper charge. It is open only to defenses which accrue after the time for filing objections has expired. This has been very many times decided. *Thapies v. Herbert*,

61 Ala. 340; *Thornton v. Moore*, Id. 347; *Clark v. Knox*, 70 Ala. 607; *Bandle v. Carter*, 62 Ala. 95; *Hubank v. Clark*, 78 Ala. 73; *Moore v. Winston*, 66 Ala. 296. In *Heydenfeldt v. Towns*, 27 Ala. 423, there are some expressions which go beyond the doctrine announced above, but in that case the question did not arise as it does in this. If it was intended to declare that a claim filed against an insolvent estate, and not objected to in the 12 months, becomes, in all cases, so far a judgment as to furnish conclusive evidence of the debt in a suit to subject lands for its payment, later rulings have qualified that doctrine. In *Randle v. Carter*, 62 Ala. 95, 104, this court said: "In *Heydenfeldt v. Towns*, 27 Ala. 429, it is said that the decree in favor of the creditor in the course of the insolvent proceedings has, as matter of evidence, a larger operation than a judgment at common law against the personal representative; that it is, as against the heir or devisee, *prima facie* evidence of the debt or demand. However, that may be, it is, as against legatees who claim in privity with the personal representative, as are all judgments rendered by a court of competent jurisdiction, *prima facie* evidence of the debt or demand." In this latter case the ruling in *Heydenfeldt v. Towns* was expressly approved when applied to personal assets, and approval withheld when applied to real estate. But let us consider this question on principle. Before December 4, 1878, only the personal representative and the creditors were or could be parties to proceedings in insolvency of estates. Heirs, devisees, legatees, distributees were not permitted to be heard. They were said not to be affected by them. As to them, the proceedings were *res inter alios acta*. *McGuire v. Shelby*, 20 Ala. 456; *Randle v. Carter*, 62 Ala. 95; *McMillan v. Rushing*, 80 Ala. 402. Would it not be monstrous to hold that the heirs are concluded by a proceeding of which they had no notice, and in which they had no right to appear if by chance they had learned that it was pending? If the statute had declared in terms that the effect of proceedings in insolvency, in which they are denied the right to appear, should be to establish a debt under which lands descended to them could be sold, without any right in them to question the existence of the debt, such statute would be palpably unconstitutional. *Wilburn v. McCalley*, 63 Ala. 486. And such doctrine, applied to such a case as this, is all the more shocking when, by inattention or indifference, a careless administrator, or careless or interested creditors, may fail to file objections to claims, and thus establish them, no matter how groundless they may be.

As we understand the position taken by the appellant, it is not denied that, if Boyle's estate had remained solvent, then the heirs could interpose any defense to the present application, or to the claims on which it is founded, which their ancestor could urge if living. Our many rulings have settled this doctrine too firmly to leave even a pretense for further dispute. *Teague v. Corbitt*, 57 Ala. 529; *Steele v. Steele*, 64 Ala. 438; *Scott v. Ware*, Id. 174; *Trimble v. Fariss*, 78 Ala. 260; *Warren v. Hearne*, 82 Ala. 554, 2 South. Rep. 491. Can a reason be urged why this rule, at least before December 4, 1878, does not apply to insolvent estates? The reason on which the rule rests, is that while the title of the personality is in the personal representative, and, as to it, he represents all parties in interest, such is not the case with realty. This descends to the heirs, and in every step the personal representative takes in regard to it he interferes with the descent. All the power the statutes give him over the land is in the interest of the creditors, and is in antagonism to the rights of the heirs at law. *Teague v. Corbitt*, 57 Ala. 529; *Steele v. Steele*, 64 Ala. 438, 455; *Trimble v. Fariss*, 78 Ala. 260, 266; *Clark v. Knox*, 70 Ala. 607, 622. And this is alike and equally true of insolvent as it is of solvent estates. We hold that, with exceptions to be noticed further on, there is neither a difference, nor ground for a difference, on this question between solvent and insolvent estates; and, when proceedings are instituted to subject lands to the payment of debts of an insolvent estate, "whatever would operate

to defeat and bar the debt as a legal subsisting demand, enforceable against the intestate if living and sued, will defeat and bar it when the personal representative seeks to charge the descended lands." *Steele v. Steele*, 64 Ala. 438; *Warren v. Hearne*, 82 Ala. 554, 2 South. Rep. 491. When, on proper proceedings, an estate is declared insolvent, it does not put an end to suits then pending against the personal representative. It, however, changes the *status* of all common-law suits which have for their object the fixing of a money liability on the estate represented. These are retained, and permitted to be prosecuted to judgment, for the purpose of ascertaining whether anything, and how much, is due. If a money judgment is recovered against the estate, it is not enforceable by execution, as ordinary money judgments are. It is certified to the court of probate for equal allowance with the other debts of the insolvent estate, and shares only *part passu* with them in the disbursement. Code 1886, §§ 2250, 2251. Money demands, however, or claims solvable in money, asserted against the estate, if not in suit when the decree of insolvency is pronounced, stand on a different footing. On such claims no suit at law can afterwards be instituted. Their assertion, and any litigation growing out of it, must take place in the probate court in which the administration is pending, and can be had nowhere else. The claim must be filed, verified, within nine months after the decree of insolvency, or after the accrual of the claim. *Id.* § 2238. If no opposition or objection is filed to the claim within twelve months after the decree of insolvency, then "such claim must be allowed against the estate without further proof." *Id.* § 2244. If objection is filed to the claim within twelve months, "the court [of probate] must cause an issue to be made up between the claimant and the objector, in which issue the correctness of such claim must be tried as in an action of law, if required;" and if the issue, either in whole or in part, is found in favor of the claimant, to the extent so found it becomes an established claim against the estate without further proof. *Id.* §§ 2245, 2246. Claims thus established become fixed liabilities of the estate, having many of the qualities of *prima facie* judicial ascertainment. This for the obvious reason that no other proceeding or suit is open to the creditor of an insolvent estate. A judgment against a personal representative rendered on a liability not barred when the suit was brought, merges the liability in the judgment, and fixes a new departure from which to compute time necessary to perfect a bar. *Scott v. Ware*, 64 Ala. 174; *Yandell v. Pugh*, 58 Miss. 295. So a claim established against an insolvent estate in the probate court must, *prima facie*, have the same effect; for no other form of judicial trial is open to such claimant. *Heydenfeldt v. Towns*, 27 Ala. 423; *Randle v. Carter*, 62 Ala. 95. So effectually does a decree of insolvency ascertain that there are debts of the estate in excess of personal assets that on such decree the personal representative may obtain an order to sell lands for the payment of debts, without taking any evidence to show the necessity of the sale. Code 1886, § 2258. We think, however, that the proper interpretation of the statute last referred to is that it makes only a *prima facie* case. To hold it conclusive would be, perhaps, to make it unconstitutional. *Stoudenmire v. Brown*, 57 Ala. 481; *Zeigler v. Railroad Co.*, 58 Ala. 594; *Wilburn v. McCalley*, 63 Ala. 436. It would certainly overturn the rulings of this court in *Teague v. Corbitt*, 57 Ala. 529; *Steele v. Steele*, 64 Ala. 438; *Clark v. Knox*, 70 Ala. 607; and *Trimble v. Pariss*, 78 Ala. 260.

Our insolvent system was intended to be complete, and we do not doubt it includes and provides for all claims that can be brought within its provisions. Does it meet every class of cases? It will be remembered that each of the two claims against Boyle's estate brought to view in this case is preferred in the character of surviving partner, claiming a balance due on partnership account, and not pretending that any settlement of either partnership has ever been had. Aside from these two claims, there are no debts. Are these claims

of such a character as, not being objected to within the 12 months, they become established claims against the estate, so as to authorize an order of sale without further proof of indebtedness? Code 1886, § 2258. While we concede that all claims against insolvent estates, absolute or contingent, legal or equitable, must be filed within the nine months to entitle them to share in the disbursement, there are claims which, in their nature, forbid that anything shall be done in the probate court beyond the mere filing. We will not undertake to define or declare to what classes of cases this principle applies, but will confine our ruling to the case in hand. We hold, then, that claims to be "allowed against the estate without further proof," (Id. § 2244,) merely because they were filed verified in nine months, and not objected to in twelve months, must be of a character which, if objected to, the probate court can determine their correctness on "an issue to be made up between the claimant and the objector," (Id. § 2245.) To hold otherwise would be to declare that a claim would be entitled to allowance if filed and not objected to, while the same claim, if objected to, could not be allowed, because the probate court is without jurisdiction to ascertain its correctness. The legislature cannot be supposed to have intended so incongruous and inequitable a system as this would imply. The claims in the present case being between partners, growing out of partnership dealings, and the accounts not settled between themselves, the question of debit and credit depends on the entire accounting and adjustment of the entire effects of the respective firms. *Broda v. Greenwald*, 66 Ala. 538. This cannot be had in the probate court. Only the chancery court can settle partnership accounts between partners. *Vincent v. Martin*, 79 Ala. 540; 5 Wait, Act. & Def. 149. The claims relied on in this case, although not objected to, do not amount to *prima facie* proof of indebtedness from decedent which will authorize a decree ordering a sale of lands for their payment. Controlled by the principles stated above, we hold that the proceedings in insolvency in this case have cut off none of the defenses which the heirs could otherwise make to the claims of Kelly and Milner. To them the claims are simply accounts barred in six years, prolonged to six years and six months by reason of Boyle's death. *Pickett v. Hobdy*, 68 Ala. 609; *Levis v. Ford*, 67 Ala. 143; *Lee v. Downey*, 68 Ala. 98; *Bond v. Smith*, 2 Ala. 660; *Teague v. Corbitt*, 57 Ala. 529; *Scott v. Ware*, 64 Ala. 174; *Steele v. Steele*, Id. 438; *Trimble v. Fariss*, 78 Ala. 260; *Warren v. Hearne*, 82 Ala. 554, 2 South. Rep. 491. To them the affairs of the several partnerships are unsettled, with no act in recognition of their continued existence for a period much longer than is requisite to perfect the statutory bar to any suit for their settlement,—in this behalf also prolonged to six years and six months. *Bradford v. Spyker*, 82 Ala. 134; *Brewer v. Browne*, 68 Ala. 210.

The inquiry may arise, if we have not left creditors situated as Kelly and Milner were, without remedy for the enforcement of their claims. If we were to declare absolutely what mode of redress was open to them, our ruling would be *dictum*. But their claims being purely equitable, and not susceptible of ascertainment in any proceeding known to the common law, should they not, after presenting and filing them, have invoked the powers of the chancery court to have them adjudicated and established, thus preventing the running of the statute? This, it would seem, was the only means open to them of putting their claims in shape for allowance in the insolvency. This is but a suggestion. The judgment of the probate court is affirmed.

CLOPTON, J., not sitting.

v.480.no.16—42

(84 Ala. 539)

**HOYT BROS. MANUF'G. CO. v. TURNER et al.**

(Supreme Court of Alabama. June 23, 1888.)

**1. SALE—BONA FIDE PURCHASERS—WHO ARE.**

A purchaser of chattels who agrees with the seller to pay the value of the same upon notes given by the latter to third persons, upon which the former is already liable as indorser, incurs no new obligation, and is not a purchaser who has paid the purchase price.

**2. SAME—INSTRUCTIONS.**

In trover by the original vendor of chattels against a subpurchaser from the alleged fraudulent vendee, an instruction to find for defendants if they were innocent purchasers for a valuable consideration is erroneous, as excluding from the jury the qualifying principle that not even an innocent purchaser for value can claim protection unless he has parted with the purchase price before notice.<sup>1</sup>

**3. SAME—ACTIONS AGAINST FRAUDULENT PURCHASER—BURDEN OF PROOF.**

The burden of establishing notice of fraud on the part of defendants is not upon the plaintiff, but the former must establish that they paid value for the property before such burden is shifted upon the latter.<sup>1</sup>

**4. SAME—EVIDENCE.**

Evidence of fraudulent transactions on the part of defendants' immediate vendor, of unpaid judgments recovered against him on account of such transactions, and of other purchases made by him for which he was unable to pay, is competent to prove, not only his insolvency, but the fact of his fraudulent intent, though notice of the fraud on defendant's part must also be shown, as it is competent to establish each fact separately.<sup>1</sup>

**5. SAME—SALE BY FRAUDULENT VENDEE—NOTICE TO PURCHASER.**

Instruction that a subpurchaser from a fraudulent vendee at a fair price will be protected if he pays the purchase money before the original vendor elects to rescind the sale, though at the time of payment he had notice of the fraudulent nature of the sale to his vendor, is erroneous.<sup>1</sup>

**6. SAME—PROOF OF FRAUD.**

An instruction that plaintiff must prove knowledge of fraud upon the part of defendants before it can recover, is erroneous, as it is necessary only to establish facts sufficient to charge the latter with knowledge.<sup>1</sup>

**7. SAME—RESCISSON FOR FRAUD—BONA FIDE PURCHASERS.**

An instruction that, if such vendee offered to sell the chattels to defendants before they arrived, and defendants at the time "doubted" whether the same had been paid for, and "doubted" such vendee's right to sell without the consent of plaintiff, and asked such vendee if he had a right to sell, but was not told that plaintiff had been consulted as to the sale, and if defendants could have ascertained by reasonable diligence the circumstances under which the chattels were purchased, then they were not *bona fide* purchasers for value and without notice, and the verdict should be for plaintiff, is erroneous and misleading, as asserting that a mere doubt on defendants' part, however vague or unreasonable, was sufficient to put them on inquiry as to the fraud.<sup>1</sup>

**8. SAME—FRAUD IN PROCUREMENT—RIGHT OF SELLER TO RESCIND.**

The evidence tended to show that, before plaintiff learned of the insolvency and fraud of its vendee, it sent out an agent with instructions to collect the purchase money of the chattels sold from such vendee, but with no other authority; and, upon learning of such vendee's fraud and insolvency, it withdrew all authority from the agent, and rescinded the sale. Held, that an instruction that if plaintiff or its agent had notice and knowledge that such vendee was insolvent, and had sold the chattels to defendants, and, after such knowledge, had endeavored to collect the purchase money from such vendee, this was an affirmation of the sale, and the verdict must be for defendant, was erroneous, as the fact of agency was improperly assumed as a proved fact, and as there could be no ratification of the sale in the absence of a knowledge of fraud; knowledge of mere insolvency being insufficient.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

The appellant, Hoyt Bros. Manufacturing Company, an Illinois corporation, brought this action against the appellees, Turner & Oates, for the alleged conversion of certain machinery bought by Turner & Oates from one Lyles, the original purchaser of said machinery from the plaintiff. The charges referred to in the opinion are as follows: At the request of the defendants,

<sup>1</sup>On the subject of fraud and false representations as grounds for rescission of sales, and from whom the property sold may be retaken, see *Wolner v. Lehman*, (Ala.) 60 Ala. 642, and note; *Henderson v. Gibbs*, (Kan.) 18 Pac. Rep. 923.

the court gave the following charges, to the giving of each of which charges the plaintiff excepted: "(1) If the jury believe from the evidence that the defendants were innocent purchasers of said machinery from said Lyles, and that they purchased for a valuable consideration, they must find for the defendants. (2) If the jury believe from the evidence that Turner & Oates purchased the machinery sued for from Lyles for a fair price, and paid for it by paying his (Lyles') notes or liabilities to third parties before plaintiffs elected to rescind the contract, then they must find for the defendants, and Turner & Oates are not required to disprove any fraud Lyles may have committed in the purchase of said machinery from the plaintiff. (3) That it devolves on the plaintiff to prove to the satisfaction of the jury that Lyles committed a fraud on them in making the purchase, and, further, that Turner & Oates had notice of the fraud at the time they purchased the machinery from Lyles, or notice of such facts which, if followed up, would have disclosed the fraud. (4) The burden of proof is on the plaintiff to show to the satisfaction of the jury that Turner & Oates had notice and knowledge of the fraud of Lyles in making the purchase from plaintiff, provided they believe from the evidence there was fraud, or of such facts which, if followed up, would have led to the discovery of fraud by them. (5) If the jury believe from the evidence that Turner & Oates were indorsers on Lyles' paper, held by third parties, to an amount equal to the value of the machinery he sold them, and that they assumed to pay said paper in consideration of such sale, and they did pay, or provide for the payment thereof, before any disaffirmance of such sale by the plaintiffs, then they are *bona fide* purchasers for value of said machinery, unless they believe from the evidence that they had notice of the fraud of Lyles, or notice of such facts which, if followed up with reasonable diligence, would have disclosed the fraud, if any; but the burden of proving such notice is on the plaintiff." There was evidence tending to show that before the plaintiffs learned of the insolvency of Lyles, or of the alleged fraud that he had perpetrated on them in the purchase of the machinery, they sent one F. G. Hanchett to Mobile, as their special agent, with instructions to attempt to collect from Lyles the purchase money for the machinery, but they did not confer upon him any other authority; and as soon as they learned of the insolvency of Lyles, or of the alleged fraud that he had perpetrated upon them, they withdrew all authority whatever from Hanchett, and rescinded the sale. At the request of the defendants, the court gave the following charge, and the plaintiff excepted: "(6) If the jury believe from the evidence that C. L. Hoyt, the president of the Hoyt Bros. Manufacturing Company, or its agent, F. G. Hanchett, had notice and knowledge that Lyles was insolvent, and had sold the machinery to Turner & Oates, and, after such knowledge, endeavored to collect from Lyles the notes he had given them for the machinery sued for, then this is an affirmation of the sale, and they must find for the defendants." The plaintiff asked the following charge, and to the refusal excepted, (the refusal to give this charge forms the eighth assignment of error mentioned in the opinion:) "If the jury believe from the evidence that Lyles offered to sell the machinery in controversy, together with that purchased from Filer and Stowell & Company, to Turner & Oates before it arrived, and that Mr. Turner, at that time, doubted whether it had been paid for, and also doubted Lyles' right to sell it without the consent of the original sellers, and asked Lyles if he had a right to sell it, and was shown a letter from the Filer & Stowell Company assenting to the sale of the property bought from them, but was not told that the plaintiff had been consulted as to their property; and if the jury further find from the evidence that the property had been bought by Lyles under circumstances that would justify a recovery against him, under the charges of the court, had he been sued, and if Turner & Oates could, by reasonable diligence, have ascertained the circumstances under which the property had been purchased,—then the defendants are not *bona fide* purchasers of the property

for value and without notice, and you ought to find a verdict for the plaintiffs against the defendants." There was a verdict and judgment for the defendants, and the plaintiff appealed.

*G. L. & H. T. Smith*, for appellant. *Overall & Bestor*, for appellees.

SOMERVILLE, J. The action is one of trover, brought against the subpurchasers from an alleged fraudulent vendee, founded on the sale of certain machinery by one Lyles to the defendants, Turner & Oates, which is claimed by the plaintiff. The first charge given at the request of defendants, to which exception is taken, instructed the jury to find for the defendants if they believed from the evidence the defendants were "innocent purchasers" of the property, and that they purchased for a valuable consideration. We need not decide whether the words "innocent purchaser" are as comprehensive in meaning as the phrase "*bona fide* purchaser without notice," which is one of settled signification and clear meaning, belonging, as it does, to the current coinage of approved legal phraseology. It is sufficient to say that the charge was erroneous in excluding from the jury the qualifying principle that no purchaser, although *bona fide*, for value, and without notice, can ordinarily claim protection until the payment by him of the purchase money. If the purchase involves the duty to pay money, and the purchaser receives notice of the alleged fraud before such payment, although after the purchase, he is not protected. The agreement between the defendants and Lyles, in one phase of the testimony, was to pay the value of the machinery upon debts due by him to third persons, no promise being made to such creditors. The defendants were already liable on the notes as indorsers, and incurred no further obligation to the holders by their agreement to pay some of these notes, without specifying any particular ones. If, therefore, the defendants received information sufficient to charge them with notice of the alleged fraudulent nature of Lyles' purchase, and afterwards paid or assumed such debts by incurring an obligation to pay them, by renewal or otherwise, they did so in their own wrong.

The second charge, assigned for error, given at the defendants' request, was erroneous, in asserting, by necessary implication, that a subpurchaser from a fraudulent vendee at a fair price will be protected if he pays the purchase money before the original vendor elects to rescind the sale, although at the time of the payment he had notice of the fraudulent nature of the first sale to his immediate vendor. The proposition is manifestly incorrect.

The third charge is in violation of the rule declared in *Kyle v. Ward*, 81 Ala. 120, 122, 1 South. Rep. 468, as to burden of proof in cases of this kind. If the purchase made by Lyles from the plaintiff was fraudulent, a recovery could be had against any subpurchaser from him, unless he was a *bona fide* purchaser for value. A mere volunteer would not be protected. The law would impute to him conclusive notice of the fraudulent nature of the transaction. It is only after proof made by the subpurchaser that he paid value that the burden is shifted on the plaintiff to prove notice on the part of such subpurchaser. *Spira v. Hornthall*, 77 Ala. 137.

It was sufficient for the plaintiffs to prove notice of the alleged fraud on the part of the defendants sufficient to charge their conscience. The fourth charge was erroneous in requiring that they should prove knowledge of such fraud before the plaintiff could be entitled to recover. We need add nothing on this point to what is said in *Woolen Mills v. Sibert*, 81 Ala. 140, 1 South. Rep. 778, where "knowledge" and "notice" are distinguished as not being synonymous or equivalent terms, and a charge like the one under consideration was held to be erroneous.

The evidence tended to show a series of prior transactions on the part of Lyles with various persons which the evidence tended to prove were fraudulent, especially when taken into connection with each other. The unpaid

judgments recovered against him by creditors in these cases, and other purchases made, for which he was unable to pay, tended to prove, not only the fact of his insolvency, but also his fraudulent intent. To establish a fraudulent transfer or conveyance, two things are requisite: (1) A fraudulent intent on the part of the grantor; and (2) a knowledge or such notice of it on the part of the grantee as to authorize the conclusion of a participation in such fraud by him. The two propositions are separate and distinct, and it is competent to prove each separately. To prove the fraud of the grantor, his declarations and conduct prior to the transfer or conveyance, as throwing light upon his intention, are relevant evidence. Participation by the grantee may be proved by any circumstances sufficient to charge his conscience with knowledge or notice of the fraudulent designs of the grantor. But no amount of fraudulent intent on the part of the grantor will vitiate the transaction in the absence of participation in such intent by the grantee. *Shealy v. Edwards*, 75 Ala. 411; *Moss v. Dunham*, 71 Ala. 178; *Cigar Co. v. Bernheim*, 81 Ala. 138, 1 South. Rep. 470; *Foster v. Hall*, 22 Amer. Dec. 400.

The sixth charge improperly assumed as a proved fact that Hanchett was the agent of the plaintiff corporation. There could, moreover, be no ratification by it of the sale made by the plaintiff to Lyles, in the absence of a knowledge of facts sufficient to charge its authorized agents with notice of the fraudulent character of the sale. Knowledge of mere insolvency alone would not necessarily answer this end. *Le Grand v. Bank*, 81 Ala. 128, 1 South. Rep. 460.

The charge covered by the eighth assignment of error is misleading, if not erroneous, and was properly refused. It is susceptible of being construed to assert that a mere doubt on defendant's part, however vague or unreasonable, that Lyles had paid the plaintiff for the machinery, and had no permission to sell it, would be sufficient to put defendants on inquiry as to the alleged fraud in the purchase. This carried the rule of notice too far. The other exceptions are not well taken. Reversed and remanded.

(85 Ala. 144)

#### DUNN et al. v. WILCOX COUNTY.

(Supreme Court of Alabama. July 11, 1888.)

#### CONSTITUTIONAL LAW.—DELEGATION OF LEGISLATIVE POWERS.—WHAT AMOUNTS TO.

The several acts of assembly authorizing the court of county revenues of Wilcox county "to establish or abolish districts in which stock may be prevented from running at large," are not in violation of Const. Ala. art. 4, § 50, providing that "the general assembly shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the state," as counties are not "municipal corporations," nor do those acts delegate power to "pass laws," within the meaning of that section, the only discretionary power given the court of county revenues being to determine when they shall go into effect.

Appeal from circuit court, Wilcox county; JOHN MOORE, Judge.

Application of Robert E. Dunn and others for writ of *certiorari* to the court of county revenue of Wilcox county. The circuit court refused the writ, and the petitioners appeal.

*Brutus Howard*, for appellants. *J. N. Miller*, for appellee.

SOMERVILLE, J. The only error assigned in the present case is the refusal of the judge of the Fourth judicial circuit to issue the writ of *certiorari* to the court of county revenues, as prayed for by the appellants in their petition to said judge. Code 1886, § 8616. The purpose of the suit is to assail the constitutionality of the several acts of the general assembly authorizing the court of county revenues of Wilcox county "to establish or abolish districts in which stock may be prevented from running at large." Acts 1880-81, p. 168; Acts 1884-85, pp. 531, 560; Acts 1886-87, pp. 851, 928. It is contended that these enactments are in violation of section 50 of article 4 of our present constitution, which declares that "the general assembly shall not have power to authorize any municipal corporation to pass any laws inconsistent with the

general laws of the state." That these various statutes are inconsistent with the general laws of the state may be conceded. Code 1886, §§ 1864-1875. To sustain the appellants' contention it is necessary, therefore, to establish two distinct propositions: (1) That a county is a municipal corporation within the meaning of this section of the constitution; and (2) that the general assembly has delegated to the governing officers of Wilcox county the authority to pass stock laws within their discretion, or, in other words, that the state legislature has delegated to such county officials authority strictly legislative in its nature.

That the phrase "municipal corporation" is used in two distinct senses in our state constitution, as it often is in common parlance, seems quite obvious. In its more general sense, it may be made to include both towns and counties, and other public corporations created by government for political purposes. In its more common and limited signification, however, it embraces only incorporated villages, towns, and cities. An example of the former meaning is found in section 52 of article 4 of the constitution, which prohibits the general assembly from taxing the property of "the state, counties, or other municipal corporations," and in section 9 of article 11, which declares that the general assembly shall not have power to require "the counties or other municipal corporations" to pay any charges which are now payable out of the state treasury. So an example of the latter meaning is illustrated in section 7 of article 11, which provides that "no city, town, or other municipal corporation" shall levy, by way of taxation, more than one-half of 1 per centum of the value of taxable property; and, again, in section 7 of article 14, regulating the exercise of the right of eminent domain by "municipal and other corporations." This distinction between municipal corporations proper, such as towns and cities voluntarily organized under general incorporating acts or legislative charters, and what have been termed "involuntary *quasi* corporations," such as counties, sometimes generically termed "municipal," as pertaining to the civil and political administration of matters of state, is well defined and fully recognized in our jurisprudence. 1 Dill. Mun. Corp. (8d Ed.) §§ 22, 23; *State v. McArthur*, 13 Wis. 383; 2 Bouv. Law Dict. tit. "Municipal Corporation." The section of the constitution under consideration declares, as we have seen, that "the general assembly shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the state." Const. 1875, art. 4, § 50. The phrase "municipal corporation," as here used, in our opinion, was intended to have reference to municipal corporations in their more limited and proper sense, or to incorporated villages, towns, and cities. It must be interpreted in reference to the mischief intended to be remedied, which was, very clearly, legislation by towns and cities in the form of by-laws and ordinances enacted under special charters, and not to the *quasi* legislative functions commonly conferred on courts of county commissioners and boards of revenue of counties, which are rarely conferred except by laws of a general character. While the general rule obtains that the power to make laws is vested in the general assembly by the constitution, and this power cannot ordinarily be delegated to any other tribunal, yet it is nowhere denied that it is competent for the general assembly to delegate to municipal corporations the power to enact by-laws and ordinances which in many particulars may have all the force and validity of a statute enacted by the general assembly itself. This is commonly done in the charters granted to incorporated towns and cities, and the authority thus conferred comprehends a vast number of subjects affecting the property rights and personal liberty of the citizen, and covering the same class of acts regulated by state laws. The American theory of municipalities is that the legislation permitted to be exercised by them is a mere delegation of the power of the state; and hence it is an established rule that all laws or ordinances enacted by virtue of this delegated power are, in a certain sense, as much part of the general sys-

tem of legislation as are the laws of the state, and "it is therefore necessary that they should be consistent with the state laws." *Horr & B. Mun. Ord.* § 88. It is accordingly a familiar rule on this subject that municipal by-laws and ordinances in conflict with the general law will be adjudged void, unless they be clearly authorized by the charter of the particular town or city enacting them. *Sedg. St. & Const. Law*, (2d Ed. Pom.) 400; 1 *Dill. Mun. Corp.* (3d Ed.) § 329. The section of the constitution under consideration merely reiterates the common-law rule, and makes it of binding force on the legislature, so that they shall have no constitutional power to suspend its operation. It was not intended to prohibit the delegation to counties of the *quasi* legislative powers commonly exercised by them as governmental or auxiliary agencies of the state, and for local purposes. *Askew v. Hale Co.* 54 Ala. 639; *Stanfill v. Court of County Revenues*, 80 Ala. 287. This would defeat, rather than promote, that peculiarly American feature of republican government, which is one of decentralization, "the primary and vital idea of which is that local affairs shall be managed by local authorities." *Cooley, Const. Law*, (5th Ed.) \*189.

We are further of opinion that the stock laws here assailed do not delegate legislative power to the board of revenues in the sense of authorizing them to "pass laws," as prohibited by this section of the constitution. *Clark v. Port of Mobile*, 67 Ala. 217. These laws are complete within themselves, providing, as they do, in detail for regulating the running of stock at large, and the enforcement of the rights of all parties to be affected by them in the particular locality to which they are made applicable. None of their terms or provisions are made to rest in the legislative discretion of the county authorities. As to this feature, the general assembly has not abdicated any of that constitutional and prerogative power which is peculiarly its own. The only power conferred or delegated is to determine the contingency on which the laws, or certain designated portions of them, may go into effect. It is no objection to a statute that it is conditional, or that its taking effect is to depend upon some specified subsequent event. "Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option." *Cooley, Const. Lim.* \*117. There is much controversy and conflict of decision as to how far this principle can be carried. However this may be, it is generally conceded that it is perfectly competent for the legislature to provide that the people of a particular locality may be invested with the authority to accept or reject for themselves a particular police regulation. This involves a question of local government; and, the law being complete and valid in itself, no reason seems to exist why its going into effect may not be made to depend upon the option of the citizens in that locality or district, to be expressed in any constitutional mode provided for by the terms of the law itself, or upon any other specified reasonable contingency. *Id.* \*123; 1 *Dill. Mun. Corp.* § 44. That the regulation of strays, or animals running at large, including provisions for impounding them, is a proper subject for police regulation, has often been decided, and is now beyond all debate. *Tied. Police Power*, § 141; *State v. Court of Common Pleas*, 13 Amer. Rep. 422, note, 428; *Horr & B. Mun. Ord.* §§ 212, 249; 1 *Dill. Mun. Corp.* (3d Ed.) § 402; *Cartersville v. Lanham*, 67 Ga. 753. This being true, no doubt can exist as to the power of the legislature to confer on the governing body of a county the authority to accept or reject the terms of a stock law of the kind under discussion, and to fix the area of the district, in the mode pointed out by the law, in which it may be established at one time, or abolished at another. The authority conferred is but *quasi* legislative, and, in our judgment, violates no provision of our state constitution. *Stanfill v. Court of County Revenues*, 80 Ala. 287; *People v. City of Butte*, 1 Pac. Rep. 414. Under these views, the error assigned must be overruled, and the judgment of the circuit court, refusing the writ of *certiorari*, will be affirmed.

(35 Ala. 26)

SEELYE v. SMITH *et al.*

(Supreme Court of Alabama. July 11, 1888.)

## EQUITY—SALE OF LAND—WHEN DECREE BECOMES FINAL—SERVICE OF PROCESS.

Under Code Ala. 1886, §§ 3489-3495, providing that a decree for the sale of land without personal service of process on defendant, or appearance by him, shall not become absolute until 18 months after its rendition, unless a copy thereof be personally served, when the period will be 6 months from the service, and also that execution thereon shall not issue, within such period of 18 months, unless plaintiff give bond, with good security, conditioned to account for the value, rents, and profits of the land if the decree should be set aside, a sale of the land of a non-resident defendant, under a decree *pro confesso*, after service by publication, will not be held void in a collateral action not brought until seven years thereafter, though the statutory requirements as to bond and service of a copy of the decree were not complied with.<sup>1</sup>

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Statutory action of ejectment brought by John H. Smith and others against Samuel D. Seelye. Judgment for plaintiffs, and defendant appeals.

*Brickell, Semple & Hunter*, for appellant. *W. H. Graves and Watts & Son*, for appellees.

CLOPTON, J. In defense of a statutory real action brought by appellees to recover the land in controversy, the appellant set up a title derived from a purchaser at a sale by the register under a decree of the chancery court rendered on a bill taken *pro confesso*, without personal service, to which three of the plaintiffs were defendants, who did not appear. Sections 3830-3835, Code 1876, which correspond with section 3489-3495, Code 1886, provide, among other provisions not necessary to be mentioned, that a decree made against a defendant, without personal service, who does not appear, is not absolute for 18 months from the rendition thereof, except as otherwise provided by the statutes, and that the court must direct a copy of the decree to be sent to such defendant. At any time within 18 months from the rendition of such decree, the defendant may file a petition showing a sufficient cause for setting aside the same, and permitting him to defend the suit on the merits, unless he has been served with a copy thereof, in which event the petition must be filed within 6 months from such service; and, upon hearing, the chancellor has full power to open the decree, and proceed with the cause as if no decree had been rendered therein. Where personal service of the decree is made by serving the defendant with a copy, it is conclusive and binding on him if the petition to set aside the decree is not filed within 6 months from such service; and it is also provided that, before the execution of such decree within 18 months from the rendition thereof, the plaintiff or party interested must give bond, with two sureties, payable to and approved by the register, in a penalty prescribed by the chancellor or register, conditioned, in case the subject-matter of the suit is real estate, to account for its value, rents, and profits, and to abide and perform such decree as the court may render, if the decree taken on the bill *pro confesso* is set aside. The decree in the chancery suit was enrolled March 1, 1878. At what particular time the sale was made under the decree does not appear, but the sale was reported by the register, April 25, 1879, and was confirmed on the succeeding day. The bill of exceptions states that it did not appear, from the record or otherwise, that a bond was given, as required by the statute, before the execution of the decree, or that a copy of the decree was personally served on the defendants, or either of them. The question is whether the sale made under the decree of the chancery court shall be declared a nullity in a collateral action, when the record does not affirmatively show a compliance with the terms of the statutes

<sup>1</sup>As to what will justify setting aside a judicial sale, see *Fletcher v. McGill*, (Ind.) 10 N. E. Rep. 551, and note; *Bean v. Hoffendorfer*, (Ky.) 2 S. W. Rep. 556, and note.

in the execution of the decree. Appellees insist that the provisions of the statute are conditions precedent, on performance of which the jurisdiction of the court to make and confirm the sale is dependent, and that such performance must appear from the record. The contestation between the parties is whether the sale and confirmation are void, or only voidable. In *Sayre v. Land Co.*, 78 Ala. 85, an original bill was filed by the defendant in the suit in which the decree of sale was entered, and in the same court, to vacate and annul the sale under the decree, on the ground that he was a non-resident of the state at the time the proceedings were had; that service was made on him only by publication; that the bond required by the statute was not given before the execution of the decree; and that he had no knowledge or notice of the filing of the bill, the decrees, or the sale thereunder, until about a year before the bill to vacate the sale was filed. The sale was made within six months after the rendition of the decree. It was held that the decree which the court is authorized to render against an absent defendant is not final or conclusive in the first instance, but provisional, subject to be set aside on application within the time prescribed by the statute, showing sufficient cause; and that the bond is essential to the execution of the decree before it becomes absolute. The sale and confirmation were set aside as being in violation of the provisions and prohibitions of the statute, and for want of jurisdiction and authority of the court to make the sale. The bill was sustained on the rule that courts of equity will intervene, upon proper application, after confirmation, to set aside sales of lands made by their officers, or under their process, when such sales are unconscionable, inequitable, or conducted in violation of law. Though an original bill was considered the proper mode, the sale having been confirmed, the attack was regarded and treated as direct, and decided on principles which are applicable when judgments or decrees or sales are directly assailed. While there are some expressions in the opinion rendered from which the voidness of the sale and confirmation might be inferred, such inference was not intended; a decision as to this matter being expressly pretermitted. It is said: "Whether the sale and confirmation ought to be pronounced void, as is earnestly insisted by the counsel for the appellant, is a question not free from difficulty, upon a consideration of which the case does not compel us to enter." We do not question that a sale made under such decree, without compliance with the statutory provisions, or before it became absolute, should be set aside on timely and proper application to the same court which made and confirmed the sale. But the present case raises a very different question.

The validity of the sale and confirmation is collaterally assailed, and the question is, what presumptions should be indulged, on a collateral attack, in support of the proceedings in the chancery court, after the decree has become absolute in fact and in law, and after the plaintiffs, who were defendants in the chancery suit, have acquiesced for more than seven years without ever making application to have the sale and confirmation vacated and annulled? The controlling principle is that all reasonable presumptions are indulged to uphold judicial proceedings in a court of general jurisdiction, which have been conducted to a final judgment or decree, when collaterally drawn in question, and that whatever of doubt or ambiguity may be apparent from the record will be resolved in favor of their validity. The principle applies to every judgment, decree, or order, from the institution to the completion of the proceedings. In such case, the presumption is that every act is rightly done, and in accordance with the law. Our own decisions have repeatedly announced and applied these principles to the judgments or decrees of courts of general jurisdiction. *Hamner v. Mason*, 24 Ala. 480; *Falkner v. Christian*, 51 Ala. 495; *Pettus v. McClanahan*, 52 Ala. 55. In *Voorhees v. Bank*, 10 Pet. 449, proceedings in a suit commenced by attachment were called in question in a collateral action, and their validity assailed, on the ground

that the record did not show that the statutory requirements had been complied with in issuing the attachment, in giving notice, and on rendering judgment by default, and that an order of sale was made before the expiration of 12 months from the return of the writ, when the statute prohibited a sale from being made within that time. The sale was made and confirmed. After referring to the provisions of the statute, and the contention of the plaintiff in error, BALDWIN, J., says: "This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in attachment for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy are narrowed to the simple question whether the omission invalidates the sale. The several courts of common pleas in Ohio, at the time of these proceedings, were courts of general civil jurisdiction, to which were added, by the act of 1805, power to issue writs of attachment, and order a sale of property attached under certain conditions. No objection can be made, therefore, to their jurisdiction over the case, the cause of action, or the property attached. The process which they adopted was the same as prescribed by the law. They ordered a sale, which was executed, and on the return thereof gave their confirmation. This was the judgment of a court of competent jurisdiction on all acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of the debt." It was held that the judgment of confirmation raised a presumption conclusive, so long as it was unreversed, that whatever was necessary to the legality of the sale was proved and found by the court, and it cannot be impeached collaterally, though the record does not show that the requirements of the statute had been complied with. This case was subsequently cited and approved in *Harvey v. Tyler*, 2 Wall. 328; and the principles declared applied to a judgment of the county court exonerating lands from delinquent taxes. *Dawson v. Litsey*, 10 Bush, 408, was an action to recover land which had been sold by the commissioner under a judgment of the circuit court enforcing a lien for the purchase money. The title thus derived by the purchaser was relied on in defense of the action. The commissioner, in making the sale, did not follow the judgment; but the sale was reported and confirmed, the purchase money paid, and a deed executed to the purchaser. Objection was made that the court, in the order of confirmation, had ratified a void sale. It is said: "The order of confirmation is a judicial recognition of the right of the commissioner to make a sale as reported, and is such a final order as may be appealed from by the party aggrieved. The chancellor alone is to judge of the validity of such sales; and the true test in all cases is, did the court have jurisdiction of the parties and the subject-matter of the action when rendering the judgment? If so, it determines the rights of all the parties to that judgment, so long as it remains unreversed." Other cases could be cited illustrative of the application of the general principles of law above stated to sales made under a judgment or decree of a court of competent jurisdiction which had been confirmed, but we deem it unnecessary. No objection is made to the regularity of the service by publication in the chancery suit. Being in strict conformity with the statute, it was sufficient to give the court jurisdiction of the parties. The chancery court had jurisdiction of the subject-matter, and is a court of general jurisdiction. The decree of sale was regular and valid. *Holly v. Bass*, 63 Ala. 387. Though not final, so as to put it beyond the power of the court to set it aside at a term subsequent to its rendition, on proper application being made within the time prescribed by the statute, it was authority to the register to sell, on the statutory conditions being complied with, without further order or decree of the court. The power to render a decree of sale, and make an order of confirmation, are not derived

from the statutes, but grow out of and are inherent in the original jurisdiction of the subject-matter. The purpose and policy of the statutes is to afford defendants not personally served ample opportunity to be heard on the merits. The statutes operate to restrain and prohibit the execution of the decree of sale until the statutory bond is given, or the decree becomes absolute, as provided. Without the bond, it becomes absolute after the expiration of 18 months from its rendition, or after the expiration of 6 months from personal service on the defendants by serving them with a copy. It may therefore become absolute long before the expiration of the 18 months. More than 12 months had expired after the rendition of the decree before the sale was reported and confirmed. In whatever other respects an order of confirmation may be regarded as wanting in dignity and importance, it is binding and conclusive on the parties until set aside in some proper mode. Until then it is *res adjudicata* as to every fact and matter essential to the lawful execution of the decree of sale, and to the regularity and validity of the sale, and becomes a part of the record, which proves itself, without the aid of evidence that is not required to be entered of record. While the failure to give the bond required by the statute, or service of the decree, "would furnish good ground for refusing to confirm the sale, or for setting it aside, if moved for within a reasonable time," as was said in *Holly v. Bass*, *supra*, it may well be doubted whether the regularity of the sale and of the order of confirmation can be assailed in any mode other than by application to the chancery court in the manner and within the time prescribed by the statute, or by original bill in the same court, as was done in *Sayre v. Land Co.*, *supra*. That the defendant may avail himself of the latter mode, he must move in a reasonable time, be diligent, and acquit himself of unexplained laches. There should be a time beyond which judicial proceedings cannot be questioned, when purchasers at sales under the decrees of courts of competent jurisdiction will be protected, and the property thus purchased may be transmitted without risk. If the party is required to move in a reasonable time when making a direct attack, a *fortiori* all reasonable intendments should be made in support of the decrees or orders of the court when collaterally called in question after the lapse of more than seven years, during which time no complaint was made.

The acts of the register in taking and approving the bond, and in serving a copy of the decree, are not judicial; and the statute does not require that they should be entered of record. On a collateral attack, only the proceedings of the court entered on record can be looked to. Nothing need appear of record not required by law to be entered. By the order of confirmation, the court adjudged that the decree of sale was executed in conformity with the statutes. The order is not impeached by anything apparent on the record, and, being unreversed, the sale must be regarded as valid in fact and in law. The decree of sale, the sale, and order of confirmation, operated to pass the title of the plaintiffs, who were parties thereto. Of course, the title of the heirs of Dalgam, as to whom the chancery suit was abated, is not affected thereby; but, as all the plaintiffs are not entitled, none can recover. *Whitlow v. Echols*, 78 Ala. 206. Reversed and remanded.

(36 Ala. 196)

MORRISON *et al.* v. MORRIS *et al.*

(Supreme Court of Alabama. July 11, 1888.)

SALE—BILLS OF—PROOF OF ADEQUATE CONSIDERATION—GARNISHMENT.

A bill of sale recited that it was made in full payment of the seller's indebtedness to the purchaser, and that for the same purpose the seller had also conveyed certain real estate by separate deed. Held, there being no evidence that the price paid was disproportionate to the value, that both the realty and personalty were transferred

in payment of the indebtedness, and not the realty alone, thus leaving no consideration for the bill of sale, and therefore the purchaser was not chargeable as garnishee of the seller.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. *Rice & Wiley*, for appellants. *Tompkins, London & Troy*, for appellees.

STONE, C. J. MORRISON, Herriman & Co. and their co-appellants were attaching creditors, and Josiah Morris & Co. were garnishees. The garnishment was served August 9, 1886, and the garnishees filed their answer January 19, 1887. They fully and positively denied all indebtedness, and all other grounds of liability, which can be reached and condemned in garnishment proceeding. Code 1886, §§ 2945, 2946, 2974. The record shows no intervening proceedings between the filing of their answer by the garnishees, and the final judgment entry, July 15, 1887. If the answer was contested, the record contains nothing in regard to it. Yet the case went off on verdict of a jury, and it is probably our duty to presume there was a contest of the answer. In the form in which the answer is given, nothing less could have presented an issue for trial by a jury. Under the general charge there were verdict and judgment for garnishees. Certain exceptions were reserved by the attaching creditors. Plaintiffs showed that Knowles & Warner were indebted to each of the three attaching firms in a large sum due and demandable before July 30, 1886. Their several claims had been reduced to judgment January 14, 1887, which judgments were in evidence. Testimony for the garnishees set forth that Knowles & Warner were indebted to them in the sum of \$28,200; that Knowles & Warner executed to them a bill of sale of their merchandise, and other articles named in it, on the day it bears date, July 31, 1886, and then placed them in possession, which they have since held under the said bill of sale; "that the value of all the property conveyed by Knowles & Warner was less than their indebtedness to Josiah Morris & Co. The value of the stock of goods and other property conveyed by the bill of sale was \$16,000." The bill of sale was in evidence, and this was all the testimony.

Appellants' claim of right to recover in this suit is based on two clauses of the bill of sale. After the recital of the indebtedness of Knowles & Warner to Josiah Morris & Co., \$28,203.23, the bill of sale has this language: "Now, for the purpose of paying said indebtedness, we, A. S. Knowles and W. C. Warner, do bargain, sell, and deliver to the said Josiah Morris & Co., in full satisfaction and payment of said indebtedness, the entire stock of goods," etc. After describing the things conveyed, the bill of sale contains this further clause: "And, for the same purpose, we have also conveyed to the said Josiah Morris & Co. certain real estate in Verbena, Chilton county, Ala., by a separate deed, and we also transfer to the said Josiah Morris & Co. our notes and book-accounts." The contention of appellants is that, under a proper interpretation of this bill of sale, it shows that the "certain real estate in Verbena" had been conveyed "in full satisfaction and payment of said indebtedness," and thus left no consideration to uphold the bill of sale of the merchandise. The conveyance of the real estate was not put in evidence. We do not so interpret the bill of sale. Our construction, in the absence of other proof of value, is that it means nothing more nor less than that the real estate, the merchandise, the chattels, and notes and accounts, were conveyed and received in full satisfaction and payment of the debt. If the purchase was made at a price materially disproportionate to the value, that was a subject for testimony. None is shown to have been offered, and that question does not appear to have been raised. *Hodges v. Coleman*, 76 Ala. 103; *Dixon v. Higgins*, 82 Ala. 284, 2 South. Rep. 239; *Carter v. Coleman*, 84 Ala. —, 4 South. Rep. 151. Affirmed.

(35 Ala. 154)

## CLARK v. ZEIGLER.

*(Supreme Court of Alabama. July 11, 1883.)*

1. **VENDOR AND VENDEE—BREACH OF WARRANTY—GRANT OF RIGHT TO CUT TREES.**  
In an action for breach of warranty of title of real estate, where the defect complained of was a prior grant to a third person of a right, for a certain time, to cut trees from a portion of the land conveyed to plaintiff, it is competent to prove the value of the trees cut by the grantee of the right from such portion after the conveyance to plaintiff.
2. **SAME—EVIDENCE—ACTS AFTER CONVEYANCE.**  
Evidence of the value of trees cut under the contract from a portion of the land not embraced therein is inadmissible, since such act would be a mere trespass against the vendee.
3. **SAME—COMPARATIVE VALUE—COLLATERAL ISSUES.**  
An inquiry as to what good farming land in the neighborhood of the land in question is worth is improper, as it raises a collateral inquiry involving a comparison between such land and the land in question.
4. **SAME—STATEMENT OF VALUE BY VENDEE.**  
Refusal to allow plaintiff, who had testified that the land, as incumbered by the grantor, was worth but ten cents per acre, to be asked, on cross-examination, if he had not been offered one dollar per acre for it, is reversible error.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

This action was brought by Henry S. Zeigler, appellee, against Henry W. Clark, appellant, to recover damages for a breach of the covenants of a warranty in a deed to certain land sold to plaintiff by the defendant. The deed was dated October 10, 1883, and, after reciting the consideration for the transfer, conveyed a tract of land containing 320 acres, using the words "grant, bargain, and sell," and containing a clause in these words: "And I, the said H. W. Clark, do covenant with the said Zeigler to warrant and defend the same against the claims and demands of all persons." Prior to the making of this deed to Zeigler, on the 6th December, 1880, Clark sold and conveyed by deed to one W. W. Wadsworth, for a consideration recited, "all the saw-timber" on a large tract of land, embracing 40 acres of the 320-acre tract sold by Clark to Zeigler, giving the said Wadsworth the right to enter, and allowing him three years within which to cut and remove the timber. Under this grant, said Wadsworth entered, cut and removed about 327 trees from the said 40 acres contained in the tract sold to Zeigler after the same had been conveyed to him. Upon the trial, plaintiff introduced in evidence the deed of Clark to Zeigler to the lands conveyed on October 10, 1883. A witness for plaintiff was asked what the 40-acre tract of land purchased by him from Clark was worth, with the incumbrance of Wadsworth on it. The defendant objected to this question, and, upon the court overruling his objection, the witness answered, "Ten cents." The defendant excepted. It was then proved that, under his contract of conveyance, Wadsworth had cut and removed about 327 trees from the 40 acres referred to, which trees were worth about one dollar a piece. Plaintiff then offered in evidence the deed from Clark to Wadsworth, conveying the right to cut and remove the trees from the land. Defendant objected, but the objection was overruled, whereupon defendant excepted. There were several questions asked the different witnesses as to the value of the trees cut from the other portion of the land other than the 40 acres constituting a part of the 320 acres sold to Zeigler, but, upon the plaintiff objecting to these questions, the court refused to allow the witnesses to answer them, and the defendant separately and severally excepted to each of the court's refusals. Defendant's counsel asked one of the witnesses "if he had ever had an offer for the land since the timber was cut off," and "if he had not been offered \$1.00 per acre for this land since the timber was cut from it." Plaintiff objected to both of these questions. The court sustained the objections, and the defendant excepted. Upon the plaintiff asking some of the witnesses what this land was worth in 1883, when Clark sold the same to

Zeigler, the defendant objected to the question, but the court overruled the objection, and the defendant excepted. The defendant then asked one of the witnesses, "What was good farming land worth an acre in that section in the fall of 1883?" The plaintiff objected to this question, the court sustained the objection, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed, and assigns all the several rulings of the court below as error.

*Tompkins, London & Troy*, for appellant. *Watts & Son*, for appellee.

SOMERVILLE, J. When this case was last before us, we held that the measure of the plaintiff's damages for the alleged breach of the defendant's covenant of warranty would be the diminished value of the whole tract of land by reason of the incumbrance created in favor of Wadsworth; or, in other words, the difference between the value of the whole tract if the title were good, and its value as depreciated by the incumbrance. 79 Ala. 346. To this rule we adhere, not on the ground that its application will work exact justice in all cases, but it seems to go as far in that direction as is practicable from the application of settled principles of law relating to cases of this nature. So we hold that the value of the trees cut by Wadsworth from the incumbered portion of the land, under his license, would be admissible as a fact relevant to show what damage was occasioned by this incumbrance. The rulings of the circuit court are in accord with these principles. It was permissible to prove how many trees Wadsworth cut, under the contract, from the 40-acre tract covered by the incumbrance complained of, and also their value, but not the number or value of trees cut from the other part of the land. As to these trees he was a trespasser, and would be liable to Clark as such if they were cut prior to October 10, 1883, the date of Clark's deed to Zeigler, or to Zeigler himself, if cut after that date. Their value was foreign to any issue involved in this case. The court properly refused to allow the witness Estes to be asked what good farming land was worth in the neighborhood of the land in controversy. This question would necessarily raise a further inquiry involving a comparison between the relative merits of these and the other neighboring lands referred to, which would tend to draw away the minds of the jurors from the true point in issue, and thus mislead them. The court erred, however, in refusing to allow the plaintiff to be asked, on cross-examination, whether he had not been offered as much as one dollar per acre for the land which he had testified was worth only ten cents per acre. Whether it be permissible to prove the value of the property by showing that a solvent person had made a *bona fide* offer of a certain sum for it is not the precise point of inquiry presented by the case before us. The question here is one propounded on cross-examination, where the range of inquiry is of greater latitude. The testimony of the witness as to the value was a mere matter of opinion, liable to be influenced by prejudice in his own behalf. The inquiry has a tendency to test the extent of this bias of the witness, and should have been allowed for this purpose at least. If such an offer had been made without a sufficient excuse, it would tend to impeach the fairness of the witness' depreciated estimate of value placed on the land, and to call for some explanation of the reasons upon which it was founded. We have examined the other rulings objected to, and find them to be free from error. Reversed and remanded.

(35 Ala. 175)

#### COTTON v. CARLISLE.

(Supreme Court of Alabama, July 11, 1886.)

#### SUBROGATION—DEFENSES—PURCHASER OF EQUITY OF REDEMPTION.

Under Code Ala. 1886, § 2892, providing that, "when any interest [in real estate] less than the absolute title is sold, the purchaser is subrogated to all the rights of

the defendant, and subject to all his disabilities," a mortgagor in possession cannot set up the outstanding title of the mortgagee to defeat ejectment by a purchaser of the equity of redemption at execution sale.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

This was a statutory real action in the nature of ejectment brought by the appellee, M. N. Carlisle, against the appellant, G. J. Cotton, for the recovery of a certain piece of real estate described in the complaint. Issue was joined on the plea of the general issue by the defendant, and the only question which arose in the trial of the case was whether the mortgagor in possession could set up the outstanding title of the mortgagee to defeat a recovery by the purchaser of the equity of redemption at a sale under execution against the mortgagor. The court refused to give the general affirmative charge in favor of the defendant, but gave the general affirmative charge in favor of the plaintiff; and to this refusal and giving of the respective charges by the court the defendant excepted. There was verdict and judgment for the plaintiff, and the defendant appealed, and assigns the refusal of the court to give the charge requested by him, and the giving of the charge asked by the plaintiff, as error.

*Parks & Son*, for appellant. *M. N. Carlisle*, for appellee.

CLOFTON, J. As stated in the bill of exceptions, the only question presented for decision is whether a mortgagor in possession can set up the outstanding title of the mortgagee to defeat an action of ejectment brought by a purchaser of the equity of redemption at a sale under execution against the mortgagor. The sale under an execution against the defendant issued on a valid judgment, the purchase by and the sheriff's conveyance to appellee, who brings the action, and the mortgages made by the defendant prior to the rendition of the judgment, are conceded facts. Defendant insists that the title and estate of the mortgagor is equitable, and will not support the action of ejectment, in which only the legal estate and right of possession are involved. The cases of *Childress v. Monette*, 54 Ala. 317, and *Atcheson v. Broadhead*, 56 Ala. 414, are cited and relied upon to support the contention on the part of defendant. In the opinion delivered in the first of these cases there are expressions to the effect that the statute subjecting an equity of redemption to sale under execution does not convert the equity into a legal estate, authorizing the purchaser to maintain or defend ejectment, and that his right can be asserted and enforced only in equity; and in the second case it was held, on the authority of the first, that a purchaser of the equity of redemption, after the maturity of the mortgage, did not acquire a title on which he could maintain a real action to recover possession. These cases are irreconcilable with the later rulings, and, as against them, are not now regarded as authority in respect to the kind and character of the estate of a mortgagor in possession. In *Marks v. Robinson*, 82 Ala. 69, 2 South. Rep. 292, they were considered, explained, and qualified in conformity with the later cases. Between the parties, the mortgage transfers the legal title, defeasible on performance of the conditions, and the right of immediate possession, unless by its terms possession is reserved in the mortgagor for an unexpired term. As to the mortgagee, the mortgagor has only an equity; but it has been uniformly ruled in all the later cases, and may now be regarded as settled, that, as to all persons except the mortgagee and those claiming in his right, the mortgagor is the owner of the fee, and has title under which he may maintain ejectment against strangers who have no connection with the title of the mortgagee, and will not be allowed to set up such outstanding title to defeat the action. *Allen v. Kellam*, 69 Ala. 442; *Umby v. Mellgren*, 58 Ala. 147. These principles are reiterated, reaffirmed, and emphasized in *Marks v. Robinson*, *supra*, which is the latest judicial expression on this question. The general rule is that a purchaser at execution sale acquires whatever estate and interest the defendant in execution owns and possesses, and succeeds to his title and rights, in-

cluding the right of possession. The statute which subjects an equity of redemption to levy and sale under execution expressly affirms the general rule in such case. It declares: "When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities." Code 1886, § 2892. He acquires the equity of redemption as against the mortgagee; and, as to the mortgagor, and all other persons except the mortgagee and those succeeding to his rights, whatever title and estate, legal or equitable, the mortgagor may have. From the effect of the statute, and the foregoing principles, it necessarily follows that such purchaser may maintain an action at law to recover possession from the mortgagor, who will not be permitted to defeat the action by setting up the outstanding title of the mortgagee, with which he has no connection other than as mortgagor. Affirmed.

(34 Ala. 502)

AGNEW v. WALDEN *et al.*

(*Supreme Court of Alabama. July 12, 1883.*)

1. NEGOTIABLE INSTRUMENTS—ACTIONS—PARTIAL FAILURE OF CONSIDERATION.

A promissory note was given as a retainer to attorneys in a prosecution against the maker for homicide. Shortly afterwards, and before trial, the maker was killed by a mob. *Held*, in an action against the maker's administrator, that there was a partial failure of consideration, which may be shown under proper pleadings.

2. EXECUTORS AND ADMINISTRATORS—PROBATE PRACTICE—FILING CLAIMS.

Where a claim against a decedent's estate, evidenced by note, was presented at the probate office within the time prescribed by statute, and an entry was made on the record as to the nature of the claim, in whose favor and against whose estate it was, and of the amount, date, and time when due, though neither the note nor a copy was filed there, this is a sufficient compliance with Code Ala. 1886, §§ 2081, 2083, barring all claims not presented to the administrator, or docketed in the probate office, within a certain time, by filing therein the claim, or a statement thereof.

3. TRIAL—IMMATERIAL ISSUE—EVIDENCE TO SUPPORT.

Where issue has been taken on a plea, though it tenders an immaterial issue, it is error to reject testimony offered by defendant in support of it.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Action brought by Walden & Son, against L. D. Agnew, as administrator of one J. R. Dorsey, deceased, on a promissory note. On the trial the court refused to allow the defendant to introduce any testimony tending to show a failure of consideration, and charged the jury that, if they believed the evidence, they must find for the plaintiffs for the amount of the note, with interest. Judgment for plaintiffs. Defendant appeals. Code Ala. 1886, §§ 2081, 2083, provide that all claims against a decedent's estate shall be forever barred unless presented to the executor, administrator, or the judge of probate within 18 months after the claims have accrued, or within 18 months after the grant of letters testamentary or of administration.

*Mattheus & Daniel and Brickell, Semple & Gunter*, for appellant. *J. L. Barnett*, for appellees.

STONE, C. J. The present suit was brought on a bond, or note under seal, of which the following is a copy: "\$500.00. One day after date I promise to pay to Walden & Son, or bearer, five hundred dollars; and, to secure the same, I hereby waive all exemption or relief laws under the statutes and constitution of Alabama,—said sum being retainer to said Walden & Son as my attys. in case of state of Alabama against me, charged with homicide. Witness my hand and seal this October 9, 1884. J. R. DORSEY. [Seal.]" When this note or bond was given, Dorsey was in jail under a charge of murder. Soon afterwards, and before any trial was had, Dorsey came to his death by violence at the hands of a mob. On November 24, 1884, letters of administration on Dorsey's estate were granted by the proper court to Agnew, the appellant in the present case. This suit was commenced June 18, 1886, more than 18 months after Agnew's appointment.

One of the defenses relied on was non-claim; that the claim was neither presented to the administrator, nor filed in the office of the probate court, within 18 months after the grant of letters of administration. This, if true, is a good defense under the statute. We think there is nothing in this defense. True, neither the claim itself, nor a copy of it, was filed and left in the probate office. It was presented there, and the substance of it was put on record. June 13, 1885. The entry on the record showed in whose favor the claim was filed, (Walden & Son,) against whose estate it was filed, (J. R. Dorsey's,) the amount, (\$500,) date and time due, and that it was due by note. This was a sufficient description and identification, and sufficiently showed that Dorsey's estate was looked to for payment. *Halfman v. Ellison*, 51 Ala. 543; *Smith v. Fellows*, 58 Ala. 467; *Bibb v. Mitchell*, Id. 657; 3 Brick. Dig. 473, 474.

The second defense relied on was that there was a failure of consideration; that the contract contemplated that Walden & Son should defend Dorsey on his trial for murder; that they had not done so; and that, without fault on Dorsey's part, it was now rendered impossible that they could perform the services which were the inducement and consideration of the promise. This was pleaded and relied on in full defense of the action. The note or bond on its face declares that said sum, \$500, was a retainer to said Walden & Son as Dorsey's attorneys in case of the state against him, charged with homicide. Retainer is "the act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting it where he is plaintiff, or defending it when he is defendant," (Bouv. Law Dict.; Worcester. Dict.; Webster. Dict. ;) "the engagement of a counsel or solicitor to take or defend proceedings, or to advise or otherwise act for the client," (Rap. & L. Law Dict. ;) "a preliminary fee given to a counsel to secure his services, or, rather, as it has been said, to prevent the opposite side from engaging them," (Imp. Dict. Eng.) We apprehend that neither of these definitions is technically and universally correct. Much must depend on usage and custom as the same may prevail in the particular locality or jurisdiction in which the contract is made. That there are two classes of retainers by which the services of attorneys, solicitors, or counselors are secured, is believed to be common, if not universal. First, general retainers. These have for their object the securing beforehand of the services of a particular attorney or counselor for any emergency that may afterwards arise. They have no reference to any particular service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable. Counsel thus retained is not at liberty to accept employment or render service adversary to the interest of the client thus retaining him. He is, as to such client, monopolized. A special retainer has reference to a particular case, or to a particular service. Such was the retainer in this case. It, however, imposes obligations, *pro hac vice*, equally binding with those enjoined by a general retainer. It forbids the acceptance of adversary employment, or the performance of adversary services. It exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people. In that particular service, his talents and skill are not his own; they are bought with a price. These he must bestow with all the zeal and earnestness of his nature, and in all the methods which truth and honesty can sanction. The obligation hath this extent; no greater. Under our system, and the usages and customs which prevail with the profession, we feel safe in saying that, in the absence of qualifying terms, a retainer such as was given and accepted in this case imposes on the attorney the following duties and obligations: He must accept no retainer from the opposite side, must give counsel whenever needed or called for, must acquaint himself with the case and its wants, must render all needed professional aid in the preparation of the defense, and must give his earnest, unflagging attention and services to the trial when it comes, unless the prosecution is cut short in some

such way as is mentioned further on; and in these several duties he must not relax in zeal until there is a judgment in the trial court, or other termination of the prosecution. Taking upon one's self so great duties, obligations, and restraints as those enumerated above, surely presents some elements of consideration which cut off the defense of total failure of consideration. *Maul v. Vaughn*, 45 Ala. 134; *Hixon v. Hetherington*, 57 Ala. 165. The present record presents something of an anomaly. The original complaint contained two counts, one special and one common. To this complaint the defendant filed four pleas on September 23, 1886. The fourth plea sets forth the facts recited above as a failure of consideration, and as a bar to the action. To this plea there was a demurrer assigning causes. On December 17, 1887, the plaintiffs, under the leave of the court, filed an additional count, describing the note or bond *in hac verba*, and claiming the amount of the same, with interest. To this amended complaint, and on the same day, the defendant pleaded six several pleas; the fifth of this series being in every essential: a verment a substantial copy of the fourth in the first series. On this day, December 17, 1887, the trial was had. The judgment entry recites that the court sustained the plaintiffs' demurrer to the fourth plea of the first series, and then proceeds as follows: "And issue being now joined upon the defendant's pleas this day filed to the original and amended complaint, thereupon came a jury," etc. It will thus be seen that there were two pleas essentially and substantially alike, to one of which a demurrer was sustained, while issue was joined on the other. Now, if we regard plea No. 4 of the first series as faulty, and, as a consequence, the demurrer to it as rightly sustained, the inevitable corollary is that plea No. 5 is equally bad, and tenders an immaterial issue; and, issue having been taken on it, defendant should have been allowed to introduce testimony in support of it. *Farrow v. Andrews*, 69 Ala. 96; *Mudge v. Treat*, 57 Ala. 1. The circuit court erred in rejecting testimony in support of plea 5 of the second series.

Do the facts show there was a partial failure of consideration? We have summarized above the duties and services the plaintiffs undertook to perform for their client when they accepted his retainer. The bond should be read as if it expressed these implications on its face. It is manifest that, without any fault on the part of the client, these services have been performed only in part, and that they never can be performed more fully. The agreed compensation was what each contracting party admitted and consented was the equivalent of all the services they would or could render in the defense they undertook to conduct, and we must suppose the general routine in such prosecutions was expected and had in contemplation. Executory contracts are entered upon with reference to the ordinary current of events. Abnormal results are neither anticipated nor provided against. Should they not, when they do occur, be considered in the interpretation? A mechanic is employed to make repairs, and either enters, or is ready to enter, upon the performance of his contract. Without fault of either contracting party, fire, or some other casualty, destroys the subject of the contemplated repairs, and renders performance impossible for all time. And, to make the illustration completely pertinent, we may hypothesize that the fire is incendiary. What are the rights and liabilities of the contracting parties? Can the employer hold the contractor responsible for not doing the impossible, or can the contractor recover for the work he has not done, and has been rendered incapable of doing, by no fault of the employer? And are an attorney's services different from any other skilled laborer's, the conditions being similar? We might extend these illustrations further. We subjoin authorities which support the line of argument we have been pursuing. *Stewart v. Loring*, 5 Allen, 306; *Walker v. Tucker*, 70 Ill. 527; 3 Wait, Act. & Def. 606; 7 Wait, Act. & Def. 360; *Blodgett v. Mills*, 52 N. H. 215; *Steele v. Hobbs*, 16 Ill. 59; *Hubbard v. Helden*, 27 Vt. 645; *Hillyard v. Crabtree*, 11 Tex. 264. The case of *Walker v. Clay*, 21

Ala. 797, is not opposed to these views. In that case it was not shown that the services of the attorney could not be rendered at some future time, and would not be called for. Performance had not become impossible, as in this case. The real point was whether, by the terms of the contract, the performance of the services had been made a condition precedent to the right to demand the fee. It was rightly ruled that it had not. The testimony offered ought to have been received as tending to prove partial failure of consideration. Compensation in this case should not be scaled down to a mere equivalent for the actual services shown to have been rendered. The fact that the plaintiffs disabled themselves to accept a retainer on the opposite side is itself a consideration. The magnitude of the issue, and the responsibilities attendant upon such service, should be considered; and the consultation and counsel presumed to have been had and given at the time of the retainer, and possibly other things, must enter into the estimate. We must not be misunderstood. The retainer contemplates only the services that may become necessary in the progress of the prosecution. Should there be a failure to find a true bill, a *nol proes*, or other termination short of a verdict in the cause, this, in the absence of stipulations, would furnish no ground of defense to the action for the agreed fee. It would present no question of a failure of consideration; for in such case the attorney would have performed all the duties his contract required him to perform. Such possible result must be presumed to have been had in contemplation. In the rulings on testimony, and in the charge given, the circuit court erred. Reversed and remanded.

(84 Ala. 384)

BUTLER v. ELYTON LAND CO. *et al.*

(Supreme Court of Alabama. July 12, 1888.)

## DESCENT AND DISTRIBUTION — ILLEGITIMATE CHILDREN — RIGHT TO TRANSMIT INHERITANCE.

A bastard died seized of land, without issue, leaving a bastard half-brother and their mother surviving him. Code Ala. 1886, § 1923, provides that "the mother, or kindred of an illegitimate child on the part of the mother, are, in default of children of such illegitimate child, or their descendants, entitled to inherit his estate." *Held*, that the statute must be construed with others *in pari materia*, and the established rules of descent; and, in analogy thereto, the half-brother will take the land, to the exclusion of the mother.<sup>1</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Mary Butler, a non-resident negro woman, filed the bill in this cause, praying that one James Going be decreed to hold certain real estate in the city of Birmingham for her use, and that the Elyton Land Company be ordered to make her a deed and a clear title thereto, etc. The bill in substance avers that Mary Butler, the complainant, was the mother of two illegitimate sons, named Gus Peteet and Butler Whitney. The former, Gus Peteet, died intestate, unmarried, and without descendants, owning a contract for purchase of certain real estate in Birmingham; part of the purchase money having been paid, and for which the Elyton Land Company had given him a bond for title. After his death, his half-brother, Butler Whitney, claiming to be the sole heir of the said Gus Peteet, deceased, obtained possession of said bond for title, and, having disposed of the same, it was finally transferred and assigned to one Going. On a bill being filed by said Going against the Elyton

<sup>1</sup> Bastard children legitimated by statute are to be treated, in all respects so far as inheritable blood is concerned, as if legitimate, and inherit not only lineally, but also collaterally. *McKamie v. Beakerville*, (Tenn.) 7 S. W. Rep. 194. The effect of the Kentucky statute is to make bastard children by the same mother legal brothers and sisters as to inheritance from each other. *Sutton v. Sutton*, (Ky.) 8 S. W. Rep. 337.

For a construction of the Illinois statute conferring the right to inherit upon illegitimate children, see *Bales v. Elder*, (Ill.) 11 N. E. Rep. 491; *Jenkins v. Drane*, (Ill.) 12 N. E. Rep. 684.

Land Company, said company was ordered to make and did make title to and for said real estate to the said Going. Mary Butler now files her bill, claiming to be the heir of her illegitimate son Gus Peteet, and that the deed made to the said Going by the said Elyton Land Company is void. A demurrer to the bill, assigning as ground therefor that Mary Butler was not the heir at law of the said Gus Peteet, was sustained, and the bill was accordingly dismissed; whereupon the complainant appealed.

*W. M. Brooks and Barnes & Barnes*, for appellant. *Webb & Tillman*, for appellees.

SOMERVILLE, J. This case turns on the proper construction of our statute regulating inheritance between bastard children and their mothers and other kindred; the contest here being one, in effect, between the mother and uterine brother of a deceased bastard who died seized and possessed of the real estate in controversy. These sections of the Code (1886) read as follows: "Sec. 1921. Every illegitimate child is considered as the heir of his mother, and inherits her estate, in whole or in part, as the case may be, in like manner as if born in lawful wedlock. Sec. 1922. The mother, or kindred of an illegitimate child on the part of the mother, are, in default of children of such illegitimate child, or their descendants, entitled to inherit his estate." The inquiry is whether the mother, Mary Butler, under this statute, takes the property of her deceased illegitimate son, Gus Peteet, to the exclusion of the latter's half-brother, one Butler Whitney, of the blood of the same mother. It is contended for appellant that the latter section (section 1922) must be construed to mean that, in default of children of an illegitimate child, the mother shall first inherit; and, if there be no mother living at the time of descent cast, then the kindred of the illegitimate child on the part of the mother shall be entitled to take his estate, and not otherwise. The appellee, on the contrary, contends that these sections of the Code are not complete within themselves, but are a part of an entire system of statutes on the subject of descents and distributions, and are to be construed *in part materia* with them. The judge of the city court adopted the latter view of the statute, and we fully concur with him in this conclusion.

These sections are clearly not complete within themselves. It is declared that the mother, or kindred on the part of the mother, shall inherit. The word "kindred" means relations by blood, and includes collateral as well as lineal relations. It includes children of an intestate and their descendants, brothers and sisters, nieces and nephews, cousins, uncles and aunts, and other next of kin. How are these numerous kindred to inherit, and which, if any of them, are to be preferred? And what is to be the share of each one's inheritance? Necessarily, these inquiries are to be answered by reference to the statutes of descents and distributions, which form a part of the same chapter and article in the Code that embrace the sections under consideration. Except so far as declared otherwise, the rule of descent for real estate must be governed by section 1915, Code 1886, and of personal property by section 1924, which precisely correspond to sections 2252, 2261, Code 1876, the law in force at the time of the death of the intestate, in the year 1838. There is nothing in the statute indicating a purpose to give the mother a priority of right over other kindred whose rights are preferred by the statute of descents. If this had been the legislative intent, it was easy of expression, as appears in the New York statute, which declares that if an illegitimate child die intestate, without descendants, the inheritance "shall descend to his mother; if she be dead, it shall descend to the relatives of the intestate on the part of the mother as if the intestate had been legitimate." 3 Rev. St. N. Y. p. 42, § 14, (1859.) This construction is a necessary result from the settled rule that, in construing a doubtful statute, all statutes *in part materia*, or relating to the same general subject-matter, are to be taken and examined together

in order to arrive at the legislative intent. "All acts which relate to the same subject," said Lord MANSFIELD in *Rex v. Loxdale*, 1 Burrows, 447, "notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently." We are also authorized to examine, for the same purpose, the original statute from which the present law was first codified in the form it now appears, which is the same as that in the Code of 1852. Code 1852, §§ 1578, 1579. The language of that Code is identical with that of all other subsequent Codes of the state down to the one now in force. The law prior to codification in the present form, as taken from the act of 1824, reads as follows: "Sec. 4. Bastards shall be capable of inheriting, or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother; and shall also be entitled to a distributive share of the personal estate of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother. Sec. 5. The kindred of any bastard on the part of his mother shall be entitled to the distribution of the personal estate of such bastard, in like manner as if such bastard had been lawfully begotten of his mother." Aiken, St. (2d Ed.) 1836, p. 129; Clay, Dig. Ala. 1843, pp. 168, 169. This old statute differs in phraseology, but not materially in signification, from the one now embraced in the Code of 1886, brought forward, as we have said, from the Code of 1852. It was intended to remedy the cruel and rigorous policy of the common law in reference to bastards, by which was visited on these unfortunates a stigma which more properly belonged to their parents, and at the same time to deal with the erring mother in a more liberal spirit of justice as well as of Christian charity. By that law a bastard was *nullius filius* as to the whole question of inheritance. He had no mother or father, no brothers, sisters, or other kindred, no inheritable blood, and hence no capacity to inherit or transmit inheritance save to the heirs of his own body. The supposed origin of this rule has been asserted to be the discouragement of a promiscuous and illicit intercourse between the sexes. It is at least debatable whether precisely the opposite policy, conferring equal rights of inheritance upon legitimate and illegitimate offspring, would not better preserve the high moral duty of chastity between the sexes. This was, to a certain extent, the tendency of the civil and Jewish law, as well as of many other ancient codes, now everywhere admitted to be more humane and enlightened than the rule of the common law on this subject. The general spirit of modern legislation has accordingly been to sweep away, to a great extent, this unjust and illiberal policy of the English law, and to not only permit bastards to inherit from their mothers, but also, in many instances, to provide for their legitimation by the subsequent marriage of their parents, or by written declaration made for that purpose and duly recorded, and to authorize them to transmit inheritance to kindred of their mother's blood both collateral and lineal. The laws of Scotland, France, Holland, and Germany all provide that the intermarriage of the parents after the birth of a child shall render such child legitimate,—a rule of the canon law, the adoption of which the ecclesiastics urged in vain upon the English parliament in the reign of Henry III. This has long been the law of Alabama; legitimation following from the intermarriage of the reputed parents, and recognition by the father. Aiken, St. p. 129, § 3; Code 1886, §§ 2364-2369.

This construction as to the heritable rights of bastards and their collateral kindred was placed upon the Virginia statute enacted in 1785, and carried into the Code of 1819 of that state. Our old statute, as appearing in Aiken's and Clay's Digests, seems to be copied from the Virginia Code. That law was construed by the Virginia court of appeals, in *Garland v. Harrison*, 8 Leigh, 368, (decided in 1837;) an exhaustive and learned opinion being delivered by three of the five judges. They all agreed that the purpose of the statute was to confer on bastards, not only the capacity to inherit from their mothers just as

they would do were they legitimate children, but also the power to transmit inheritance to their maternal kindred, both collateral and lineal, as if they had been born in lawful wedlock. The object of the statute, said Judge PARKER, was to make bastards "quasi legitimate on the maternal side; to give the bastard a mother and maternal kindred; and to make them heritable from each other, in the order prescribed by the law of descents, as if the bastard had been lawfully begotten of such mother. It places this line, in respect to inheritance, precisely in the situation it would be in if one born in lawful wedlock should die leaving no paternal kindred." Judge BROCKENBROUGH said: "A bastard may inherit, on the part of his mother, in like manner as if he were the legitimate son of his mother. He may therefore inherit from his mother, or from his maternal grandparents, in the direct line, or from his maternal uncle and aunt, or great-uncles and great-aunts, in the collateral, and a half portion from his legitimate or bastard half-brother, in the same manner that a legitimate son could inherit from his legitimate half-brother." Judge TUCKER construed the statute, in like manner, to render bastards "capable of inheriting from all his kindred on the part of his mother, whoever they might be." The whole court vigorously repudiated the soundness of the decision of the United States supreme court in the case of *Stevenson's Heirs v. Sullivan*, 5 Wheat. 207, (decided in the year 1820,) and relied on for authority in this case by appellant's counsel, in which that court had come to a different conclusion in construing the Virginia statute, holding that it prescribed transmission of inheritance lineally, but not collaterally, on the part of the mother of a bastard; in other words, that it conferred on bastards capacity to inherit by descent immediately or through their mother in the ascending line, and to transmit the same to their line of descendants, in like manner as if they were legitimate, but did not authorize brothers, sisters, or other collateral kin even on the mother's side to inherit from them. The question came before the Virginia court again in *Hepburn v. Dundas*, 18 Grat. 219, (decided in 1856,) and still again, four years later, in *Bennett v. Toler*, 15 Grat. 588; and the case of *Garland v. Harrison*, 8 Leigh, 368, was, after renewed discussion, adhered to and reaffirmed. The Vermont statute provided that "bastards shall be capable of inheriting, and transmitting inheritance, on the part of the mother, as if lawfully begotten of such mother,"—the precise language of section 4 of the Alabama law as cited above from Aiken's and Clay's Digests. It was held in *Town of Burlington v. Fosby*, 6 Vt. 83, (decided in 1834,) that, under the statutes of descents and distributions, one illegitimate child could inherit from another illegitimate child of the same mother, which is the precise question arising in this case. The Ohio statute is in identical language, and the supreme court of that state, in *Lewis v. Eutsler*, 4 Ohio St. 354, (decided in 1854,) repudiated the construction placed on the Virginia statute by the United States supreme court in *Stevenson's Heirs v. Sullivan*, *supra*, and followed the Vermont decision, where a like statute, as we have seen, was construed. They, without scruple, overruled the case of *Little v. Lake*, 8 Ohio, 289, (decided in 1838,) in which *Stevenson v. Sullivan* had been followed. It is observable that in none of these cases is there any reference made to the case of *Garland v. Harrison*, *supra*. In *Briggs v. Greene*, 10 R. I. 495, however, the authority of the Virginia case is expressly adopted in construing a similar statute in Vermont, and that of the United States supreme court in *Stevenson v. Sullivan* repudiated. It was accordingly held, under a statute precisely like the one in Virginia and the former one in Alabama, that bastard children of the same mother are capable of transmitting inheritance on the part of the mother; and when a bastard dies intestate, leaving a bastard sister by the same mother, her estate will pass to that sister. Opposed to this view is the case of *Bent v. St. Vrain*, 30 Mo. 268, (decided in 1860,) which follows the United States supreme court, without noticing the Virginia decisions; and *Remington v. Lewis*, 8 B. Mon. 606, (decided in 1848,) which

omits to notice any of the foregoing cases. We adopt the view of the Virginia court as being more in accordance with the principles of justice and the enlightened and liberal policy of modern legislation on this subject. *Simmons v. Bull*, 56 Amer. Dec. 263, note; Schouler, Dom. Rel. § 381; 2 Kent, Comm. (12th Ed.) \*208-\*214. "Our law of descents," as said by Judge TUCKER in *Garland v. Harrison*, *supra*, "was formed in no small degree upon the human affections; the legislature very justly conceiving that the object of a law of descent was to supply the want of a will, and that it should therefore conform in every case, as nearly as might be, to the probable current of those affections which would have given direction to the provisions of such will. Under the influence of these opinions," he adds, "they legislated in reference to bastards." An English judge long ago said, in harmony with the same idea: "The statute of distributions makes such a will for the intestate as a father, free from the partiality of affections, would himself make; and this," he said, "I call a parliamentary will." *Edwards v. Freeman*, 2 P. Wms. 441. We accordingly hold that, under our present statute of descents and distributions, the brother of the deceased intestate bastard by the same mother is entitled to inherit land of which such intestate dies seized, to the exclusion of the mother. The chancellor so held; and his decree, sustaining the demurrers to complainant's bill, is affirmed.

(35 Ala. 1)

## FARISS v. STATE.

(Supreme Court of Alabama. July 16, 1888.)

## 1. HOMICIDE—MURDER—INSTRUCTIONS—SELF-DEFENSE.

On a trial for murder it appeared that deceased was acting boisterously, and defendant coming up accosted him, whereupon he advanced towards defendant, who retreated. Deceased was advancing when the fatal shot was fired. Defendant testified that deceased had a knife, and one witness testified that he heard deceased say, "Turn me loose, or I cut you." The other witnesses saw no knife. The court charged that if deceased walked towards defendant, and did not strike or offer to strike him, and defendant, with malice, shot and killed defendant, he was guilty of murder. *Held*, that the charge was erroneous, as it ignored the question whether or not deceased had a knife when advancing on defendant.<sup>1</sup>

## 2. SAME—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge in such a case that, if the proof of self-defense rests entirely upon defendant's testimony, the jury may consider this fact, and the fact that defendant testified under the influence of great interest, and the further fact, if it be a fact, of the conflict between defendant's testimony and that of the other witnesses, and, if they find his statement untruthful, disregard the question of self-defense, is erroneous, as the testimony that deceased said, "Turn me loose, or I cut you," has some bearing on the question, and defendant is entitled to have it passed upon.<sup>1</sup>

## 3. JURY—EXCUSING REGULAR JURORS—CALLING SPECIAL JURORS.

Where special jurors, in addition to the regular panel, are summoned for a murder trial, it is not error to excuse five of the regular jurors without defendant's knowledge, though they were afterwards drawn upon impaneling the trial jury.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

The defendant, Irvine Fariss, was indicted for murder, and from a conviction of manslaughter he brings this appeal. The charge to which reference is made in the opinion is as follows: "(3) If the proof of self-defense in this case depends entirely upon the testimony of the defendant himself, and there is no other witness who testifies to facts tending to prove self-defense, the jury are authorized to consider this fact in weighing the testimony, and may also consider the fact that the defendant testified under the influence of great interest in the result of the case, and the further fact, if it be a fact, that there is a conflict between the testimony of the defendant and of Mr. Johnson, and also between that of the defendant and the other witnesses who swear that

<sup>1</sup> On the subject of instructions as to self-defense in homicide cases, see *State v. Keasling*, (Iowa,) 38 N. W. Rep. 397; *Brown v. State*, (Ala.) 3 South. Rep. 837; *State v. Hickam*, (Mo.) 8 S. W. Rep. 252; *State v. Rider*, Id. 723; *Bledson v. Com.*, (Ky.) 7 S. W. Rep. 884; *Humphries v. State*, (Tex.) Id. 668; *Barnard v. Com.*, (Ky.) 8 S. W. Rep. 444.

they saw the difficulty; and if, from these circumstances, they find that the defendant has not told the truth, they may reject his testimony altogether; and, if they do so reject said testimony, there is no element of self-defense proven in this case." The defendant excepted to the giving of this charge.

*John G. Winter*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

STONE, C. J. The defendant was indicted for murder, and convicted of manslaughter in the first degree. On March 10, 1888, the defendant was arraigned, pleaded not guilty, and Thursday, April 12, 1888, was set for the trial. The court ordered that "fifty jurors, including the regular jurors summoned for the week in which this case is set for trial, be summoned for the trial of this cause." No question is raised on the summoning and impaneling of the jury except what is after shown. The case was taken up for trial during the week for which it was set. Pending the drawing of jurors for the purpose of selecting and impaneling the jury, five several names were drawn, each of whom was of "the regular jurors summoned for the week." They not appearing, the court announced, in reference to each of them, that, on their several applications, they had been excused by him from attendance on the court as jurymen for reasons which the court deemed sufficient. This had been done without the knowledge of defendant, and the discharge had been ordered on Monday, the first judicial day of the week. This question was properly reserved for our consideration. In *Parsons v. State*, 22 Ala. 50, this court held that the discharge of a juror under circumstances shown above, if objected to on the trial, was a reversible error. In *Sylvester's Case*, 71 Ala. 17, speaking of this subject, we said: "Without deciding it to be error to excuse a juror from service before a capital felony is regularly called for trial, when he is shown to be exempt by statute, we are of opinion that the safer practice is not to excuse any juror, in advance of the trial, until he claims the privilege of such exemption on his name being regularly drawn." *Phillips v. State*, 68 Ala. 469; *Shelton v. State*, 73 Ala. 5. This question, however, has been twice decided the other way, and we will treat it as settled. *Floyd v. State*, 55 Ala. 61; *Jackson v. State*, 77 Ala. 18. We do this not reluctantly, because the rule asserted in *Parsons' Case* is exceedingly inconvenient in practice, and it is believed that it accomplishes no good result. It must be presumed that judges, in excusing jurors, act on correct principles, and discharge them only for good and sufficient reasons. *Parsons v. State*, 22 Ala. 50, so far as it conflicts with this opinion, is overruled.

All the witnesses who saw the homicide testified that it took place in the night-time, in front of Abbie Times' dwelling. Deceased was standing at her door, was acting boisterously, made threats against his own wife, who was within, and had been beating on the door with a stick, and trying to get in. Defendant, coming up, accosted him with the inquiry: "What's the matter here?" Deceased replied to this, and advanced towards defendant. Defendant gave back a few steps, deceased still advancing, when the fatal shot was fired. We say all the eye-witnesses agree in this much. None of the witnesses were as near to the parties as they were to themselves; and while they all, with the exception of the defendant, testified that they saw no knife, he testified that the deceased was advancing on him with a knife. He testified, further, that he retreated as far as he could, and into a fence corner, before he fired the pistol. Johnson, superintendent, though not in sight, testified that he three times heard deceased say: "Turn me loose, or I cut you;" and afterwards he heard the report of the pistol. This tends to prove two things: that defendant had taken hold of deceased, and deceased threatened to cut him. In the seventh charge given at the instance of the state, referring to the conduct of the parties immediately preceding the pistol shot, the court said: If the deceased "walked towards the defendant, and did not strike or offer to strike the defendant, and defendant, stepping back, shot the deceased

with a pistol and took his life, this would be an unlawful killing, and he would be guilty of murder, if the jury find beyond a reasonable doubt that the shooting was done with malice," etc. If there had been no testimony except that of the prosecution, this charge would have been correct. It had direct reference to the tendencies of the testimony, and, in the event supposed, would have covered its whole field. So, if the hypothesis of the charge had contained another clause, namely, that the jury did not believe the evidence tending to show deceased had a knife, then the charge would have been free from error. Given as the charge was, it instructed the jury that, if they found the facts hypothesized to be true, then the guilt of the defendant followed, and in the degree mentioned, whether the deceased had a knife or not. In other words, that the inquiry of knife *vel non* was immaterial, provided the deceased was simply advancing on the accused, and neither struck nor attempted to strike him. A charge given on the effect of evidence must not ignore other testimony, the tendency of which is to vary or impair the force of the testimony the charge is rested on. *Thompson v. Duncan*, 76 Ala. 334. It needs no argument to show that, if deceased was advancing on defendant with a knife, this should exert an influence in determining the fact and extent of defendant's guilt. It would not necessarily make good his plea of self-defense. If he provoked the difficulty by word, tone, or manner, this would deny him the right to claim acquittal, (*De Arman v. State*, 71 Ala. 851;) and if he brought on the difficulty, and then slew his adversary pursuant to a formed design, this would be murder. Still, if the deceased had a knife, it varied the principles of law applicable to the case; and any charge on the effect of the evidence which pretermitted or ignored that inquiry must needs be faulty. 3 Brick. Dig. p. 107, §§ 9, 10. This charge should not have been given. We do not question the right of any party, in a proper case, to invoke the ruling of the court on his own phase of the testimony; and in many cases he may do this without making any reference to the tendencies of the adversary's evidence. This rule applies when the two categories are so diametrically repugnant that the truth of the one necessarily establishes the falsity of the other. When, however, as in this case, such repugnancy does not exist, but the one category is at most a modification of the other, without displacing it, a charge which predicates legal accountability of the main facts, without reference to the qualifying facts or circumstances, is an error. *Thompson v. Duncan*, *supra*. The question whether or not there was any testimony on a given point was for the court to determine, and not for the jury. The testimony of Johnson had some bearing on the inquiry whether there was a knife. It may have been slight, but the defendant was entitled to have it weighed. So the defendant's good character, if proved, should be considered by the jury on all debatable questions. 3 Brick. Dig. 227. The third charge is subject to criticism. Very important inquiries in this case are the spirit and intent with which defendant visited the scene of the disturbance. If it was in the interest of peace, or, in a proper spirit, to stop the affray and prevent further violence, his purpose was lawful and praiseworthy. "Blessed is the peace-maker." If, on the other hand, he went as a partisan or avenger, he put himself outside of legal authority. And the inquiry may arise, why had he a pistol? These are inquiries the jury must answer, in view of all the facts and circumstances. It is not our intention to bias them in their deliberations. Reversed and remanded.

(84 Ala. 592)

WHAUN *et al.* v. ATKINSON *et al.*

(Supreme Court of Alabama. July 16, 1883.)

## 1. EVIDENCE—SECONDARY—COPY OF DEED—RECORDED IN ANOTHER STATE.

A certified copy of a deed to lands in Georgia, though authenticated as required by the act of congress, is not admissible in evidence in Alabama without proof of

the loss or destruction of the original, as under the statutes of Georgia providing that, if a recorded deed be lost, a copy is admissible if the court be satisfied of the loss, it would not be admissible in that state without such proof.<sup>1</sup>

**2. HUSBAND AND WIFE—CONVEYANCE TO WIFE—RIGHTS OF HUSBAND'S CREDITORS.**

A conveyance made by a debtor in failing circumstances to his wife in payment of a *bona fide* debt proportionate to the value of the property conveyed, no use or benefit being reserved to the debtor, is valid as against creditors.<sup>2</sup>

Appeal from chancery court, Chambers county; S. K. McSPADDEN, Chancellor.

Bill by Walton Whaun & Co. against N. L. Atkinson *et al.* to set aside a conveyance executed by said Atkinson to his son for the use of his wife. Judgment for defendants. Plaintiffs appeal.

*J. R. Dowdell*, for appellants. *N. D. Denson*, for appellees.

CLOPTON, J. When, by the laws of another state, a deed to property situate therein is required to be recorded, a copy of such deed, if authenticated as required by the act of congress, will have the same effect in this state to which it is entitled by the laws of the state where the deed is recorded. *Swift v. Fitzhugh*, 9 Port. (Ala.) 39. The statutes of Georgia, put in evidence, provide that the original of a registered deed shall be admissible in evidence without further proof, unless the execution is denied on oath; and, if the original deed be lost, a copy from the registry, if duly recorded, shall be admissible in evidence whenever the court is satisfied of the fact of loss or destruction. A copy is only admissible, under the statutes, when the loss or destruction of the original is satisfactorily shown. There was no attempt to prove the loss or destruction of the original deed, the authenticated copy of which was offered in evidence by complainants. In the absence of such proof, the certified copy was properly rejected, and cannot be considered for any purpose.

The bill was filed by appellants, who are creditors of S. M. Tolliver & Co., of which firm N. L. Atkinson, Sr., was a member, and seeks to have a deed executed by him to his son for the use of the wife of the grantor declared fraudulent, and the land thereby conveyed subjected to the payment of their claims. The property conveyed by the deed was the individual property of the grantor. The bill alleges, and the proof shows, that the debts of complainants were contracted prior to the execution of the conveyance, which casts on the defendants the burden of proving a valuable and adequate consideration. The deed recites as the consideration the payment of an indebtedness due by the grantor to his wife on account of 57 shares of stock in the Rock Mills Manufacturing Company, which constituted the *corpus* of her separate estate, and were converted to his own use by her husband. The deed was executed in substitution of a former deed made by the grantor, January 26, 1885, directly to his wife, conveying the same property, and on the same consideration, for the reason that the former deed did not pass the legal title. The evidence satisfactorily shows that in 1868, when the husband was free from debt, and many years before the debts of complainants were contracted, he gave his wife \$6,700, which he had placed to her credit on the books of the Rock Mills Manufacturing Company, and that afterwards, in August of the same year, \$5,700 of the money was used in paying for stock in the company, a certificate for

<sup>1</sup>As to the admissibility of secondary evidence to show the contents of public records shown to have been lost or destroyed, see *Kreitz v. Behrensmeyer*, (Ill.) 17 N. E. Rep. 282, and cases cited in note. On the general subject of the admissibility of secondary evidence of the contents of written instruments, see *Railroad Co. v. Hembree*, (Ala.) 4 South. Rep. 392, and note; *Railroad Co. v. Mount Vernon Co.*, Id. 356.

<sup>2</sup>As to what is a sufficient consideration to support a conveyance from a husband to his wife, as against the husband's creditors, and when such conveyances will be held fraudulent and void, see *Gerald v. Gerald*, (S. C.) 6 S. E. Rep. 290, and note; *Sims v. Moore*, (Iowa,) 33 N. W. Rep. 374; and note; *Park v. Batty*, (Ga.) 5 S. E. Rep. 402, and cases cited in note; *Bank v. Guenther*, 1 N. Y. Supp. 753, and cases cited in note; *Morgan v. Becker*, (Cal.) 16 Pac. Rep. 317, and note.

which was issued to him as agent for his wife, and that several years thereafter the stock was converted by the husband to his own use, he promising to reimburse his wife therefor. The gift of the money was valid against all persons except existing creditors of the husband, and was the wife's separate estate. By the conversion of the stock in which the money was invested, the husband became indebted to his wife for the value of the stock at the time of its conversion. The well-settled doctrine in this state is that a debtor, though in failing circumstances or insolvent, may sell the whole of his property in payment of an antecedent debt, to the exclusion of his other creditors, and that such sale, if the debt be *bona fide*, and its amount not materially less than the value of the property, will be sustained, if no use or benefit is reserved to the debtor. *Hodges v. Coleman*, 76 Ala. 103; *Levy v. Williams*, 79 Ala. 171. It is equally well-settled that if the husband converts the *corpus* of his wife's separate estate, either by using it for his own purposes, or investing it in property in his own name, he becomes indebted to her for the amount so used or converted, and may pay her by a conveyance of property for that purpose; and if there be no material disparity between the liability and the value of the property conveyed, and no use or benefit is secured to the husband, equity will uphold the conveyance, and protect her rights against the other creditors of the husband. *Northington v. Faber*, 52 Ala. 45; *Vincent v. State*, 74 Ala. 274. We concur in the conclusion of the chancellor as to the value of the stock at the time of conversion. The complainants introduced no evidence as to the value of the property conveyed. It was estimated, in the sale to the wife, at \$3,500. The evidence on the part of the defendant shows that this was about its value. The *bona fides* of the debt being established, and it being shown that the value of the property conveyed is not materially greater than the debt, and no secret benefit was reserved, the conveyance must be sustained as against complainants. Affirmed.

(84 Ala. 433)

## SMITH v. STATE.

(Supreme Court of Alabama. July 16, 1888.)

## 1. SALE—WHEN TITLE PASSES—UNASCERTAINED QUANTITY.

Defendant, under a contract to farm M.'s land on the shares, and that the latter should have a lien on defendant's interest in the crops for advances made, agreed, on settling, that M. should take his share of the corn, about 80 bushels, which, in advance of the settlement, had been divided and put into a crib by itself; at 50 cents per bushel, in part payment of defendant's debt of \$98 for advances. The corn was not measured, but M. nailed up the crib, which was on his land, and left the place. Held, that this agreement, followed by M.'s assumption of control, possession, and ownership, was sufficient to merge the lien, and vest the title of the corn in him.<sup>1</sup>

## 2. LIEN—ON CROPS—CRIMINAL PROSECUTION FOR REMOVING PROPERTY.

An indictment for removing property on which there was a lien under Code Ala. § 3635, which provides that "any person who removes or sells any personal property for the purpose of hindering, delaying, or defrauding any person who has a claim thereto, \* \* \* lien created by law for rent or advances, or any other lawful or valid claim, \* \* \* must, on conviction, be punished as if he had stolen the same," is not maintainable where it appears that the property in question was held by right of ownership; the statute not being intended to protect such right, the word "claim," as used, meaning simply a charge upon property.

Appeal from circuit court, Madison county; THOMAS J. TAYLOR, Judge.

Indictment of Amos Smith for removing property on which there was a lien. Charge No. 1, requested by the defendant, and refused by the court, was: "If the jury believe all the evidence in this case, you cannot convict the defendant on this indictment." The defendant was convicted, and he appeals.

T. N. McClellan, Atty. Gen., for the State.

<sup>1</sup> As to when title passes on a sale of chattels, see *Wagar v. Farrin*, (Mich.) 38 N. W. Rep. 865, and note.

STONE, C. J. The defendant was indicted and convicted under section 3835 of the Code of 1886, (form 77.) The facts of the case, as the uncontroverted testimony tends to show, were that McCalley, who owned lands and stock or team, contracted with Smith that he (McCalley) would furnish the land and team; that Smith and his wife were to cultivate the crop; that McCalley was to furnish supplies to Smith, who was to pay for them out of his share of the crop; and that, with this exception, the crops were to be divided between them in equal parts. The crop had been gathered, and, in advance of a settlement between them, Smith's half of the corn had been put into a crib by itself. A settlement was then had of advances made by McCalley, and it was ascertained and admitted that Smith was indebted to him on that account in the sum of \$28. It was then agreed that, in part payment of such balance, McCalley was to take Smith's corn, so in the crib, (25 or 30 bushels,) at 50 cents per bushel, but the corn was not measured. McCalley thereupon nailed up the crib, and left the place. Smith subsequently abstracted part of the corn, removed it clandestinely, and concealed it in the house of a friend. What effect had this transaction on the ownership of the corn? Did it remain Smith's, McCalley having a lien upon it for his advances, or did the title to the property pass to McCalley? If it had been destroyed without fault, whose loss would it have been? There are few questions in the law on which more distinctions, and shadings of distinction, have been drawn than that which arises out of the inquiry, what acts are necessary to pass title in a sale of personal property? And we may add there are few questions on which differences of fact, however small, exert a more controlling influence. One general rule is that, when anything remains to be done by either party as a condition precedent or concomitant, either as a means of individualizing the subject, fixing the terms, etc., then the contract is executory, and title does not pass. But the matter of weighing, measuring, or counting, as a means of determining the compensation, or even the matter of price, although usually conditions precedent to the passing of title, are neither of them universally so. Much depends on the intention of the parties. *Shealy v. Edwards*, 73 Ala. 175; *Wilkinson v. Williamson*, 76 Ala. 168; 1 Benj. Sales, (4th Amer. Ed.) p. 324, § 311. It is fairly presumable from the fact that McCalley was the landed proprietor, and Smith the laborer or tenant, that the corn was housed on McCalley's land. His conduct, immediately after the agreement to surrender and accept the corn in part payment of the balance due him, amounted to an assumption of control, possession, and ownership, and the title to the corn thereby vested in him. From a creditor with a lien he became the owner. This is shown by the further fact that, whether the corn would sell for more or less than 50 cents a bushel, he was entitled to it at that price, entered as a credit on Smith's debt, and Smith was entitled to neither more nor less than that amount of credit, irrespective of the market-value of the corn. We repeat, the lien became merged in the title which accrued to McCalley by virtue of his purchase.

The relations between landed estates and agricultural labor in parts of what were formerly called "Slave States" have been more or less tentative since the emancipation of the African race. With varying modifications, participation in the crops and their products by both parties has become a common method of utilizing the land, and compensating the laborer. The contracts entered into, having this end in view, have not been uniform. Sometimes the landed proprietor furnishes only the land, while the laborer furnishes the team and labor. Section 3064 of the Code of 1886 defines the relation which this species of contract creates. Other sections of the Code provide for other forms of joint adventure. Sections 3065, 3075. Crops raised on contracts securing to the landholder and laborer each part ownership in such crop we have held constitute them tenants in common. Yet the statutes confer many civil rights and civil remedies which, without the statutes, could not be asserted by mere

tenants in common. Code 1886, §§ 3056, 3061, 3064, 3065, 3075, 3076; *Collier v. Faulk*, 69 Ala. 58; *Holcombe v. State*, Id. 218; *Wilson v. Stewart*, Id. 302. And, in order to protect the several interests of the respective tenants in common, certain penal enactments are framed to meet the varying phases of criminal interference with the rights these statutes secure. The Code has two separate provisions intended to provide for and cover the varying criminal aspects of the question: Sec. 3835. "Any person who removes or sells any personal property for the purpose of hindering, delaying, or defrauding any person who has a claim thereto, under a written instrument, lien created by law for rent or advances, or any other lawful or valid claim, verbal or written, with a knowledge of the existence thereof, \* \* \* must, on conviction, be punished as if he had stolen the same." Sec. 3837. "Any tenant in common, or any person in any other way interested in any personal property or outstanding crop in which any other person has an interest, who, with intent to defraud his co-tenant or such other person, sells, gives away, or otherwise disposes of or conceals or removes such personal property or outstanding crop, or any part thereof, or any person who, with such intent, aids or assists in removing or concealing the same, must, on conviction, be punished as if he had stolen personal property of the value of the interest of such co-tenant or other person having an interest therein." These two sections were intended to have different fields of operation. The first (section 3835) was not intended to apply to property or crops held as tenants in common and undivided. The latter (section 3837) is expressly intended for property held in common, and not divided or separated at the time of the offense. After division it is inapt and improper. The first applies to cases where the property never was held in common; or, if once so held, where the holding in common has been terminated by a division. So the same property may, at different stages, be the subject of the offense denounced in each of the statutes copied above; that is, before division, to section 3837; after division, to section 3835. Section 3835 provides for offenses against property to which another person has a claim "under any written instrument, lien created by law for rent or advances, or any other lawful or valid claim, verbal or written." In *Ellerson v. State*, 69 Ala. 1, we considered the import of the word "claim," employed in this statute. We said the statute was "not intended \* \* \* to protect the general ownership of personal property. \* \* \* True, the statute employs the word 'claim,' as well as the word 'lien, and the former is generally of larger meaning than the latter, and may embrace the general ownership, while the latter usually embraces simply a right to charge property. But it is evident the words are used in a kindred sense, embracing mere charges or incumbrances upon the general ownership, and not the general ownership itself." We think this interpretation clearly correct. To hold otherwise would be to so enlarge the statute as to make it embrace cases of simple larceny at common law. That this could not have been intended is shown by the penalty the statute provides, to "be punished as if he had stolen the same." The indictment in this case charges that the defendant, "with the intent to hinder, delay, or defraud John E. McCalley, who had a lawful and valid claim thereto under a lien created by law for rent or advances, did remove personal property, consisting of three bushels of corn, of the value of five dollars, having at the time a knowledge of the existence of such claim." This indictment would have been an accurate statement and description of the offense imputed if the corn had remained in the condition it was after the division, and before the sale to McCalley. We have shown it did not remain in that condition, but that the title passed to McCalley. If the defendant was guilty, it was simple larceny, and there was a fatal variance between the indictment and the proof. Charge No. 1, asked by defendant, ought to have been given. *Ellerson v. State*, 69 Ala. 1, has been referred to. In that case, as in this, the property held in common had been divided, and the laborer's

share separated from the land-owner's. In that case, unlike the present one, there had been no sale by the laborer, but the crop remained *in statu quo*, without any merger of the lien. Under the rules declared above, that indictment was maintainable under section 4353, Code 1876; section 3835, Code 1886. It was not maintainable under section 3837; for the property, when the offense was committed, was not held in common. That case, so far as it conflicts with the views expressed in this opinion, is overruled. Cases may arise in which it is not clear whether the imputed crime is common-law larceny, or whether it falls under one or the other of the two sections of the Code, 3835 and 3837. Each of these offenses is punished alike. It may become a question whether or not it would be the safe practice to add a count in each of the forms when any question can arise as to the *status* of the property. Reversed and remanded.

(38 Ala. 7)

## WALKER v. STATE.

(Supreme Court of Alabama. July 16, 1888.)

## 1. HOMICIDE—ASSAULT WITH INTENT TO KILL—PROOF OF MOTIVE.

On a trial for assault with intent to murder, where it appeared that defendant and the woman injured had lived in adultery for some time; that she left him; and there was some evidence that he shot her for her persistent refusal to return and live with him,—evidence of defendant's continuous efforts to induce her to return, her repeated refusals, his following her from place to place, his threats in consequence of her refusal, and his demonstrations of violence on such occasions, is competent, in connection with the immediate circumstances of the injury, to prove circumstances from which a motive for the assault may be inferred.

## 2. SAME—EVIDENCE—SUBSEQUENT THREATS.

Evidence that defendant, after an indictment for assault with intent to murder, while passing the injured woman in the court-house about two weeks before the trial, said, "I'll get you yet," is admissible, as showing his state of feelings towards her, not only at the time of the menace, but also at the time of the assault, and that he still cherished his malicious intent.

## 3. SAME—INSTRUCTIONS—DUTY TO CHARGE AS TO LESSER OFFENSE.

On a trial for assault with intent to murder, a remark by the judge, in response to a suggestion from counsel of his omission to instruct as to assault and battery, that "I know of no evidence in this case which would warrant a verdict for assault and battery," is not reversible error where the record discloses no evidence on which a verdict for a minor assault could have been reasonably found; and evidence that defendant was intoxicated a short time before the difficulty is not evidence that would warrant such verdict, it not appearing that he was incapacitated from forming a design to kill.

## Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

The defendant, appellant here, is a white man, and was indicted, tried, and convicted for assaulting one Daisy Harris, a negro girl, with intent to murder by shooting her with a pistol. Upon conviction, he was sentenced to the penitentiary for five years. In addition to the facts as narrated in the opinion, the woman, Daisy Harris, testified that once, in Birmingham, while in the court-house, some time before the shooting for which the defendant was on trial, the defendant said to her: "I will kill you, even if you were in the arms of the judge." The defendant moved to exclude this testimony as to the declaration by the defendant while in Birmingham, some time before the shooting occurred; but the court overruled his motion, and the defendant excepted. The same witness further testified that, after the above occurrence in the court-house, and before the shooting in Montgomery, for which he was on trial, the defendant continued to follow her about wherever she went, and on one occasion, on the streets of Birmingham, he threatened to kill her, but never tried to carry his threats into execution then, although he had at the time a pistol, and drew it on her, "and ordered her to stop." The defendant moved to exclude this testimony of the witness; but the court overruled his objection, and the defendant excepted. Upon the state attempting to prove that on one occasion after the indictment had been found against the

defendant, and about two weeks before the trial, while the said Daisy Harris was in the court-house in Montgomery, that the defendant passed by her, and said, "I'll get you yet," the defendant objected; but the court overruled his objection, and he thereupon excepted. The witness further testified that, on the night of the same day of the remark in the court-house in Montgomery, the witness was on the cars going from Montgomery to Birmingham, and that the defendant boarded the train at some station out from Montgomery, and took a seat just behind her, spoke to her, and attempted to take hold of her hand, and that she then called for protection. The defendant objected to this evidence; but the court overruled his objection, and he excepted. There was also testimony tending to prove that the defendant, at the time of the shooting, was drunk. At the request of the state, in writing, the court gave the jury the following charges, and the defendant excepted to each: (1) "In determining whether or not the defendant had the intent to take the life of Daisy Harris, the jury may consider the facts, if they be facts, that in Birmingham, prior to the shooting, the defendant drew a pistol on said Daisy Harris, and ordered her to stop; that subsequently, and before said shooting, defendant threatened to kill said Daisy; and that in the city of Montgomery, on the night before the said shooting, said defendant again threatened to take her life; and the defendant went to Wiley's office on the morning of the shooting, where said Harris was, and then shot said Harris with a deadly weapon, —in connection with all the other evidence in the case; and if they believe from the whole evidence, beyond a reasonable doubt, that, at the time of the shooting, the defendant had the intent to take the life of Daisy Harris, and that he shot with malice, and not in self-defense, and that this occurred in November last and in Montgomery county, they must convict the defendant as charged in the indictment." (2) "Voluntary drunkenness is no excuse for crime; and, unless the defendant was so drunk at the time of the shooting as to be incapable of forming an intent to take life, his being drunk cannot avail him anything." (3) "Although the defendant may not have been the aggressor or in fault, and may have had a reasonable belief that he was in danger of losing his life, or of great bodily harm, he cannot be acquitted unless there was no reasonable mode of escape, or of declining the combat with safety." (4) "The jury are authorized to presume malice from the use of a deadly weapon, unless the facts which establish the shooting rebut the presumption of malice; and if, from the use of a deadly weapon, and the manner of its use, and from the threats made, and the other evidence, the jury believe beyond a reasonable doubt that in this county, and in November last, the defendant shot Daisy Harris, with malice, and at the time of said shooting the defendant shot with intent to take the life of said Daisy Harris, and not in self-defense, the defendant would be guilty as charged in the indictment." (5) "Before a defendant can be acquitted on the ground of self-defense, three essential elements must concur: *First*, the defendant must be free from fault,—that is, he must not say or do anything for the purpose of provoking a difficulty, nor must he be disregarding of the consequence, in this respect, of any wrongful word or act; *second*, there must be a present impending peril to life or of great bodily harm, either real or so apparent as to create the *bona fide* belief of an existing necessity; and, *third*, there must be no convenient or reasonable mode of escape or declining the combat, and, unless they be found to exist, the defendant cannot be guiltless.

T. N. McClellan, Atty. Gen., for the State.

CLOPTON, J. All minor or evidentiary circumstances which tend to shed light on the intent of the defendant are admissible in evidence against him, though they may have transpired previous to the commission of the offense. Motive is an inferential fact, and may be inferred, not merely from the attendant and surrounding circumstances, but, in conjunction with these, all

previous occurrences having reference to and connected with the commission of the offense. It having been shown that the defendant and the woman injured had lived in adultery for some time; that she left him in May, 1887; and there being evidence tending to show that he shot her because of her persistent refusal to return and live with him,—the relation which had existed, and the defendant's repeated and continuous efforts, growing out of such relation, to induce her to return, her repeated refusals, his following her from place to place, his threats in consequence of her continued refusal, and demonstrations of violence on such occasions, are each and all competent evidence to go to the jury, in connection with the immediate circumstances of the injury, from which may be inferred the intent with which the assault was made. If it be said that the weight and force of some of the transactions and declarations should be regarded as weakened or lessened by the lapse of time, such probable effect is more than counteracted by the constant and frequent repetitions, continuing up to or about the time of the injury. But, if entitled to little weight, they nevertheless cannot be considered incompetent or irrelevant evidence. *Johnson v. State*, 17 Ala. 618; *Hudson v. State*, 61 Ala. 333; *Evans v. State*, 62 Ala. 6. The menace made by defendant in the courthouse, after the indictment was found, and about two weeks before the trial, was not merely a threat having reference to the future exclusively. It also referred to a past act, and included an implied admission, in the form of a threat, of the previous attempt to kill her, and, though having failed, he would yet accomplish his intention. It manifested his state of feeling towards the person whom he had seriously wounded, not only at the time of the menace, but also at the time of the assault, and that he still cherished the malicious intent. The evidence comes within the spirit and reason of the rule laid down in *Henderson v. State*, 70 Ala. 29, and *McManus v. State*, 36 Ala. 285.

The court having omitted, in the general charge, to instruct the jury specifically as to the offense of assault and battery, counsel called attention to the omission. In response, the presiding judge remarked, "I know of no evidence in this case which would warrant a verdict for assault and battery." Counsel excepted to the remark of the judge, but did not state any evidence on which to base such charge, and did not request any special charge on the question. It may be conceded that, had there been any evidence on which a verdict for the minor offense could have been reasonably found, such remark, in the hearing of the jury, would work a reversal of the judgment. But an examination of the record, which purports to set out all the evidence, does not disclose any, unless it be the proof that the defendant was drunk a short time before the difficulty. This testimony falls far short of showing that he was so intoxicated as to incapacitate him to form the design to kill or the intent to murder. *Morrison v. State*, *ante*, 402. The charges given at the instance of the prosecution state the law in accordance with our uniform rulings. *Baker v. State*, 81 Ala. 38, 1 South. Rep. 127; *Watson v. State*, 82 Ala. 10, 2 South. Rep. 455; *Storey v. State*, 71 Ala. 329; *De Arman v. State*, *Id.* 351. We discover no error in the record. Affirmed.

(35 Ala. 106)

COOPER *et al.* v. ANNISTON & A. R. CO.

(Supreme Court of Alabama. July 26, 1888.)

## 1. INJUNCTION—WHEN LIES—ERRORS OF LAW IN CONDEMNATION PROCEEDINGS.

Errors of law in condemnation proceedings by a railroad company are not grounds for awarding an injunction restraining the company from proceeding to lay out a right of way, and construct its road over the condemned land.

## 2. SAME—FORMER ACQUISITION OF RIGHT OF WAY.

Nor the fact that it already has one right of way over the lands of plaintiffs; the power to condemn being co-extensive with the necessary requirements for the successful operation of the road.

## 3. SAME—PAYMENT OF MONEY INTO COURT—INSOLVENT RAILROAD COMPANY.

Nor, where the compensation awarded plaintiffs in the probate court had been deposited in court, is it sufficient ground for such injunction that the company is insolvent, and will not be able to pay a judgment for increased damages, which may be obtained on the appeal to the circuit court, as plaintiffs have a lien therefor on the land, enhanced in value by the construction of the road, and an adequate remedy by restraining order out of chancery to compel payment as a condition of further enjoyment of the easement.

Appeal from chancery court, Calhoun county; S. K. McSPADEN, Judge.

Bill by O. W. Cooper and others against the Anniston & Atlantic Railroad Company, to enjoin defendant from proceeding further in laying out its right of way over plaintiffs' lands. In September, 1887, defendant filed its petition and application in the probate court of Calhoun county to have certain lands belonging to the complainants condemned for a right of way. Seven commissioners of award were appointed, who awarded to complainants compensation for the lands sought to be taken, and the probate court allowed the railroad to go on in laying out its right of way and in the construction of its road. The grounds on which complainants ask for an injunction in this case are that errors and irregularities occurred in the condemnation proceedings in the probate court; that the railroad company already has one right of way on which it is now operating and transacting its business; that the compensation awarded to complainants by the commission is inadequate to the value of the property so condemned, and is not a just compensation therefor; and that the railroad corporation is largely indebted, and is insolvent, and that, therefore, a just compensation cannot be obtained by pursuing an appeal from the award of the commissioners to the circuit court from the probate court, as allowed by law. Defendant answered, denying all the material allegations of the bill; and also demurred to the bill for want of equity, and because the complainants had a full, adequate, and complete remedy at law; and then moved the court to dissolve the injunction. Upon the hearing the injunction was dissolved. Complainants appeal.

*E. H. Hanna*, for appellants. *Brothers, Willett & Willett*, for appellee.

STONE, C. J. If any errors of law were committed in the condemnation proceedings alleged to have been had in this case, they should have been taken advantage of before the probate judge, or, on the appeal to the circuit court, if they had not been waived by the course pursued in the primary trial. Such errors furnish no ground whatever for equitable interference. *Mills*, Em. Dom. § 823; *Ewing v. City of St. Louis*, 5 Wall. 413; *Secombe v. Railroad Co.*, 23 Wall. 108. Nor is there anything in the objection that, having once obtained a right of way, the railroad company is bound to adhere to it, and cannot proceed for a further condemnation. The power is continuous, and co-extensive with the wants of the corporation. It should be a clear case of abuse, to justify withholding relief on the ground that the easement asked for is not necessary to the successful operation of the railroad. 1 Ror. R. R. 274 *et seq.*; *Railroad Co. v. Wilson*, 17 Ill. 123; *Fisher v. Railroad Co.*, 104 Ill. 823; *Smith v. Railroad Co.*, 105 Ill. 511; *Railroad Co. v. Decaney*, 42 Miss. 555; *Railroad Co. v. Railroad Co.*, 26 Kan. 669; *Railroad Co. v. Love*—v.480.no.17—44

joy, 8 Nev. 100. The amended bill charges that the railroad company is insolvent, and will not be able to meet and pay the increased damages, should such be awarded in the circuit court, to which the case has been appealed. The land-holder, complainant in this bill, has ample means for enforcing any damages he may recover. He has a lien in the nature of that of a vendor, on the property taken, enhanced in value by the improvements to be put upon it; and, if the payment be withheld, the chancery court, by a restraining order, may compel payment as a condition of further enjoyment of the easement. *Hooper v. Railroad Co.*, 69 Ala. 529; *Railroad Co. v. Jones*, 68 Ala. 48, 70 Ala. 227; *Thornton v. Railroad Co.*, 84 Ala. 109, *ante*, 197. The case of *Browning v. Railroad Co.*, 4 N. J. Eq. 47, was, in its facts, very like the present one, and an injunction was awarded in that case. The ruling, however, was put on the ground that, under their system, the appeal suspended and superseded the judgment of condemnation, and with it the judgment in favor of the land-holder for the assessed damages. Our statute is entirely different. Code 1876, § 1839. If the railroad company deposits with the probate judge the amount of the award and the costs of the commission, the appeal in nowise hinders or impedes work on the condemned property. The deposit was made in this case. The present bill is without equity, and the injunction was rightly dissolved. Affirmed.

(84 Ala. 465.)

HAWK *et al.* v. STATE, to Use.

(Supreme Court of Alabama. July 16, 1888.)

**BAIL—ABSCONDING OF PRINCIPAL DURING TRIAL—LIABILITY OF SURETIES.**

The sureties on the bail-bond of a person indicted for murder, conditioned, as provided in Code Ala. 1886, § 4427, for his appearance "from day to day and term to term, until discharged by law," are liable as for a forfeiture where defendant absconds during the progress of his trial, as he will be regarded as continuing in their custody, and not in the custody of the sheriff.

Appeal from circuit court, Jackson county; LEROY F. BOX, Judge.

*Scire facias* against Arthur Hawk and others on forfeited bail-bond. For non-appearance of Hawk, who was under indictment for murder, and out on bail, judgment *nisi* was rendered against him and his sureties on his bail-bond, and a *scire facias* issued. The sureties denied their liability by proper pleas, to which plaintiff demurred. By agreement of the parties, the issue was submitted to the trial court for decision, without the intervention of a jury, and judgment was rendered sustaining the demurrer. Defendants appeal.

D. D. Shelby and L. W. Day, for appellants. T. N. McClellan, Atty. Gen., for the State.

SOMERVILLE, J. The bail-bond in terms imposed on the principal, Arthur Hawk, who was under indictment for murder, the obligation to appear at the August term, 1887, of the Jackson circuit court, "and from day to day and term to term thereafter, until discharged by law, to answer to the offense of murder." This is in substantial compliance with the requirements of section 4427 of the present Code, (Code 1876, § 4852,) which provides that "the undertaking of bail binds the parties thereto jointly and severally for the appearance of the defendant on the first day of the court, from day to day of such term, and from day to day of each term thereafter, until he is discharged by law." The question raised for decision by this record is whether the undertaking of bail, which is here in writing, is forfeited by the absconding of the defendant during the progress of the trial, and after his appearance to answer an indictment for felony; or, to state the question differently, whether the defendant, upon the commencement of the trial, is at once placed, by operation of law, in the custody of the sheriff, without any order of court to that effect, or whether he is to be considered as in the continued custody of his sureties

until the coming in of the verdict of the jury. The plain language of the statute would seem to leave no doubt on this point. It declares that the undertaking of bail binds them for the appearance of the defendant "until he is discharged by law." This discharge can take place after the trial is begun, in the absence of a surrender by the sureties, only by an order of discharge based on a *nolle prosequi* of the indictment, a verdict of acquittal, or a verdict of conviction, followed by the sheriff's taking custody of the defendant by the implied or express order of the court, which includes any necessary custody taken to prevent his escape. The obligation, therefore, ordinarily binds the sureties for the continued appearance of the defendant during every stage of the trial, from the time it is entered on at least until the rendition of the verdict of the jury. It was long ago held in this state that the flight of a defendant during the trial, and before the coming in of the verdict, amounted to a mistrial. *State v. Battle*, 7 Ala. 259. The theory of the law is that, when bail is given, the principal is at once placed in the custody of his sureties, such custody being really a continuance of his imprisonment. The sureties are accordingly empowered at any time to arrest their principal as his jailers, whenever they see fit, for the purpose of delivering him into the custody of the sheriff or other lawful officer. *Cain v. State*, 55 Ala. 170; Whart. Crim. Pl. (8th Ed.) § 62; Code 1886, § 4429. These powers are fully adequate for the protection of the sureties, and it is no hardship on them to construe the effect of their undertaking to be commensurate with every stage of the trial. The practice of the courts in this state is uniformly in accordance with this view of the statute, so far as we are aware, and has been from time immemorial. This fact alone is conclusive of the matter. The case of *Hodges v. State*, 8 Ala. 55, cited by appellant's counsel, has no bearing on this case. It did not involve any question touching the liability of bail. The circuit court did not err either in sustaining the demurrers to the defendant's pleas, or in the judgment rendered. Affirmed.

(35 Ala. 17)

## FRAZIER v. STATE.

(Supreme Court of Alabama. June 28, 1888.)

## LARCENY—WHAT CONSTITUTES—POSSESSION OBTAINED BY FRAUD.

On an indictment for the larceny of a hog, it appeared that defendant shot the hog in a thicket, and covered it with pine tops; that he then went in company with another to the owner of the hog, and told him that they had found one of his hogs killed in one of his fields; that it was spoilt and unfit for use; that the owner told him he might have it for soap-grease; that the owner found the hog at defendant's house the next morning, and that it was not spoilt. Held that, as the possession was obtained by trick or fraud, there was a felonious taking and carrying away.<sup>1</sup>

Appeal from circuit court, Wilcox county; JOHN MOORE, Judge.

The appellant, John Frazier, was indicted for the larceny of a hog, was tried and convicted, and was sentenced to hard labor for two years. The facts of the case, as shown by the bill of exceptions, are that some time before the finding of the indictment, the defendant went out in the field of one Sheffield, shot the hog down in a little pine thicket, and covered the hog so killed with pine limbs and pine tops; that, on the evening of the shooting, the defendant went to the owner of the hog, in company with some one else, and told him, the owner, that they had found one of his hogs killed in his field, designating the field, but that it was too badly spoilt for use; upon this representation, the owner of the hog told him to take the hog, as "he reckoned it would do for soap-grease, and that, if they would clean it, they might have it;" on the next morning he went to the house of the defendant, and found the hog, which had been killed the evening before, cleaned and perfectly sound; and that he took the hog, and carried it home for his own use. Upon.

<sup>1</sup> See note at end of case.

this evidence, the defendant requested the court to give the following charge, which the court refused to do, and the defendant thereupon excepted: "If the jury believe from the evidence that John Frazier killed Mr. Sheffield's hog by shooting him with a gun, and if they further believe that he did not move the hog after he was killed, then they must acquit the defendant of the larceny."

*T. N. McClellan*, Atty. Gen., for the State.

**CLOPTON, J.** It has been held that to shoot and then chase a hog with felonious intent, over which the defendant was prevented from acquiring dominion, is not a sufficient caption and asportation to constitute larceny. *Wolf v. State*, 41 Ala. 412. On the other hand, a charge has been held to be correct which instructed the jury that if the defendant shot and killed, and then took hold of the hog, and cut its throat, this would constitute a taking and carrying away in the meaning of the law. *Croom v. State*, 71 Ala. 14. It is said, generally, that, to constitute the offense, there must be a wrongful taking possession of the goods of another with the intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent. The caption may be constructive, as when possession is obtained by trick, fraud, or deception. If the defendant shot and killed the hog, with the larceny of which he is charged, in a pine thicket in the field, with felonious intent, and covered it with pine tops, in order to conceal it until he could return and secretly remove it, and if he subsequently removed it in pursuance of the previous felonious intent, there was, in the legal acceptance of the terms, a taking and carrying away sufficient to complete the offense, though the removal may have been with the consent of the owner, if such consent was procured by intentional misrepresentation and deception. *State v. Wilkerson*, 72 N. C. 376; *Fulton v. State*, 13 Ark. 168. The charge requested by the defendant ignored these material facts, which there was evidence tending to prove, and was misleading. There is no error in its refusal. Affirmed.

#### NOTE.

**LARCENY—WHAT CONSTITUTES.** Where possession of property is obtained lawfully, the subsequent appropriation thereof, *animus furandi*, to the taker's use, does not constitute larceny. *Boyd v. State*, (Tex.) 6 S. W. Rep. 853; see, also, cases cited in note; *People v. Cruger*, (N. Y.) 7 N. E. Rep. 555; *People v. Miller*, (Utah,) 11 Pac. Rep. 514. In *People v. Rae*, (Cal.) 6 Pac. Rep. 1, the court says: "Where, by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, larceny is established." It is larceny, under the Texas statutes, to point out the property of another, claiming it, and thus to sell it to a third person. *Doss v. State*, (Tex.) 2 S. W. Rep. 814.

On a trial for theft from the person, it appeared that defendant snatched money from the vest pocket of complaining witness, and offered to bet with it; that they stood talking at arms-length for about 10 minutes, when, after taking a drink, witness asked for his money. Defendant said he had returned it, and asked to be searched. He afterwards went away a short distance out of sight of witness, then returned, and was searched, but the money was not found. Held, under Pen. Code Tex. art. 727, providing that, if the taking was lawful, to constitute theft the property must be obtained by some false pretext, or with the intent to deprive the owner of the same, that the evidence did not warrant a conviction. *Graves v. State*, (Tex.) 8 S. W. Rep. 471.

An officer, to detect the author of certain thefts, feigned a drunken slumber, with intent to allow any thief to rob him, in order to make a case of larceny against him, having no suspicion that defendant would be the one. While in this condition, perfectly conscious and making no resistance, defendant took money from his person. Held, that the conduct of the officer did not constitute such consent as to take away a material element of the crime, and that defendant was guilty of larceny. *People v. Hanselman*, (Cal.) 18 Pac. Rep. 426.

In general, as to what constitutes larceny, see *Johnston v. State*, (Tex.) 9 S. W. Rep. 48; *Connor v. State*, (Tex.) 6 S. W. Rep. 133; *Com. v. Eichelberger*, (Pa.) 18 Atl. Rep. 423; *Haley v. State*, (Ark.) 4 S. W. Rep. 746.

(35 Ala. 169)

LEE v. WOOD, Probate Judge, *et al.*

(Supreme Court of Alabama. July 12, 1888.)

## LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—ACTION AGAINST PROBATE JUDGE.

The statute of limitations commences to run in favor of a probate judge and his sureties for the former's approval of an administration bond with insufficient sureties, as against an heir of the decedent under guardianship at the time, at least from the time of final settlement of and decree against the administrator; and is not interrupted by the guardianship subsequently ceasing during the ward's minority.<sup>1</sup>

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Action by Ida Lee, by her next friend, against Willis C. Wood, probate judge, and the sureties on his official bond. Judgment for defendants, and plaintiff appeals.

*P. N. Hickman* and *W. D. Roberts*, for appellant. *Gamble & Gamble* and *M. N. Carlisle*, for appellees.

STONE, C. J. Willis C. Wood was qualified as judge of probate of Pike county, July 20, 1868; the other defendants being sureties on his bond as such judge. On October 13, 1870, he appointed C. N. Carpenter administrator of the estate of W. A. Carpenter, deceased, and approved his bond as such. Ida Lee, *nee* Carpenter, is the child and distributee of W. A. Carpenter, entitled to share his estate. When this suit was brought she was still a minor, though married. B. A. Hill became guardian of Ida Carpenter, and afterwards, in March, 1875, C. N. Carpenter came to a settlement of his administration, and a decree was rendered against him, as such administrator, for the distributive share of said Ida. This decree was rendered in favor of Hill as guardian, and has not been collected. Two years after this Hill ceased to be guardian, and Ida has had no guardian since that time. The present suit was commenced March 4, 1887, and seeks to charge Woods and his sureties for approving the administration bond of C. N. Carpenter with insufficient sureties. The defense is the statutes of limitations; ten years in the case of Wood, and six years as to his sureties. Code 1886, §§ 2614, 2615. The sole question is whether the statute commenced to run from the date of the decree in favor of Hill as guardian. As a general rule, statutes of limitation do not run against those laboring under a personal disability, such as infancy. Code, § 2624. This rule, however, does not apply to infants, or other persons disabled, who have a trustee capable of suing. *Bryan v. Weems*, 29 Ala. 423; *Riggs v. Fuller*, 54 Ala. 141; *Molton v. Henderson*, 62 Ala. 426; *Martin v. Tally*, 72 Ala. 23; *Darnall v. Adams*, 13 B. Mon. 273; 7 Wait, Act. & Def. 280. When the statute begins to run, no supervening disability intercepts it. *Doe v. Thorp*, 8 Ala. 253; *Bank v. Donelson*, 12 Ala. 741; *Lowe v. Jones*, 15 Ala. 545; 7 Wait, Act. & Def. 272. The statute of limitations commenced to run against the guardian or trustee, at the least, in March, 1875, and, by force of the rule above declared, against the *cestui que trust* or ward at the same time. *Fretwell v. McLemore*, 52 Ala. 124. The claim sued on was barred as to each of the defendants before the suit was brought. Affirmed.

<sup>1</sup>The liability of a surety on an administrator's or executor's bond is not fixed, and no cause of action arises on such bond, until there is a judicial ascertainment of the default of the principal, and from this time the statute of limitations begins to run. *Alexander v. Bryan*, 4 Sup. Ct. Rep. 107. For a full discussion of the running of the statute of limitations, see *Traer v. Clews*, 6 Sup. Ct. Rep. 155, and note. See, also, *Judge v. Mann*, (Mass.) 6 N. E. Rep. 740; *Bradley v. Cole*, (Iowa,) 25 N. W. Rep. 849, and note.

(85 Ala. 171)

**SOUTH & NORTH ALA. R. CO. v. GILLIAM.**

(Supreme Court of Alabama. July 16, 1888.)

**PUBLIC LANDS—GRANTS IN AID OF RAILROADS—PRE-EMPTION RIGHTS.**

Plaintiff in ejectment claimed title under Acts Ala. 1875-76, p. 154, and Acts 1876-77, p. 114, dividing among certain railroads lands granted to the state in aid of their construction, by act of congress of June 3, 1856. The original grant to the state expired by its own limitation in 10 years, but it was renewed April 10, 1869, subject to all the conditions of the original grant, one of which was that if it should appear that the right of pre-emption had attached to any of the lands thus granted, other lands should be selected in lieu thereof. Defendant's pre-emption right attached in May, 1867, in the interim between the expiration of the original grant and its renewal. Held, that he was entitled to the land.

Appeal from circuit court, Blount county; JAMES AIKEN, Judge.

Statutory real action in the nature of ejectment, brought by the South & North Alabama Railroad Company against John Gilliam. Defendant pleaded the general issue and the statute of limitations. Plaintiff rested its title to the land in controversy on a report of the commissioners appointed to set apart certain lands for the aid of certain specified railroads in the state, under an act of the general assembly of Alabama. A certified copy of the report of the commissioners, and the list of the lands attached, was offered in evidence, and upon this evidence the plaintiff rested its right to recover. The defendant claimed title under a homestead entry made in due and proper form, under the regulations of the United States land department, and offered in evidence a transcript setting out at length the homestead entry of the defendant, and the proceedings thereon, to which the plaintiff objected; but its objection was overruled. The court directed a verdict for defendant, and judgment was entered accordingly. Plaintiff appeals.

*Hamil & Lusk*, for appellant.

SOMERVILLE, J. The certified copy of the report of the commissioners, and the list of lands attached, offered in evidence by the plaintiff, may be considered as *prima facie* evidence of plaintiff's title to the lands in controversy as vested by virtue of the acts of the general assembly of Alabama, approved January 31, 1877, and February 10, 1876, having reference to the division, among other railroads in the state, of the lands granted by congress to aid in their construction. Acts 1875-76, p. 154; Acts 1876-77, p. 114. Under the provisions of these statutes, such certified report and list is made to operate as a conveyance to the railroad companies, respectively and severally, of all the rights, title, and interest in these lands which the state had derived under the act of congress donating them for the uses declared. If the state acquired no title to the land in controversy, therefore, the plaintiff can claim none.

The defendant claims title under a homestead entry made in due form, under the regulations of the United States land department, based on a right of pre-emption, with continuous occupancy, which attached as far back as May, 1867. The present action was not commenced until January, 1882. The lands in controversy fall within the general limits of those granted to the state of Alabama by the act of congress approved June 3, 1856, to aid in the construction of certain railroads in the state. 11 U. S. St. at Large, 17, 18. This grant was revived and renewed by act of congress approved April 10, 1869, subject to all the conditions and restrictions contained in the former law. 16 U. S. St. at Large, 45, 46. One of these conditions was that "in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above spec-

ified," other lands in place of those thus sold or appropriated, which the statute provides shall be held under a like trust and for similar uses. 11 U. S. St. at Large, p. 17, § 1. This would seem very clearly to reserve from the operation of the grant such lands as the government might elect either to sell, or to appropriate to homestead settlers, provided sale should be made, or the pre-emption right should attach, before the route of the railroads was definitely fixed. This construction is made clear by the third section of the act of April 21, 1876, confirming certain pre-emption and homestead entries of public lands within the limits of railroad grants, where such entries have been made under the regulation of the land department of the general government. This section provides that "all such pre-emption and homestead entries which may have been made by permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant, at a time subsequent to the expiration of such grant, shall be deemed valid, and a compliance with the laws, and the making of the proof required, shall entitle the holder of such claim to a patent therefor." 19 U. S. St. at Large, 35, 36. The grant of June 3, 1856, by its own terms, expired in 10 years after its date of approval, if the road otherwise entitled to it should not be completed by that time; all unsold lands reverting to the United States. 11 U. S. St. at Large, p. 16, § 4. The date of expiration was, therefore, June 3, 1856. The pre-emption right of the defendant, which was afterwards perfected into a homestead entry, attached in May, 1867, which was subsequent to the expiration of such grant, and therefore comes within the terms of the act of April 21, 1876, which declares such entry to be valid. The renewal of the grant by the act of April 10, 1869, conferred on the grantee a title subject to the burden of all pre-emption rights which had attached between June 3, 1856, and April 10, 1869, or between the expiration and the renewal of the grant. Under this view of the law, irrespective of any rights of the defendant based on his alleged adverse possession of nearly 15 years, the circuit court did not err either in admitting the evidence objected to, or in giving the general affirmative charge in favor of the defendant. The record discloses the fact that the construction which we have given the statutes under consideration is the same as that adopted by the officers of the land department at Washington, which is entitled to great respect, at least in doubtful cases. "The construction given to a statute by those charged with the duty of executing it ought not," it has been said, "to be overruled without cogent reasons." *Advertiser Co. v. Burke*, 82 Ala. 381, 2 South. Rep. 632. We have assumed, in the appellant's favor, that the present controversy belongs to that class of cases in which the decision of the officers of the land department is not conclusive, but subject to review on collateral attack in a state court, even in an action of ejectment at law; a point, however, which we do not intend to positively decide. *Moore v. Robbins*, 96 U. S. 580; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 Sup. Ct. Rep. 1157; *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 340.

We discover no error in the record, and the judgment of the circuit court is affirmed.

(35 Ala. 218)

TELL v. LEWIS.

(Supreme Court of Alabama. July 19, 1888.)

**LIENS.—SALE OF PROPERTY SUBJECT TO—EXECUTION.**

Under Code Ala. § 3605, providing that in suits to enforce equitable liens execution may issue for the balance found due, after a sale of the property subject to such lien, execution cannot issue for the balance unpaid after a sale of property to satisfy a vendor's lien, against a subpurchaser, though with notice of the lien, who did not assume to pay the purchase money due from his vendor, by such contract as would warrant a judgment at law against him personally therefor.

Appeal from chancery court, Crenshaw county; JOHN A. FOSTER, Chancellor.

Bill in equity to enforce vendor's lien, filed by James Tell, administrator, against B. H. Lewis, administrator of the estate of Alfred Hovey. After sale of the property, plaintiff applied for execution for the balance of purchase money unpaid, under Code Ala. § 3605. The report of the register that there was no further liability on defendant was confirmed. From this order defendant appeals.

*John D. Gardner*, for appellant. *John Gumble*, for appellee.

CLOFTON, J. The original bill was filed by appellant for the enforcement of a vendor's lien. After a sale of the land under a decree ordering it to be sold for the payment of the purchase money, the complainant petitioned the chancellor to find the balance due after applying the proceeds of the sale, and award execution for the same against appellee, as administrator of the estate of Alfred Holly. The ascertainment of the amount remaining unpaid was referred to the register, who reported that nothing was due by the estate of Holly. Exceptions were filed to the report, which were overruled, and it was confirmed. The statute provides that, in "suits for the enforcement of equitable liens, execution may issue for the balance found due after a sale of the property ordered and decreed to be sold." Code 1886, § 3605. In the absence of a statute, the court of chancery did not render a decree for any balance of the amount for which the land is ordered to be sold that remains unpaid by a sale of the property, and execution could not be awarded or issued on the decree enforcing the lien. The complainant was remitted to his legal remedies to recover such balance. Section 3605 is a condensation of section 3908 of Code of 1876, which we have heretofore considered and construed. The statute provides for a second decree,—a money decree,—based on the entire indebtedness, as ascertained by the decree of sale, and the amount to be deducted therefrom as ascertained by the sale. *Presley v. McLean*, 80 Ala. 309. The purpose of the statute is to obviate the pre-existing necessity of resort to another action to recover any balance of the purchase money, which may remain unpaid after the sale, to make the chancery suit effectual for the enforcement of all the rights of complainant, and prevent unnecessary and additional suits. Its effect is to authorize a money decree for the balance only in cases in which a judgment *in personam* could be recovered against the defendant in an action at law for the purchase money. The statute has no operation where the defendant has not brought himself under obligation to pay the purchase money, when the decree enforcing the lien merely ascertains the sum with which the property shall be charged, and orders it to be sold in satisfaction of the same, as in case of a subpurchaser, who bought the land with notice of a vendor's lien, but did not assume to pay the purchase money due by his vendor, the original vendee.

It is insisted that the first decree, which was affirmed by this court, is conclusive that there was a contract of sale between complainant's intestate and Holly, and as to the latter's personal liability. The first decree declared that the land was subject to the purchase money, and ordered it to be sold for the payment of a specified sum; but in the opinion, which preceded and accompanied the decree, the chancellor held that complainant would not be entitled to a judgment and execution thereon for any balance which might remain unpaid after applying the proceeds of the sale. It is manifest that the effect of the decree of sale is not to adjudge the personal liability of Holly; if an adjudication at all in respect to the matter, it was that he was not personally bound. The decree, confirming the report of the register, ascertaining that nothing was due by Holly's estate, is founded on such being the effect and operation of the first decree, and on the absence of proof that Holly ever assumed or promised in writing to pay the purchase money due by Ramer, who was the

vendee of the complainant's intestate, though he purchased with notice of the lien. As the decree enforcing the lien did not adjudicate that Holly was personally bound, his personal representative could interpose to the rendition of a money decree any objection or defense which would avail to defeat a suit at law for the recovery of the purchase money. An examination of the evidence satisfies us that Holly never made any valid agreement to pay the purchase money of the land, which could have been enforced by an action at law; consequently there is no error in the chancellor's confirmation of the report of the register. *Affirmed.*

(84 Ala. 446)

## PAGE 7. STATE.

*(Supreme Court of Alabama. July 18, 1888.)*

## 1. INTOXICATING LIQUORS—SALE TO MINORS—WHAT IS.

Where a minor approaches a bar with one who calls for two drinks of whisky, and two glasses and a bottle are set up, and both drink, the bar-keeper is guilty of a sale or gift to the minor, though he did not know one of the drinks was intended for him.<sup>1</sup>

## 2. SAME—INDICTMENT—SUFFICIENCY—CONSENT OF PARENTS.

An indictment under Code Ala. 1876, § 4205, charging a gift or sale of intoxicating liquors to a minor "without the requisition of a physician, for medicinal purposes," charges no indictable offense; the above act having been amended by act of February 26, 1881, under which the sale is legal if made by or with the consent of the parent, guardian, or person having the management and control of the minor, or upon the prescription of a physician.<sup>1</sup>

Appeal from circuit court, Jackson county; LEROY F. BOX, Judge.

*Brown & Kirk*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

STONE, C. J. The defendant was indicted under section 4205 of the Code of 1876, charging that he sold or gave away "spirituous, vinous, or malt liquors to Forest Driver, a minor, without the requisition of a physician, for medicinal purposes." Forest Driver's minority was clearly proved, and it was both proved and admitted that Page, a saloon keeper, sold the spirituous liquor, and that it was drunk at the counter of the saloon in Page's presence. The case is not distinguishable from *Walton v. State*, 62 Ala. 197, save in a single particular, presently to be pointed out. The testimony most favorable to the accused was that of the defendant himself. He testified that, "on one occasion last fall, Driver's uncle, Dave Driver, came into my saloon, and called for two drinks of liquor, and paid for them. He drank one, and handed the other to his nephew, who was standing near by, and he, Driver, drank it. I saw him when he took the liquor and drank it. I did not say anything or do anything to prevent his taking the drink, but I did not know at the time he got the liquor that he intended one of the drinks for his nephew, Driver." This alleged want of knowledge on Page's part that one of the drinks bought and paid for by Dave Driver was intended for Forest Driver, the minor, is the difference between this case and that of *Walton*, *supra*. Forest Driver, the minor, testified that "on one occasion, in the fall of 1887, his uncle, Dave Driver, took him, witness, into the defendant's saloon, where the defendant was at the time behind the counter waiting upon customers, and called for whisky. The defendant set out two bar glasses and a bottle of whisky upon the counter, and he, witness, and his uncle, poured out a drink each and drank it, and his uncle paid for the two drinks." Hunbree, Page's clerk, testified that "on two or more occasions he had seen the witness, Forest Driver, come into the defendant's saloon with other persons, who would buy whisky at defendant's bar, sometimes from the defendant, and sometimes from this witness, and they would drink it at the bar; the person treating young Forest

<sup>1</sup>See note at end of case.

Driver paying for it. He thinks he saw young Driver's uncle, Dave Driver, do this on one occasion."

The defendant requested the court to charge the jury that "unless the defendant knew at the time he sold the liquor, or received the money, that the minor was going to drink, the jury should find the defendant not guilty." This laid down too exacting a standard. Dave Driver and his nephew approached the counter together; the uncle called for drinks and paid for them; the defendant understood the number of drinks wanted, for he set before them a bottle and two glasses, and the two drank together. Now, although defendant could not know as fact that the uncle intended one of the drinks for his nephew, his conduct showed that he understood such was the intention. Men act in the gravest matters on appearances no stronger than were shown in this case. Even jurors, who impose the heaviest penalties known to the Criminal Code, do not know the defendant is guilty. They act on convictions, not knowledge. Although Page did not know one of the drinks was intended for the minor, the circumstances were such as reasonably to convince him of what was intended.

Our statute, as formerly existing, (Code 1876, § 4205,) forbade the sale or gift of intoxicants to a minor without the requisite certificate of a physician. In *Walton's Case* we declared the purpose of the statute, and we gave full effect to it. We upheld his conviction, because he had aided and participated in the gift of an intoxicating drink to one of the interdicted classes. Less than the rule then declared would have made the statute so easy of evasion as to leave it practically worthless. We adhere to the rule then declared. The statute under which the conviction was had in this case was amended by act approved February 26, 1881, (Sess. Acts, 50; Code 1886, § 4038.) Since then, to constitute the punishable offense of selling or giving intoxicating liquors to a minor, there are two categories, either of which legalizes the sale; or rather, under the statute, as framed, there may be said to have been three. The sale or gift was lawful if made by or with the consent of the parent, guardian, or person having the management and control of the minor, or upon the prescription of a physician. The present case is controlled by that statute, as enacted, for it was committed before the Code of 1886 went into effect. The indictment, being framed without reference to the amendment, is imperfect and defective. It fails to charge an indictable offense. *Britton v. State*, 77 Ala. 202. The Code of 1886, § 4038, changes the phraseology of the act approved February 26, 1881. Reversed and remanded.

#### NOTE.

INTOXICATING LIQUORS—SALES TO MINORS. Under the statutes of *Massachusetts* the sale or delivery of intoxicating liquor to a minor is equally an offense, whether made for the use of the minor or the use of a third person. *Com. v. O'Leary*, 8 N. E. Rep. 887. The same is true in *Michigan*. *People v. Garrett*, 36 N. W. Rep. 234. *Contra*, under the statutes of *Connecticut*. *State v. McMahon*, 5 Atl. Rep. 596. See, as to the sufficiency of the indictment in such cases, *O'Bryan v. State*, (Ark.) 2 S. W. Rep. 330. A sale to a third person, as agent for a minor, of which agency the liquor seller has no knowledge, is not a sale to the minor. *Gillam v. State*, (Ark.) Id. 185. The fact that the father of the minor authorized the sale is no defense, under the *North Carolina* act forbidding the sale in any manner, or the giving away, of intoxicating drinks or liquors to minors. *State v. Lowrance*, (N. C.) 2 S. E. Rep. 367. Under the *Michigan* statutes, giving a right of action to any one injured by an intoxicated person against the seller of the intoxicating liquor to such person, defendant is liable for injuries caused by a minor intoxicated by liquor sold by defendant, though such sale was made to the minor with his father's consent. *Flower v. Witkovsky*, 37 N. W. Rep. 364. A physician who "keeps on hand intoxicating drinks or liquors for the purpose of sale or profit," is within the definition of a "dealer" in such drinks, and is guilty of a violation of the *North Carolina* act if he prescribes for a minor, knowing him to be such, drinks or liquors such as, in his judgment, the minor ought to take as a medicine, and thereupon sells or gives him the same, even if he honestly supposes that such act is not forbidden by the law. *State v. McBryer*, (N. C.) 2 S. E. Rep. 755. The written consent of the father of a minor, as follows: "Please let my son John have anything in reason, or a drink when he wants it, and oblige a friend,"—signed and delivered to the defend-

ant by the father, is a continuing authority to sell to such minor, and, until revoked, a complete defense to an indictment for selling liquor to such minor in ordinary retail quantities, without the consent of his parent or guardian. *Mascoovitz v. State*, (Ark.) 4 S. W. Rep. 656. It is a good defense to an indictment for selling intoxicating liquor to a minor, under the *Indiana* statute, that the accused made the sale after the exercise of proper caution, in the reasonable and honest belief that the purchaser was of lawful age. *Kreamer v. State*, 6 N. E. Rep. 841, and note. But the accused must show that he used due care in ascertaining the minor's age, and mere appearance may not always be sufficient. *Mulread v. State*, 7 N. E. Rep. 884. It is not sufficient that he relied upon the minor's representation. *Behler v. State*, 13 N. E. Rep. 272.

(84 Ala. 375)

*NANCE et al. v. NANCE et al.*

(*Supreme Court of Alabama. July 18, 1886.*)

1. HUSBAND AND WIFE—CONVEYANCE TO WIFE—ANTENUPTIAL SETTLEMENT.

A conveyance from a husband to his wife pursuant to an antenuptial settlement, where the wife did not know at the time of the settlement that the husband was indebted, and where no fraud was intended, is valid as against the husband's creditors.

2. SAME—TIME OF CONVEYANCE.

Where such conveyance is effected by separate deeds, one of which is made after the other, but within the agreed time, such later deed is not post-nuptial, but is valid as against the husband's creditors.<sup>1</sup>

3. SAME—IMPROVEMENT OF WIFE'S PROPERTY BY HUSBAND—RIGHTS OF CREDITORS.

Creditors of a husband cannot charge his wife's separate estate with his labor and skill in making improvements thereon, nor with materials furnished by him for such improvements which were exempt from execution in his hands.<sup>2</sup>

Appeal from chancery court, Talladega county; S. K. McSPADDEN, Chancellor.

Action by J. W. Nance and others, judgment creditors of W. H. Nance, against said W. H. Nance and others, to set aside a conveyance made by the latter to his wife. Judgment for defendants, and plaintiffs appeal.

*John T. Heflin*, for appellants. *Bishop & Whitson and Watts & Son*, for appellees.

CLOPTON, J. The defendants were married in February, 1867. Prior to the solemnization of the marriage, an agreement was entered into between them, by which W. H. Nance agreed, in consideration of the marriage, to settle on the intended wife, by good and sufficient conveyances, to be executed on or before the 1st day of January thereafter, certain specified real estate situate in the town of Talladega. The conveyances were executed as provided by the agreement. Appellants, who are judgment creditors of Nance, and who were creditors at the time of the execution of the agreement and of the marriage, seek by the bill to condemn the real estate to the satisfaction of their judgments, on the ground that the agreement and conveyances are fraudulent as to his creditors. Though fraud may be intended by the husband, an antenuptial settlement is not void as to his creditors if the wife has no notice of his fraudulent intent; both must concur, or the wife's right will not be

<sup>1</sup> A conveyance of real property made in consideration of marriage, where the grantee has no knowledge of any intent to delay the creditors of the grantor, is good against the grantor's creditors existing at the time of its execution. *Pieroe v. Harrington*, (Vt.) 7 Atl. Rep. 462. Fraud cannot be presumed in an action to set aside a marriage settlement, but must be proven by clear and satisfactory evidence to have been concurred in by both parties. *Noble v. Davies*, (Va.) 4 S. E. Rep. 206.

That it is necessary that the grantee should have knowledge of and in some way participate in the fraud, in order to render a conveyance void as to creditors, see *Halverson v. Brown*, (Iowa,) 38 N. W. Rep. 123, and note; *Manufacturing Co. v. Turner*, *ante*, 658, and note; *Smith v. Selz*, (Ind.) 16 N. E. Rep. 624, and note.

<sup>2</sup> To the point that creditors cannot complain of a conveyance of exempt property by their debtor, although without consideration, see *Sannoner v. King*, (Ark.) 5 S. W. Rep. 397, and note; *Taylor v. Duesterberg*, (Ind.) 9 N. E. Rep. 907, and cases cited in note. Fraud cannot be predicated upon the alienation of exempt property. *Taylor v. Duesterberg*, *supra*.

affected thereby. In *Pruitt v. Wilson*, 108 U. S. 22, the husband was the owner of a large amount of property, consisting chiefly of lands, which he conveyed to his wife in consideration of marriage. He was insolvent, his property being worth about \$50,000 and his debts exceeding \$70,000. Though the wife knew that he was embarrassed and in debt, there was no evidence that she was aware of the amount of his property, or the extent of his debts, or that he had any purpose except to induce her to consent to the marriage. It is said: "There is an entire absence of elements which vitiate even an ordinary transaction of sale, where, if set aside, the parties may be placed in their former positions. And an antenuptial settlement, though made with a fraudulent design by the settlor, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement." It may be that, at the time of the agreement, Nance was in fact insolvent; but, if so, there is no evidence tending to show that he himself was aware of it at that time. It was subsequently revealed by the development of the condition of the mercantile business in which he was engaged. The wife was not informed, and had no reason to believe or suspect, so far as appears from the evidence, that he was in debt. Both parties testify, and there is nothing which casts a doubt on the truthfulness of their statements, that no fraud was intended, and the sole consideration of the agreement was the marriage as expressed therein; the wife requiring a settlement to be made on her as a wise and prudent provision against future misfortune or adversity. The evidence wholly fails to show that she was prompted by a fraudulent intent, or that she participated in any such purpose on the part of her husband.

Two conveyances were made by Nance to his wife at different times, but both within the time required by the agreement; distinct lots being embraced in each conveyance, and both conveying only the two lots expressly designated and stipulated. Counsel contend that the first conveyance should be regarded as having been made and accepted in full satisfaction of the agreement, leaving the second conveyance purely post-nuptial. This position is untenable. Fraud cannot be inferred from the mere fact that two conveyances were executed, when one would have answered. Marriage is a valuable consideration, and often regarded as of the highest degree of value. The husband was under a moral and legal obligation to fully perform the contract upon the faith of which the wife entered into the marital relation. Had he, after making the first conveyance, refused to convey the other lot specified in the agreement, a court of equity would have enforced its specific performance by compelling the execution of a conveyance to such other lot, and will sustain, when voluntarily done, what would have been compelled. *Lockwood v. Nelson*, 16 Ala. 294.

The evidence shows that the husband expended his skill and labor in making valuable erections and improvements on the lots after the marriage, and it is insisted that complainants have a right to condemn to their demands the value of the labor. The bestowment of the labor in improving the separate estate of the wife did not constitute her a debtor to the husband, nor can her separate estate be charged therewith in favor of the husband's creditors. As personal labor is not the subject of compulsory sale for the payment of debts; and as a decree *in personam* cannot, in such case, be rendered against the wife, a court of equity is powerless to appropriate the value of the labor to such purpose. In *Hoot v. Sorrell*, 11 Ala. 886, where this question was considered and decided, it is said: "The labor was not susceptible of seizure, and the auxiliary jurisdiction of equity cannot operate upon it. When the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors charge it with the value of the labor." Materials furnished in making erections or improvements on the wife's separate real estate by the husband

with his own money, if he is embarrassed, will be regarded a gift in fraud of his creditors, who may make her estate liable therefor. But her estate will not be charged unless the bill alleges and the proof shows that the materials furnished by the husband were, in his hands, subject to their claims. If the husband's power of disposition is not restricted as to the creditors, they cannot complain, as no wrong is done to them. A creditor cannot impeach as fraudulent a sale of voluntary disposition of property which by statute is exempt from the payment of debts. In a conveyance or other disposition of such property he has no interest, and is not thereby delayed, hindered, or defrauded, as he could not have subjected the property if retained by the debtor. At the time the materials were furnished by the husband, personal property to the amount of \$1,000 was exempt. The duty to select what particular property he will retain as exempt is devolved on the debtor, when he owns personal property exceeding in value the amount exempted, and such selection must be made before there is a sale under legal process. But if he has not property exceeding in value the amount exempted, a selection is not required. In such case, the statute "attaches the exemption as absolutely and unconditionally as if the particular property was specially designated and declared exempt." *Alley v. Daniel*, 75 Ala. 403; *Fellows v. Lewis*, 65 Ala. 343. The averments of the bill may be sufficient, but the whole tendency of the evidence is that at the various times when the materials were furnished, and the engine and other machinery were paid for, partly with the money of the husband, all his personal property, including the money so used, was of less value than \$1,000. Affirmed.

(85 Ala. 269)

## WILSON v. LOUISVILLE &amp; N. R. Co.

(Supreme Court of Alabama. July 18, 1883.)

## NEGLECT—INJURY TO BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a brakeman on defendant's train, while descending the ladder on the side of the caboose, not in the discharge of his duty, but for some purpose of his own, was struck and injured by the supply-pipe of a water-tank. He had been on the road for three months, knew of the proximity of the tank, and that there was not sufficient space for a person to pass between the pipe and the train. Held, that plaintiff was guilty of contributory negligence.<sup>1</sup>

Appeal from circuit court, Elmore county; JOHN MOORE, Judge.

Action for personal injuries, brought by John A. Wilson against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals.

*Brickell, Semple & Gunter*, for appellant. *Jones & Falkner*, for appellee.

CLOPTON, J. Appellant sues to recover damages for injuries suffered while engaged in the service of appellee as a brakeman on a freight train, from having been struck by the supply-pipe of a water-tank while he was descending from the top of a caboose by means of an iron ladder attached to the side thereof. The *gravamen* of the action is that the defendant knowingly and negligently constructed the water-tank so as not to leave sufficient room between the pipe and the train for the body of a person to pass, which rendered it dangerous to employes, in the discharge of duty, while trains were passing. The injury of the plaintiff, and the circumstances under which it occurred, are not controverted. The case was tried on the issue of negligence of defendant in the construction of the tank, and of contributory negligence on the part of plaintiff. The court gave the affirmative charge in favor of

<sup>1</sup> As to what constitutes negligence, and the province of the court and the jury in determining the question, see *Water-Works Co. v. Hubbard*, *ante*, 607, and cases cited in note; *Ford v. Railroad Co.*, 2 N. Y. Supp. 1. See, also, *Railroad Co. v. Gower*, (Tenn.) 3 S. W. Rep. 324; *Scott v. Navigation Co.*, (Or.) 18 Pac. Rep. 98, and note; *Bushby v. Railroad Co.*, (N. Y.) 14 N. E. Rep. 407.

the defendant. Generally, negligence is a mixed question of law and fact; and it is for the consideration of the jury, when the evidence is conflicting, or only tends to prove the facts, or, if different minds may reasonably draw different inferences, though the facts are uncontroverted. The court should not take the question from the jury, unless the facts are undisputed, or conclusively proved, and the inferences indisputable, or unless the rule of duty is clearly defined, and is invariable, whatever may be the circumstances, or unless the court could properly sustain a demurrer to the evidence. *Railroad Co. v. Jones*, 71 Ala. 487; *Railroad Co. v. Bayliss*, 74 Ala. 150. The liability of defendant to answer in damages to the plaintiff, "when the injury is caused by reason of any defect in the ways, works, machinery, or plant connected with, or used in, the business of the master or employer," as provided by the first subdivision of section 2590 of Code of 1886, is qualified by the subsequent subdivision: "Nor is the master or employer liable under subdivision one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master of employer, or some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." Under the statute, negligence in causing, or failing to discover or remedy, a defect, is essential to liability. It does not undertake to define what shall constitute a defect, or negligence in regard to the condition of the ways, works, machinery, or plant. To determine these matters, reference must be made to the principles of the common law. Therefore, whether the plaintiff's right to recovery is based on the statutory or common-law liability of an employer, the measure of defendant's duty to plaintiff is essentially the same. We have heretofore considered in several cases the duty which railroad companies owe to their employees. A statement of the rules as settled will answer the purposes of this case. Unquestionably the law devolves the duty to use ordinary care and diligence, to furnish safe and suitable instrumentalities and appliances for the use of the employees in their business, and to keep the ways, works, machinery, and plant free from defects which are dangerous, so as not to expose their employees to unnecessary perils,—such care and diligence as men of ordinary care and prudence would exercise under like circumstances. But the company does not owe to employees the duty to adopt every new invention, though it may be deemed less dangerous by some persons who are regarded as skillful and experienced. The rule as declared is: "A railroad company's duty to its employees does not require it to adopt every new invention or appliance useful in its business, although it may serve to diminish risks to life, limb, or property incident to its service. It is sufficient fulfillment of duty to adopt such as are in ordinary use by prudently conducted roads, engaged in like business, and surrounded by like circumstances." *Railroad Co. v. Allen*, 78 Ala. 494; *Railway Co. v. Propst*, 83 Ala. 518, 3 South. Rep. 764. If the apparatus used to supply the engine with water was constructed in the same manner, and no nearer to passing trains, than those constructed and ordinarily in use on other well and prudently conducted roads, negligence, founded on the manner of construction, cannot be imputed to defendant. Had the bill of exceptions shown that these facts were conclusively proved, the charge of the court would have been free from error, on the ground that the defendant was not guilty of negligence; but, on its statement that such was the tendency of the evidence, inferences had to be drawn, which should have been left to the jury.

In *Railway Co. v. Holborn*, ante, 146, where we construed section 2590 of the Code of 1886, we held that the section takes from the employer the special defenses growing out of the relation of employer and employe, but left him the defense of contributory negligence. The next question, then, is, should the court have declared, as a conclusion of law from the evidence, that there was contributory negligence on the part of the plaintiff? Previous to his employ-

ment, and with a view of being employed; the plaintiff had gone over the road twice on a pass furnished by defendant. He had been acting as brakeman over two and a half months, passing over the road two or three times a week, and the train on which he was brakeman had occasionally stopped at the water-tank where the injury occurred. From these facts, the inference is irresistible that the plaintiff knew, or ought to have known, the location of the tank, and the dangerous proximity of the supply-pipe to a passing train. But the mere knowledge of plaintiff of the danger is not, of itself, a defense, but is a circumstance to be considered on the question of negligence. Whether or not he was guilty of negligence depends on the use which he made of such knowledge. If the plaintiff were going from his regular position on top of the train to discharge some duty required by the nature of his employment, a different question would be presented; but, as appears from the evidence, he was going down to enter the caboose for his individual purpose. The proper inquiries arising on the circumstances of the case are, did the plaintiff use ordinary care, such as men of ordinary prudence like situated would exercise, in attempting to descend the ladder attached to the caboose, while the train was in motion, and when he might have reasonably expected danger, without first observing the position of the train, and the probable distance from the tank? And did he use such care, when he voluntarily abandoned, after having started, the descent by the ladder attached to the opposite side of the caboose, and attempted to go down on the side exposed to the danger? A short time before the accident occurred the train had stopped at a tank to take water. When it moved forward, the plaintiff, who was on the ground discharging duties required of brakemen, ascended to the top of the train, and on his way to his post met another brakeman, with whom he had a brief conversation, and then went back to the caboose for the purpose of going down to eat a lunch. He sat down his lamp, and started to descend on the side opposite the tank, but, seeing some one sitting in the door, returned, and was descending on the other side, when he was struck by the supply-pipe. This was about 3 o'clock in the morning. The conduct of the plaintiff showed consciousness of the side of the caboose on which he could go down without exposure to special danger. Without attempting to enter the caboose, he went back to the top, and then descended on the other side. Though he must have known that the tank was not exceeding two miles from the place where the train last stopped, he proceeded to go down without a light, and either did not look for the tank, or did not think of its location. In either event, under the circumstances, he not only failed to observe ordinary care, but his conduct verges on gross carelessness. The indisputable inferences from the undisputed facts are that the foregoing inquiries must be answered in the negative, and that plaintiff's negligence proximately contributed to his injury. The location of the tank, and the nearness of the pipe to a passing train, were obvious. The plaintiff had ample opportunity of knowing the danger, which only required usual and ordinary observation. Under these circumstances, it was not the duty of the defendant to give him express warning that it would be dangerous to attempt to descend from the top of the train when it was passing the tank. *Baylor v. Railroad Co.*, 40 N. J. Law, 23. Affirmed.

(84 Ala. 496)

REYNOLDS *et al.* v. BELL.

(Supreme Court of Alabama. July 19, 1888.)

## SET-OFF AND COUNTER-CLAIM—WHEN ALLOWABLE—FAILURE TO DELIVER FERTILIZER.

Plaintiffs agreed to sell defendant 20 tons of fertilizer for use on his plantation, but they delivered only 9½ tons. The evidence showed that plaintiffs informed defendant that they had received a large amount of fertilizer, and told him to pile up his 20 tons separately in one corner of their warehouse, and that, after defendant did this, plaintiffs allowed their other customers to take 10½ tons from defendant's

pile, promising to replace it in time for his use that year, which they failed to do. *Held*, that defendant was entitled to recover for the damage caused to his crop by plaintiffs' failure to deliver the entire amount of fertilizer agreed upon.<sup>1</sup>

Appeal from circuit court, Barbour county; J. M. CARMICHAEL, Judge.

This case was before this court on a former appeal. 78 Ala. 511. The suit was brought by Reynolds & Lee against John T. Bell to recover the price of nine and one half tons of "Alabama Fertilizer," sold and delivered by them to the defendant. The defense set up is that plaintiffs agreed to sell and deliver to defendant 20 tons of this fertilizer, at a stipulated price, with notice that it was intended for use on defendant's cotton crop. Upon repeated promises by plaintiffs to deliver the entire amount in due time, defendant delayed making efforts to purchase elsewhere until it was too late to do so. The plaintiffs delivered nine and half tons, and failed to deliver the balance ordered by the defendant and promised to be delivered by the plaintiffs. The defendant recouped the damages sustained by the failure to deliver the remaining 10½ tons. There was testimony tending to show that, when a large amount of the fertilizer was received by plaintiffs, plaintiffs informed defendant of such receipt, and told him "to pile up his twenty tons in one corner of plaintiffs' warehouse, separate from the main bulk;" that this was done by defendant, Bell, who took therefrom, from time to time, nine and one half tons; that plaintiff had allowed other customers to take the remaining ten and a half tons of Bell's fertilizer, and that plaintiffs made repeated promises to defendant that he, defendant, should have the remainder of his fertilizer in "plenty time" for use on his crop. At the request of the defendant, the court gave the following charge, to the giving of which the plaintiffs duly excepted: "If the jury believe from the evidence (1) that the plaintiffs agreed to sell and deliver twenty tons of Alabama Fertilizer at \$38 per ton, with notice that it was intended for use on the defendant's cotton crop, to be grown and raised on his plantation in Barbour county, Ala., in the year 1888; and (2) that the plaintiffs failed or refused, on demand of defendant, to deliver ten and a half tons of such fertilizer; and (3) that under the influence of repeated promises of the plaintiffs, if such promises were made, the defendants delayed making efforts to purchase the other ten and a half tons of the twenty tons of fertilizer for said use from others or elsewhere, until it was too late to do so, or he was unable to do so; and (4) that all the lands upon which the fertilizer was designed to be used were prepared and cultivated in a farmer-like manner; and (5) that upon a portion of them, the nine and a half tons which were delivered were used, producing 300 pounds or other amount of seed cotton more per acre than that adjoining, which was also planted in cotton, and the quality and cultivation of each part of said lands being precisely the same,—the jury must assess the defendant's (Bell's) damages for the failure of the plaintiffs to deliver the undelivered ten and a half tons of fertilizer according to the profits which defendant lost in the depreciated production of cotton on the part of said lands intended to be fertilized with such undelivered fertilizer, but which was not; and (6) the defendant's damages will offset, as far as they may go, the plaintiffs' debt and interest; and (7) if the defendant's damages exceed in amount the plaintiffs' debt, with interest, then the jury must deduct the plaintiffs' debt and interest from the defendant's damages, and the balance, after such deduction, must be the amount of their verdict for the defendant." There was judgment for defendant, and plaintiffs appeal.

*Jere N. Williams*, for appellants. *H. D. Clayton, Jr.*, for appellee.

SOMERVILLE, J. The only exception presented for our review is to the charge given by the circuit court, at the request of the defendant, in relation to his

<sup>1</sup> As to what constitutes a valid set-off and counter-claim, see *Weston v. Turver*, 1 N. Y. Supp. 807; *Maders v. Lawrence*, 2 N. Y. Supp. —; *Lapham v. Osborne*, (Nev.) 18 Pac. Rep. 881, and cases cited in note.

counter-claim urged by way of set-off and recoupment to the action of the plaintiffs. That this charge is correct, and announces principles of law appropriate to the case presented by the evidence, is clear, unless the one objection urged to it in argument can be sustained. *Bell v. Reynolds*, 78 Ala. 511, 56 Amer. Rep. 52; *Griffin v. Colver*, 16 N. Y. 489, 69 Amer. Dec. 718, note, 724. The criticism on the charge is that it ignores that portion of the evidence which tends to prove that the plaintiffs' contract to deliver the defendant the 20 tons of fertilizer had been discharged by the delivery of the full quantity to the purchaser, and that the second obligation incurred to deliver 10½ tons, based on the plaintiffs' alleged conversion of this quantity of the 20 tons said to have been delivered, imposed new relations on the contracting parties entirely different from those growing out of the original agreement. The contention is that this new agreement excluded by implication any liability for the profits which defendant would probably have realized from using the fertilizer upon the land, which he had prepared for its use, in the cultivation of cotton. We held, when the case was last before us on appeal, that under the contract of the plaintiff to deliver the 20 tons, with notice that it was intended for use on the defendant's cotton crop, to be grown on his plantation in Barbour county, the defendant could recover, by way of set-off or recoupment, under the provisions of the statute, (Code, 1886, § 2683,) the profits which he would have realized but for the plaintiffs' default in delivering the 10½ tons in controversy. The special facts brought to the knowledge of the plaintiffs were held sufficient to bring the damages claimed for such lost profits within the legal contemplation of the contracting parties, and such damages were held to be neither remote nor uncertain, but to be proximate and capable of accurate ascertainment. *Bell v. Reynolds*, 78 Ala. 511, 517. We do not concur in the interpretation put on the evidence by the appellants' counsel, nor in the inferences which he seeks to deduce from it. Admitting, as contended, that the plaintiffs, after delivering the full amount of the fertilizer agreed to be delivered by them to the defendant, converted to their use 10½ tons of it, nevertheless the evidence tends to show that they promised to replace it in time for the defendant to use it on his cotton crop that year. This was precisely the original obligation incurred by them as to this particular portion of the goods sold. It had reference to the same crop, the same uses, and the same land originally within the contemplation of the parties. The same damages flowed from the default, and were, therefore, in like manner, recoverable by way of set-off or recoupment, as if no new contract had been made. Nor, in this aspect of the case, is the charge objected to so misleading as to be erroneous, as it could not, in our opinion, have worked any prejudice to the plaintiffs. The case, in our judgment, remains unchanged by this new phase of the evidence, and the judgment must be affirmed.

(35 Ala. 513)

**SUMTER COUNTY v. MITCHELL, County Treasurer, et al.**

(*Supreme Court of Alabama. July 19, 1888.*)

**1. EQUITY—ADEQUACY OF REMEDY AT LAW—ACTION AGAINST COUNTY OFFICERS.**

A bill by a county against its treasurer and collector and their respective sureties, which alleges that both officers are in default to the county, and that on account of the manner in which they have managed the county taxes it is impracticable to ascertain the amount with which each is chargeable, and which prays that the collector be compelled to settle his accounts, that judgment be rendered against him and his sureties for the amount found due from him, that the collector and treasurer interplead and settle the accounts between them, and that a decree be made establishing the amount due from the treasurer, so as to fix his liability and that of his sureties, is not within the jurisdiction of a court of equity, the remedy at law being adequate.

**2. SAME—PLEADING—MULTIFARIOUS BILL.**

Such a bill is also multifarious, the causes of action against the two officers being distinct.

v. 4so.no.17—45

**Appeal from chancery court, Sumter county; S. K. McSPADEN, Chancellor. Bill by Sumter county against D. W. Mitchell, county treasurer, Brunson, county tax collector, and their respective sureties. The chancellor dismissed the bill upon demurrer, and the complainant appeals.**

*T. B. & R. P. Wetmore and R. Chapman, for appellant. A. G. Smith and Geo. G. Lyon, for appellees.*

CLOPTON, J. Appellant takes the appeal from a decree of the chancellor sustaining a demurrer to the bill, which is brought on behalf of Sumter county against the tax collector and the treasurer, and the sureties on their several official bonds. It alleges that the defendant Brunson was elected tax collector in 1880, re-elected in 1884, and after each election, before entering on the duties of his office, executed bond as required by law; and that D. W. Mitchell was elected treasurer of the county in 1884, and gave bond for the discharge of the duties of his office. It further alleges that the collector has been in default during both his terms of office, and that each of the officers is in default several thousand dollars, the aggregate sum exceeding \$12,000; but, on account of the manner in which they have dealt with and managed the county taxes, it is impracticable to ascertain the amount with which each should be charged. The leading purposes of the bill are to compel the collector to settle his accounts, and the collector and treasurer to take proceedings to settle their accounts between themselves, (in the nature of interpleader,) so that the court may determine and adjudicate the sum for which each is liable. The bill properly concedes that, the treasurer being the law-appointed and exclusive custodian of the money of the county, a suit at law or in equity cannot be commenced by the county, and a money judgment or decree recovered against him and his sureties, until the expiration of his term of office by limitation, removal, resignation, or death. While, therefore, a money decree is sought against the collector and his sureties, no such decree is asked against the treasurer and his sureties, but only that the court ascertain and establish the amount which should have been in the county treasury on a specified day, being the day on which the committee appointed by the court of county commissioners reported the condition of the books of the collector and treasurer. It is manifest that there is a joinder of distinct suits against two public officers, who have given bonds for the performance of their duties, between whom there exists no official nor legal connection, except that one is the collector of taxes, and the other is the custodian and disbursor of the funds of the county, — a joinder of distinct claims against several defendants, which renders the bill multifarious, unless they are so connected by extraneous facts as to constitute their conjunction necessary to complainant's equity and to complete relief.

Courts of equity possess what is called auxiliary jurisdiction, which is exercised not to grant relief, but to aid in the prosecution and maintenance of legal rights in actions at law pending or to be brought, — suits for discovery proper, or for the perpetuation of testimony. Complainant, however, does not invoke the exercise of this jurisdiction. In suits of these classes, when the discovery is obtained, or the testimony procured, the function of the court ceases, and no decree is made. The discovery or testimony is merely preserved, and may or may not be used in the action at law. The court does not and cannot find and establish the facts discovered or proved, so as to make them conclusive on the parties. In the present case, the complainant prays for relief, and that a decree be made fixing and establishing the amount with which the treasurer should be charged so as to make it conclusive proof thereof in a subsequent suit on his official bond, if such suit should become necessary. This, the court is without power or jurisdiction to do. Besides, the bill is not framed as one for discovery in its technical and proper acceptation. It does not make a case of equitable cognizance against the treasurer

and his sureties. The statutory declaration is, the powers and jurisdiction of courts of chancery extend "to all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals;" which is regarded as an affirmation of the pre-existing rule that courts of equity will not take jurisdiction when the rights of the parties litigant are wholly legal, if there is a plain, adequate, and complete remedy at law. Suits will not ordinarily be entertained, the sole object of which is to recover damages for the breaches of bonds, official or other. In such cases, adequate legal remedies are afforded by an ordinary action at law or by summary proceedings. There must be some independent equity, such as the enforcement of a lien, the vacation and removal of fraudulent conveyances, the suppression of evidence necessary to correct information of the true state of accounts, or some other special ground of equitable interference. The following cases may be cited as illustrative of the rule and its application, in each of which the general equity of the bill was maintained on the ground that a subject-matter properly within the jurisdiction of a court of chancery was involved. *County of Dallas v. Timberlake*, 54 Ala. 403; *Lott v. Mobile Co.*, 79 Ala. 69; *Schuessler v. Dudley*, 80 Ala. 547, 2 South. Rep. 526. In every case where the suit has been entertained there existed some special ground of equity which took it out of the operation of the general rule. This principle was expressly decided in *State v. Bradshaw*, 60 Ala. 239. A bill was filed in the name of the state for the use of Sumter county, against the administrator of the deceased county superintendent of education, and the sureties on his official bond, to compel the settlement of his accounts, and to vacate a settlement made by the administrator in the office of the superintendent of public instruction, in which he had obtained, by fraud or collusion, credits for vouchers which had been used and allowed in former settlements. It was held that a court of equity will not entertain a bill against a public officer, who has given bond for the performance of his duties, to compel a settlement of his accounts, or for the correction of errors in a settlement made with a proper officer, on the ground that he is a trustee, or of fraud, or of complicated accounts, unless there is a strong case of entanglement. Appellant does not controvert that an independent equity is essential, but insists that the case made by the bill involves a subject-matter within the jurisdiction of a court of equity. The contention is founded on the proposition that the collector and treasurer are trustees of the same fund, and agents of a common principal, who have neglected their official duties, and mismanaged the business of their respective offices; payment having been made by taking due-bills, or in other irregular ways, or by remittance in gross, without specifying the year to which they should be applied,—the deficiencies in preceding years having for a series of years been covered by the application of taxes collected for the current year; and by having mingled their private financial transactions with each other with the management of the money of the county, from which confusion and complication in accounts resulted; and that now they differ and dispute as to the true state of the accounts,—each claiming that large sums are chargeable to the other for which he is not liable. In *State v. Bradshaw*, *supra*, it is said "that bonded public officers, charged with the collection, custody, and disbursement of moneys, public and private, and whose duties are hedged about by a complete system of legal directions and restraints, do not fall within that class of trustees who can be brought to account and settlement in a court of equity, unless some special equity can be averred and shown." And the mere relation of principal and agent does not enable the principal to maintain a suit in equity for accounting, when it is really not fiduciary in its nature, and no obstacle to a recovery at law intervenes. *Crothers v. Lee*, 29 Ala. 337. It is contended that though the bill may not make a case cognizable in equity against the collector and treasurer singly, the suit is maintainable against them and their respective sureties jointly, on account of the danger

that complainant will not be able to recover all to which the county is entitled from both or either, if driven to separate actions at law, where the matter would be submitted to different juries on probably different evidence; such danger arising from their conflicting claims as to certain payments and credits, and the complication of accounts as between themselves, which warrants equitable interposition to compel them to litigate with each other, and settle the portion of the aggregate defalcation for which each is responsible. Neither the inability to make proof, nor its uncertainty, affects the adequacy of the legal remedy; and it may be remarked that the entanglement of accounts which authorizes the interference of equity is a complication between the complainant and the defendant, and not between co-defendants, against whom distinct claims are prosecuted, though both may be agents of the principal. Independent of this consideration, the bill does not make a case of complicated accounts. The evidence is readily attainable to show the amount with which each officer should be charged, and the burden is on him to show that he has properly accounted for or disbursed the same. The report of the committee appointed by the court of county commissioners, which is made an exhibit to the bill, shows that there is no confusion in the books of either officer; and that the only contention between them is that the collector asserts that the treasurer has not credited him on his books with certain payments made him, and the treasurer asserts that he has given him credit for the same. Such is not a case of entanglement of accounts of which a court of chancery will take jurisdiction. *Dickinson v. Lewis*, 34 Ala. 638. It is further insisted that, though the bill does not contain the essential elements of a bill of interpleader proper, it should be maintained on analogous principles, as in the nature of a bill of interpleader; and the doctrine is invoked that old equitable remedies will be modified, or new ones invented, if necessary, to meet the emergencies of the case. Though the remedial powers of equity are so broad and flexible as that it is difficult to limit the remedies which it can grant, they are not so flexible and expansive as to extend, by the modification or invention of mere remedies, the jurisdiction of chancery to cases of which it did not previously have original and independent jurisdiction. The remedies may be broad and flexible, but the jurisdiction is defined and limited by settled rules. Affirmed.

(35 Ala. 47)

**CENTRAL RAILROAD & BANKING CO. v. SMITHA *et al.***

(*Supreme Court of Alabama. July 19, 1888.*)

**CARRIERS—OF GOODS—LIMITING LIABILITY.**

Where defendant agreed, in consideration of being released from all liability except for fraud and gross negligence, to transport horses at a reduced rate, the shipper to have free passage on the train with the horses, and to care for them through the route, it is not liable for injury to the horses caused by want of proper care on the route, though it allowed the shipper to ride on its passenger train.<sup>1</sup>

Appeal from circuit court, Barbour county; J. M. CARMICHAEL, Judge.

Action by Smitha & Chastain against the Central Railroad & Banking Company of Georgia, for damages to certain horses while being carried on defendant's road, and for the violation of a certain contract of transportation. The evidence tends to show that when the plaintiff Smitha arrived at Atlanta, Ga., he presented the contract, with the bill of lading attached, to the agent of the defendant, and that the agent gave him a passenger ticket, free of charge, from Atlanta to Eufaula; that he then went on a regular passenger train from Atlanta to Macon, Ga.; that neither the defendant nor any of its agents prohibited him from going on the passenger train, nor did they insist

<sup>1</sup> As to how far a common carrier may limit his common-law liability by contract, see *Brown v. Steam-Ship Co.*, (Mass.) 16 N. E. Rep. 717; *Tarbell v. Shipping Co.*, (N. Y.) 17 N. E. Rep. 731; *Kaiser v. Hoey*, 1 N. Y. Supp. 499; *Railroad Co. v. Thomas*, (Ala.) 3 South. Rep. 302, and note; *Railroad Co. v. Sherrod*, (Ala.) 4 South. Rep. 22.

that he go on the same freight train that carried the stock; that at Macon he was told that the train which was to carry the stock to Eufaula would lie over at Smithville during the night, and go on to Eufaula the next morning; that the horses were then seemingly in a good condition; that he nevertheless went on to Eufaula on the regular passenger train, and arrived there the day before the horses came on the freight train; that he did not see the stock put in the car at Macon, Ga., after they were taken out, fed, and allowed to walk around the yard, and that he did not attend to them during their delay at Smithville; that, when the horses arrived at Eufaula, most of them were sick with a cold or some malady of that kind, some of them very badly skinned up, and that four of them afterwards died. The defendant asked the following charges, in writing, to be given to the jury, and excepted to the refusal by the court to give them: "(2) Giving the shipper a ticket at Atlanta that entitled him to ride on the passenger train, and permitting him to ride on the passenger train, was not a waiver of the condition in the contract that the shipper was to care for the stock during delays." "(4) If the disease or ailment which it is claimed the 16 horses suffered from is shown to have been contracted while the horses were lying at Smithville, and that their condition was produced by it, awaiting the train to Eufaula, the defendant is not liable therefor, unless the time the car remained there was unnecessarily long. (5) If the damage to the 16 horses complained of arose from the want of food and water during the lay-over at Smithville, the defendant is not liable therefor, if it is shown that the shipper did not feed or water or care for them, or request the company to do so. (6) The undertaking of the railroad in transporting the stock did not require that it should be done other than by regular trains; and, if it is shown that the railroad forwarded the stock by the first freight train that ran to Eufaula, there was no negligence in this, although the car containing the horses lay over at Smithville twelve hours. (7) The shipper's contract bound him to take proper care of the stock during the time of delays; and, if it is shown that the stock lay over at Smithville twelve hours, awaiting the first and regular train to Eufaula, it was the shipper's duty to care for them; and, if the testimony shows that the damage complained of was caused by the shipper's failure to care for the stock during such time, the defendant is not liable." There was verdict and judgment for the plaintiffs, and the defendant appealed, and now assigns the refusal of the court to give the foregoing charges as error.

*Roquemore, White & Long*, for appellant. *A. H. Merrill*, for appellees.

STONE, C. J. Railroads, as now operated, are relatively a new invention, and transportation upon them of cattle or live-stock is a still newer commercial appliance. In the very nature of things, more than ordinary risks attend such shipments. The reasons for this increase of hazard or risk will naturally suggest themselves. So great is the liability of live-stock transported in cars to be injured in the transit, that in some courts it is held that the common-law liability of carriers does not attach to such service. Cooley, the distinguished constitutional lawyer, (Torts, 641,) says: "The common-law liability of a common carrier does not apply in all respects to railroad companies as carriers of live-stock." He is more or less supported in this view by the following adjudged cases, most or all of them from courts which rank among the highest: *Smith v. Railroad Co.*, 12 Allen, 531; *Squire v. Railroad Co.*, 98 Mass. 239; *Penn. v. Railroad Co.*, 49 N. Y. 204; *Clarke v. Railroad Co.*, 14 N. Y. 570; *Farnham v. Railroad Co.*, 55 Pa. St. 53; *Railroad Co. v. McDonough*, 21 Mich. 165; *Railroad Co. v. Dunbar*, 20 Ill. 624; *Railroad Co. v. Whittle*, 27 Ga. 535; *Railway Co. v. Nichols*, 9 Kan. 235. While we do not consider it necessary to announce any opinion on the general correctness of the proposition stated above, we think we may safely adopt the opinion of the New York court of appeals, that "while common carriers

are insurers of inanimate property against all loss and damages except such as are inevitable, or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care." *Penn v. Railroad Co.*, 49 N. Y. 204; *Clarke v. Railroad Co.*, 14 N. Y. 570; *Railroad v. McDonough*, 21 Mich. 165; *Railroad Co. v. Johnston*, 75 Ala. 596. It is settled in this state, and is generally, if not universally, conceded, that, within certain limits, common carriers may by contract limit the extent of their liability. The limits are that such contracts, to be legal, must be fair and reasonable, and that carriers cannot contract for immunity against the consequences of their own negligence. *Steele v. Townsend*, 87 Ala. 247. By the terms of the contract of affreightment in this case, the shippers obtained reduced rates for the transportation of their live-stock, and also a passenger ticket for Smitha, one of the shippers and consignees. The contract was signed by both parties. The following are extracts from it: "In consideration of said railroad agreeing to transport the above-described live stock at the reduced rate of seventy dollars per car-load, and a free passage to the owner or his agent on the train with the stock, the said owner and shipper do hereby assume (and release the said railroad company from) all injury, loss, and damage, or depreciation, which the animals (or either of them) may suffer by consequence of either of them being weak, or escaping, or by injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or of being injured by fire, or the burning of any material while in the possession of the railroad; and from any other damages incidental to railroad transportation which shall not have been caused by the fraud or gross negligence of said railroad. And it is further agreed that said owner or shipper is to load, transfer, and unload the said stock (with the assistance of the railroad's agent or agents) at his or their own risk. And it is further agreed that, in case of accidents or delays in time from any cause whatever, the owner and shipper is to feed, water, and take proper [care] of the stock at his own expense. And it is further agreed that the railroad employees shall furnish the owner or person in charge of the stock all proper facilities on trains and at stations for taking care of the same." It needs no argument to prove that the parties, in making this contract, had it in contemplation, and so agreed, that the shipper or his agent would travel the entire route on the same train with his stock. The duties he undertook himself to perform, and from the performance of which he released the railroad, need not be repeated. They are expressed in the contract copied above.

It is contended for the appellees that the railroad, by furnishing to the shipper a passenger ticket at Atlanta, Ga., changed the terms of the contract of affreightment, and remitted it to that of the general liability of common carrier. In other words, that the railroad thereby released the shippers from all duties and releases expressed in the written contract. We cannot agree to this. We find no evidence of any intention to change or modify the contract first made. This case must stand or fall on the contract as expressed in the writing. And there is no injustice in this. The shippers secured reduced rates, in consideration of certain duties they undertook to perform, and certain releases they bound themselves to make. They secured the benefits, and must bear the burden. In *Railroad Co. v. Henlein*, 52 Ala. 606, a contract of affreightment was interpreted, which was not materially different from the present one. It was held to be reasonable and valid in every respect save one. In that case, as in this, there was an attempt to secure the railroad's exemption from all liability for damages, save those which might result from its fraud or gross negligence. We held that it was against public policy, and therefore illegal, to stipulate for immunity from the injurious effects of the railroad's negligence, even though it might not be gross. We adhere to that opinion, and hold that the contract signed in this case is legal and valid, in

every respect pertinent to this case, save the one we have been commenting on. *Railroad Co. v. Henlein*, 56 Ala. 368; *Farnham v. Railroad Co.*, 55 Pa. St. 53; *Railroad Co. v. Dunbar*, 20 Ill. 624; *Railroad Co. v. Whittle*, 27 Ga. 535; *Railroad Co. v. Thomas*, 83 Ala. 343, 3 South. Rep. 802. *Squire v. Railroad Co.*, 98 Mass. 239. It was the duty of Smitha, the shipper in this case, to accompany the car in which his horses were being transported, and to perform the services his contract required of him. That duty was rendered all the more pressing, when he was informed in Macon that, by the road's schedule and connections, the cars containing his horses would be sidetracked at Smithville, and remain there through the night. Any damage the stock suffered in the transit, by reason of the failure to receive the care and attention the shipper bound himself to bestow through the entire route, was his fault, and he must bear the loss.

Charges 2, 4, 5, 6, and 7, asked by defendant, should each have been given, and the circuit court erred in not giving them. Reversed and remanded.

(36 Ala. 208)

### GEORGIA PAC. RY. CO. v. PROPST.

(Supreme Court of Alabama. July 20, 1888.)

#### 1. MASTER AND SERVANT—AUTHORITY OF CONDUCTOR—RIGHT TO HIRE BRAKEMAN.

The conductor of a freight train has implied authority, in case of the sickness of one of his brakemen, to employ a person to take his place.<sup>1</sup>

#### 2. SAME—INJURY TO SERVANT—PROOF OF EMPLOYMENT.

A night watchman about a station was accustomed to go upon defendant's trains to a distant station for his meals, and, while going thither on a freight train, was asked by the conductor, one of the brakemen being sick, to make a coupling for him, in doing which he was injured. *Held*, that there was no such employment as brakeman as rendered the company liable for the injury, under Code Ala. 1886, § 2590, relating to the liability of employers.

#### 3. SAME—PLEADING—ALLEGATIONS OF NEGLIGENCE.

In an action against a railroad company by a brakeman for personal injuries, the defects and negligence causing the injury are averred with sufficient particularity, under Code Ala. 1886, where it is alleged to have been caused (first count) by a defect in the couplings and appliances used for connecting the cars; (second count) by a failure to have a sufficient number of brakemen and servants to operate and manage the train; (third count) by the negligence of the conductor, to whose orders plaintiff was bound to conform, and did conform, and that the injury resulted from his having so conformed.

Appeal from circuit court, Fayette county; S. H. SPROTT, Judge.

Action by William H. Propst, by his next friend, to recover damages for personal injuries sustained while in the employ of the defendant, the Georgia Pacific Railway Company. Plaintiff recovered judgment below, and defendant appeals. For report on former appeal, see 3 South. Rep. 764.

*McGuire & Collier*, for appellant. *Ne Smith & Sanford*, for appellee.

CLOFTON, J. The action is brought by appellee, under the act of February 12, 1885, which constitutes section 2590 of Code 1886, to recover for injuries received while in the service of appellant. The complaint contains three counts, each of which sets forth the fact and kind of employment, and the circumstances under which the injury was received. The difference between the several counts consists in the averments of the cause of the injury. It is averred in the first count that the injury was caused by a defect in the couplings and appliances used for connecting the cars; in the second count, by a

<sup>1</sup> As to the power of railroad employes and agents to bind the company, see the cases cited in the note to the report of this case on a former appeal, in 3 South. Rep. 764. When the regular brakeman is absent, and the proper and safe management of the train so requires, the conductor has implied authority to supply the place of the absent brakeman, and for the time being the person employed by the conductor is an employe of the railroad company, and entitled to recover for an injury caused by the negligence of a co-employe. *Sloan v. Railway Co.*, (Iowa,) 16 N. W. Rep. 381.

failure to have a sufficient number of brakemen and servants to operate and manage the train; and in the third count, by the negligence of the conductor, to whose orders plaintiff was bound to conform, and did conform, and that the injury resulted from his having so conformed. Under the rules of pleading prescribed by the Code, as construed by our decisions, the facts constituting the defects and negligence are averred with sufficient particularity, and are so presented that a material issue can be taken thereon. Each count sets forth a substantial and legal cause of action. The demurrer was rightly overruled.

The refusal of the court to give the affirmative charge requested by the defendant presents a very different question, which is whether, conceding the truth of and all inferences that can be drawn from the evidence in favor of plaintiff, the proof *prima facie* establishes the case made by the complaint. In considering the question thus presented, it should be kept in mind that the burden is on the plaintiff to prove a case within the provisions of the statute defining the liability of employers. Under that statute, the party claiming damages must be an employe at the time of the injury by contract, express or implied, binding on defendant; and the injury must be received while rendering the service required by the particular employment, or in obeying the orders of a superior, to which the employe is bound to conform. Injury received while doing other more hazardous service not pertaining to the employment, by way of accommodation, or self-assumed, is not sufficient. The complaint, in legal effect, sets forth, as the cause of action, that the plaintiff, being in the regular employment of defendant as night-watchman, the duties of which required him to watch and guard the engines and trains, was ordered or directed to leave such employment, and act as brakeman on a coal or freight train, by the conductor, who had control thereof, to whom superintendence was intrusted, and authority delegated to give instructions, and to whose orders he was bound to conform, and was injured in attempting, by order of the conductor, to couple cars at Berry Station, by reason of the negligence or defect above stated. On the former appeal (83 Ala. 518, 3 South. Rep. 764) it was held that, in case of emergency, the conductor has implied authority to supply the place of disabled or missing servants, and to bind the defendant thereby, and that, on the facts alleged in the counts now remaining in the complaint, the plaintiff would be regarded as a lawfully employed brakeman, sufficient to fix a liability on the defendant. But the employment must come within the scope of his implied authority.

The complaint alleging that the plaintiff was injured while acting in the employment and capacity of brakeman, and there being no pretense that he was expressly employed in such capacity by any officer or agent of defendant other than the conductor, the question is, was he ordered by the conductor to act in the capacity of brakeman, under circumstances and in a mode which rendered his employment binding on the defendant? The plaintiff was the only witness examined on his part as to the employment and the circumstances of the injury. His evidence clearly shows that he was employed as night-watchman, and placed at a station called "Patton Mines;" that, by the permission of the superintendent, he was in the habit of going to Millport, where his father resided, about 50 miles distant, to get his meals; and that he voluntarily entered the train at Patton Mines, without any order or request of the conductor, to go to Millport. The plaintiff was on the train of his own accord, and going down the road for his individual purposes. It is true he testifies, generally, that he was ordered by the conductor at Berry Station to brake for a sick brakeman; but this general statement is qualified or explained by his narrative of the occasion and circumstances, and by the words of the order, which clearly show its nature, extent, and purpose. When the train reached Berry Station, which was about 10 miles from Patton Mines, the conductor had three coal cars taken out, in order to get a box car loaded

with cotton. He was standing on the box car, and addressed the plaintiff as follows: "Will, come here, and make this coupling for me;" and the plaintiff was injured in conforming to this order or request. So far as the evidence set forth in the present record goes, this is the first and only order or request made by the conductor, and on this the plaintiff bases his claim of employment as a brakeman. When this case was before us on the former appeal, the complaint contained a fourth count, a demurrer to which had been overruled. This count seems to have been stricken out or omitted after the remandment of the cause, but it alleged the facts substantially as now shown by the evidence. We then held that the count did not set forth a legal cause of action, and that the demurrer should have been sustained. Referring to the order of the conductor at Berry Station to make a coupling, it is said: "Such order or direction, as averred, is entirely without the routine of the conductor's duties, and could not, by its abuse, fasten a liability on the railroad corporation." If a demurrer to a complaint should be sustained on the ground that it fails to set forth a legal cause of action, a demurrer to evidence, which only proves substantially the same cause of action, should also be sustained. More is essential than a mere order or request to couple cars at one time and place, or doing a single act to constitute an employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature. On the case made by the complaint, it is incumbent on the plaintiff to show that he left his regular employment at Patton Mines to act as brakeman on a trip down the road by order or request of the conductor, or while on the train was employed by him to render service as brakeman on the trip in place of a sick or missing brakeman. This the evidence disproves. On the testimony of the plaintiff himself, he has failed to show, *prima facie*, a lawful and binding employment which brought him under the control of the conductor, or subjected him to his orders. If he had previously acted as brakeman, it was of his own volition. He occupied at Berry Station merely the position of a passenger or bystander, who attempted to make the coupling at the request of the conductor as matter of accommodation. The evidence, as now shown by the bill of exceptions, which differs in material respects from the testimony on the first trial, does not entitle the plaintiff to recover on either count of the complaint. Reversed and remanded.

(85 Ala. 99)

COOK *et al.* v. ANDERSON.

(Supreme Court of Alabama. July 20, 1888.)

## 1. LANDLORD AND TENANT—DESTRUCTION OF PREMISES—OBLIGATION TO PAY RENT.

A tenant is not relieved from his covenant to pay rent by the partial destruction of the leased premises by fire during the term, where the lease does not provide for the cessation of rent in such event, nor covenant that the lessor shall rebuild or repair.<sup>1</sup>

## 2. SAME—EVICTION—ENTRY BY LANDLORD TO MAKE REPAIRS.

An entry by the landlord into a portion of the premises, with the assent of the tenant, to make repairs, after a partial destruction by fire, does not amount to an eviction which suspends the rent, nor operate as a rescission of the lease.

## 3. NUISANCE—WHAT IS—KEEPING INFLAMMABLE MATERIALS.

A dealer in builders' materials is not, in the absence of negligence on his part, liable for damages caused by a fire originating from some unknown cause, in the basement of his store, where he kept paints, oils, varnishes, lime, and cotton.<sup>2</sup>

Appeal from circuit court, Montgomery county.

<sup>1</sup>There is no implied covenant on the part of a landlord to repair the demised premises. See *Weinstein v. Harrison*, (Tex.) 1 S. W. Rep. 626, and cases cited in note. See, also, *Murray v. Albertson*, (N. J.) 18 Atl. Rep. 894, and note.

<sup>2</sup>See note at end of case.

Action by P. J. Anderson, the appellee, against Geo. W. Cook & Co., the appellants, to recover the rent of a store on Commerce street in the city of Montgomery.

*Rice & Wiley*, for appellants. *Lomax & Tyson*, for appellee.

CLOPTON, J. The appellee leased to appellants a building on Commerce street, in the city of Montgomery, "for occupation as a grocery store, and not otherwise," for one year from the 1st day of October, 1886, at a rental of \$1,000, payable in equal monthly installments. Appellee brings the suit to recover the installments due on the 1st day of March, April, and May, respectively, 1887. The defendants seek to avoid the payment of the rent in consequence of a fire which occurred November 29, 1886, and so damaged the leased building as to render it unfit for the purposes for which it was leased, in connection with the entry of the plaintiff after the fire to make repairs. The record presents only questions of law arising on facts admitted by both parties. The lease, which is in writing, contains an express covenant to pay rent for the term, and contains no stipulation for the cessation of the rent in the event the building is destroyed, nor any covenant that the lessor shall rebuild or repair. The settled rule is that a lessee of premises destroyed during the term by unavoidable accident is not relieved from an express promise or covenant to pay rent, unless he protects himself by a stipulation that the rent shall cease in such event, or unless the lessor covenants to rebuild or repair, or unless the destruction is of the entire subject-matter of the lease, so that nothing remains capable of being held or enjoyed, which operates a dissolution of the tenancy. *Chamberlain v. Godfrey*, 50 Ala. 530; *Warren v. Wagner*, 75 Ala. 188. The destruction was not entire. Only a portion of the building was damaged. The defendants remained in possession of and enjoyed that part of the building which was not destroyed, keeping a small portion of their goods therein. The plaintiff was entitled to recover unless some avoidable defense exists other than the partial destruction of the building.

Defendants insist that the entry of plaintiff for the purpose of making repairs amounted to an eviction, and discharged them from the payment of rent during the continuance of the eviction. An eviction, to be sufficient to suspend or extinguish the rent, must be tantamount to an expulsion or a motion depriving the tenant of possession and enjoyment of the leased premises. It may be total or partial. There are authorities which hold that, when the eviction is by the lessor from a part of the premises, the tenant may elect whether to abandon them entirely, and put an end to the entire tenancy and rent, or retain possession of the part that remains, free from any liability whatever for rent during the eviction; which Mr. Washburn says "seems now the settled rule of law both in England and generally in the United States." 1 Washb. Real Prop. 564. In this state a different rule, it seems, has been settled. In *Warren v. Wagner*, *supra*, BRICKELL, C. J., says: "When the landlord enters and dispossesses the tenant of a part of the premises, a discharge of the entire rent will not result, unless it be shown that the tenant surrendered or abandoned possession entirely. Nothing less than an entire abandonment or surrender will operate a dissolution of the tenancy and a suspension or discharge of the whole rent. The rent is discharged only *pro tanto*, to the extent of the value of the use and occupation of the part of the premises of which the tenant is dispossessed, if he remains in undisturbed possession of the residue." The same principle was virtually asserted in *Chamberlain v. Godfrey*, *supra*, and *Crommelin v. Thiess*, 31 Ala. 412. The question, however, is not necessarily presented by the record, which renders it unnecessary for us to consider it, or to express any opinion as to which is the sounder and better rule. The admitted facts are that plaintiff only entered for the purpose of repairing the damaged part of the building, and that he so entered with the knowledge and consent of defendants, who resumed posses-

sion of the entire building as soon as the repairs were finished. An eviction is, in its nature, wrongful. There can be no eviction, which will operate to suspend the rent; without agreement, express or implied, where it is with the assent of the lessee for a specified purpose and temporary in its duration, and is not by the assertion of a superior claim or right. The entry of the plaintiff with the consent of the tenant, for the purpose of repairing, in order to render the premises more convenient and beneficial for his use and enjoyment, does not amount to an eviction. *Peterson v. Edmondson*, 5 Har. (Del.) 378. But it is further insisted that the entry of plaintiff with the assent of defendants was the equivalent of a rescission of the rental contract; and *Magaw v. Lambert*, 9 Pa. St. 444, is cited by counsel as sustaining this proposition, where it is said: "If the landlord took possession of the ruins for the purpose of rebuilding without the consent of the tenant, it was an eviction; if with his assent, it was a rescission of the lease; and in either case the rent was suspended." In that case the building was destroyed, and the landlord took possession of the remaining premises, was bargaining for the cleaning of the cellar, and was offering to sell the property and give immediate possession,—exercising acts of ownership. The correctness of the rule may be conceded, when applied to a case where the entry of the landlord, with the assent of the tenant, permanently removes him from the possession and enjoyment of the entire premises; but it is inapplicable when the entry is of only a part of the premises, is temporary, without intention of depriving the tenant of the use and enjoyment of the premises, and is made for the sole purpose of rendering them fit for his occupation during the residue of the term.

The defendants further seek to set off against the demand of plaintiff the damages which they suffered by reason of the fire. The admitted facts are that plaintiff owned and occupied the adjoining store "as a builders' material supply store;" that he had in stock and in the basement of the store paints, oils, varnishes, lime, and some cotton; and that the fire originated in the basement of plaintiff's store, and was communicated to the building occupied by defendants, greatly damaging the property. It is further admitted that the origin of the fire is unknown, but that "plaintiff was not personally instrumental in causing the fire, and had no agency in causing it, except by reason of keeping inflammable materials in the cellar store as above stated." The contention of defendants can be founded only on the ground that keeping inflammable materials, for the purposes of trade and traffic, in the basement of a store in a city, is a private nuisance *per se*, which makes the plaintiff liable for actual injury resulting therefrom, without regard to negligence on his part. Keeping explosive substances in large quantities in the vicinity of dwelling-houses or places of business is ordinarily regarded a nuisance; whether so or not being dependent upon the locality, the quantity, and the surrounding circumstances. But negligence or want of ordinary care in the manner of keeping, or in keeping large quantities, is requisite to impose a liability to answer in damages occasioned by an accidental explosion or fire, which it is incumbent on the party affirming to prove. *Wood, Nuis.* § 140. The admitted facts do not tend to show anything in the manner of keeping the materials mentioned, or in the way they were stored, or in their use, or in the conduct of the plaintiff concerning them, from which negligence can be inferred; and the mere fact of keeping such materials in store for trade is not sufficient negligence. The rule governs which exonerates a party from liability when engaged in a lawful business, and free from negligence. Affirmed.

#### NOTE.

**NUISANCE—WHAT CONSTITUTES.** Anything which disturbs one in the possession of his property, rendering its ordinary use or occupation physically impossible, is a nuisance. *Railroad Co. v. Baptist Church*, 2 Sup. Ct. Rep. 719; *Railroad Co. v. Angel*, (N. J.) 7 Atl. Rep. 432; *Evans v. Railroad Co.*, (N. C.) 1 S. E. Rep. 529. A business, lawful in itself, which renders the enjoyment of a neighboring dwelling-house materially un-

comfortable, is a nuisance. *Snyder v. Cabell*, (W. Va.) 1 S. E. Rep. 241; *Huribut v. McKona*, (Conn.) 10 Atl. Rep. 164. But it must be of such a nature as materially to affect the comfort or the use and enjoyment of such property. *Stadler v. Grieben*, (Wis.) 21 N. W. Rep. 629. All injury to health is special and irreparable damage, which will justify the interference of equity as a nuisance. *De Vaughn v. Minor*, (Ga.) 1 S. E. Rep. 438. An engine-house and repair shop erected by a railroad corporation in a city so near to another building as to render it useless for the purposes for which it is erected, is a nuisance. *Railroad Co. v. Baptist Church*, 2 Sup. Ct. Rep. 719. So are an engine-house and coal-bins, causing soot to be scattered upon the neighboring premises, *Cogswell v. Railroad Co.*, (N. Y.) 8 N. E. Rep. 537; and a smoke-stack causing like annoyance, *Sullivan v. Royer*, (Cal.) 18 Pac. Rep. 655. Any business which necessarily and constantly impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter. *Pennoyer v. Allen*, (Wis.) 14 N. W. Rep. 609.

See, also, as to what constitutes a nuisance *per se*, *Quinn v. Electric Light Co.*, (Mass.) 8 N. E. Rep. 200, and note; *Shivery v. Streeper*, (Fla.) 8 South. Rep. 865, and note; *Appeal of Art Club*, (Pa.) 13 Atl. Rep. 537; *Gilford v. Hospital*, 1 N. Y. Supp. 448; *Dunbach v. Hollister*, 2 N. Y. Supp. 94; *Rogers v. Elliott*, (Mass.) 15 N. E. Rep. 763, and cases cited in note; *Burke v. Smith*, (Mich.) 37 N. W. Rep. 838.

(85 Ala. 233)

**BRAGG *et al.* v. PATTERSON.**

(*Supreme Court of Alabama*, July 20, 1888.)

**1. PRINCIPAL AND SURETY—WHO ARE—CONTRIBUTION.**

When two persons jointly sign a promissory note for borrowed money, half of which is used by each of them, as between themselves, each is principal as to half the debt and surety as to the other half, and entitled as such surety to the right of contribution.

**2. SAME—RIGHTS OF SURETIES—FRAUDULENT CONVEYANCES.**

A surety whose liability is contingent at the time a conveyance is made by his principal, and who is subsequently compelled to pay the debt for which he is surety, may attack the conveyance as fraudulent; being a creditor within the meaning of the statute of frauds.

**3. PARTIES—MISJOINDER—TO WHOM AVAILABLE.**

Misjoinder of defendants is a defect only available to the defendant improperly joined.

Appeal from chancery court, Wilcox county; THOMAS W. COLEMAN, Chancellor.

Bill by Thomas H. Patterson against Willis N. Bragg and others, to set aside as fraudulent a deed given by Thomas Bragg to Robert J. Carson and Willis N. Bragg, and to subject the property conveyed to the payment of complainant's claim against the grantor. A demurrer to the bill was overruled, and defendants appeal. Code Ala. 1876, § 3418, (section 3157, Code 1886,) is as follows: "Whenever a judgment is obtained by a creditor on a demand to which there are one or more sureties, the sureties may pay such demand, and the plaintiff, when the payment is made, must assign such judgment to the surety or sureties paying the money, who may collect the same, with interest and costs, in the name of the plaintiff, to their use, and may assert, in law or equity, any lien or right against the principal debtor which the plaintiff could have asserted if the debt had not been paid."

*R. Gaillard* and *S. J. Cumming*, for appellants. *J. N. Miller* and *Brutus Howard*, for appellee.

CLOPTON, J. The appeal is taken from a decree overruling a demurrer to the bill, which is filed by appellee as a creditor, and seeks to have annulled and set aside as fraudulent a conveyance made in 1887 by Thomas Bragg to Robert J. Carson and Willis N. Bragg, and to condemn the property conveyed to the payment of complainant's demands, which accrued by his payment of several notes on which he was liable as surety for the grantor. Errors are assigned only by the appellant, Willis N. Bragg. Complainant bases his claim as creditor on the following allegations: In April, 1885, Thomas Bragg borrowed from J. N. Miller, as guardian, \$400, for which he gave his note, with complainant as surety. In February, 1885, complainant and Thomas Bragg

gave their two joint notes, each for over \$500,—one to Miller as guardian, and the other to John C. Pritchett,—for money borrowed of them respectively. One-half of the money, for the loan of which the last two notes were given, was borrowed for and used by each of the makers. Complainant paid his share of these notes without suit. In July, 1887, Pritchett recovered a judgment for the balance due on his note; and in November, 1887, Miller recovered a judgment for the full amount of the note for \$400, and for the balance due on the other note. The judgments were rendered against both the makers of the notes, and, with the costs of suit, were paid by complainant, to whom they were assigned by the plaintiffs under section 3418, Code 1876.

It is assigned as cause of demurrer to the parts of the bill which claim contribution from Bragg, for the relief of complainant, on account of his payment of the two notes for the money jointly borrowed, that complainant was not surety for Bragg, but both were principals. In *Owen v. McGhee*, 61 Ala. 440, the parties desiring to purchase parts of a tract of land of unequal quantities, and not otherwise differing in value, entered into an agreement by which the entire tract was purchased in the name of one of them. All joined in the note for the purchase money, and each took possession of the part allotted to him by the agreement. It was held that all were jointly and severally bound as principals to the vendor; but, as between themselves, each was principal only for his share of the purchase money, and a surety for the remainder. The right to contribution, being founded in natural justice, is not restricted to any special relation, but applies to original contractors, or any other relation, where equity between the parties is equality of burden, and one discharges more than his share of the common obligation. Complainant and Bragg jointly borrowed the money, and as to the lender both were principals; but as between themselves, each having received and used one-half for his individual benefit, is principal as to such portion and a surety for the other half. Complainant, having paid the entire amounts due on both notes, is entitled to contribution from Bragg.

The general equity of the bill is unquestionable, and it is not affected or impaired by the assignments of the judgments to complainant. If they are such judgments and rendered on demands as fall within section 3418, the statute confers on complainant the right to assert, in law or equity, any lien or right against the principal debtor which the plaintiffs could assert if the debts had not been paid, and is cumulative, fortifying the general equity. Though the liability of complainant as surety was contingent at the time the conveyance was made, and a right of action did not accrue until the subsequent payments of the judgments, it constitutes him a creditor, within the meaning of the statute of frauds, from the date of the contract by which the liability was originally incurred, and is protected against the fraudulent conveyances of the principal debtor *ad interim*, the same as if certain and absolute from its inception. *Keel v. Larkin*, 72 Ala. 498. In such case, the surety is a simple contract debtor, and, by the statutory provision, may bring his bill to subject to his demand property fraudulently conveyed by his debtor. The sufficiency or insufficiency of the assignments is an immaterial question. If insufficient, complainant, on the allegations of the bill, may maintain it as a simple contract creditor; if sufficient, as assignee of the judgments, or in both rights. In either aspect, the relief will be the same; and, in either event, he may bring the bill in his own name without joining as complainants the plaintiffs in the judgments. *Schuessler v. Dudley*, 80 Ala. 547, 2 South. Rep. 526.

Were it conceded that the assignors of the judgments were improperly made defendants, they answered the bill without demurrer on their part; and, by the well-settled rule of equity pleading and practice, misjoinder of defendants is an objection personal, and only available to the defendant improperly joined. *Norwood v. Railroad Co.*, 72 Ala. 568. Affirmed.

(35 Ala. 242)

## POWELL v. STURDEVANT.

(Supreme Court of Alabama. July 30, 1888.)

## 1. EXCEPTIONS—TIME OF SIGNING—MOTION TO STRIKE OUT.

When it appears upon the face of the record that the bill of exceptions was signed after the expiration of the time fixed by the order of the presiding judge, it will, on motion, be stricken from the record.

## 2. FORCIBLE ENTRY AND DETAINER—JUDGMENT ON SUPERSEDEAS BOND—SURETIES.

The entry of judgment for damages, in forcible entry and detainer, against defendant and the sureties on his *supersedeas* bond, is not reversible error when objected to by the defendant alone, though the bond is not conditioned for the payment of damages; since Code Ala. 1886, § 8391, expressly authorizes such a judgment against defendant, and for the error regarding the sureties they alone can complain.

Appeal from circuit court, Dallas county; JAMES W. LAPSLEY, Judge.

Action of forcible entry and detainer by Henrietta I. Sturdevant against W. T. Powell, originally begun in a justice's court. Plaintiff obtained judgment both before the justice and in the circuit court. Defendant appeals.

*Gaston A. Robbins*, for appellant.

SOMERVILLE, J. It appears on the face of the record that the bill of exceptions was signed after the expiration of the time fixed by the order of the presiding judge. The judge, during term-time, under the authority conferred on him by the recent act of February 22, 1887, (Acts 1886-87, p. 126,) regulating the signing and allowance of bills of exceptions, had made an order on the application of the defendant, and during term-time fixing the period within which the paper was to be signed at 30 days from September 16, 1887. No subsequent order was made during vacation extending the time. It should have been signed within the prescribed time. The signature on the 17th of October following was one day too late, and the motion to strike the bill from the record must be sustained. *Pearce v. Clements*, 73 Ala. 256; *Wood v. Brown*, 8 Ala. 563. With the bill of exceptions fall all assignments of error based on it, and we are not at liberty to consider any of them. The action is one of unlawful detainer, in which judgment was rendered in favor of the plaintiff against the defendant, Powell, and the sureties on his appeal-bond, both in the justice's court and in the trial *de novo*, which took place on appeal to the circuit court. The appeal to this court is by Powell only, and the assignments of error are made by him alone. The verdict of the jury assesses the plaintiff's "damages" at \$100, and the judgment is against both the defendant and his sureties, for costs and \$100 damages. It is insisted for appellant that this is error, for the reason that section 3411 of the Code 1886 (Code 1876, §§ 8712, 3718) provides, where a *supersedeas* bond has been executed, that judgment must be rendered in unlawful detainer against the defendant and his sureties for "the value of the rent of the premises pending the appeal." This would probably be an informal error which, if well taken, would be subject to correction in this court, provided the appeal-bond were in the statutory form. But, independently of this, section 3391 of the Code (1886) particularly provides for the recovery of special damages in cases of this kind. It declares that any person who, having entered into possession under a lease, forcibly or unlawfully retains possession after the expiration of his term, and refuses to surrender the premises on written demand, "is liable for double the annual rent agreed to be paid under such contract, and for such other special damages as may be sustained by the party thus unlawfully kept out of possession, to be recovered as now provided by law in actions of unlawful detainer, or by an action at law for damages. Code 1876, § 3709. If necessary to sustain this judgment, we must presume that the evidence before the court and jury made a case which fully authorized it. It may be true, as contended, that the *supersedeas* bond in the record, unlike the one

required by section 3401 of the present Code, is not conditioned to pay the plaintiff any damages he may sustain by the prosecution of the appeal. But the appellant was liable himself for such damages in this action, and no one but the sureties themselves can urge the objection that the bond did not bind them to pay such damages. An irregular or erroneous judgment against sureties cannot be assigned as error by the principal, where the sureties themselves make no complaint, and the judgment is correct as against the principal. *Medlin v. Wilkerson*, 81 Ala. 147, 1 South. Rep. 87. There is no error discoverable in the record, and the judgment must be affirmed.

(34 Ala. 444)

## POWELL v. STATE.

(Supreme Court of Alabama. July 20, 1888.)

## 1. LIENS—ON CROPS—ADVANCES TO TENANT AS LABORER.

Under Code Ala. 1886, § 3056, giving a landlord "a lien on the crop grown on rented land for advances made for the sustenance of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market," a landlord has no lien for advances made to his tenant as a hired laborer, to be paid for by his labor.

## 2. SAME—DELIVERY OF CROP BY TENANT—SATISFACTION.

Crops raised by a tenant, and delivered by him to his landlord, must be applied to the debt for which the landlord had a lien on the crops, though the landlord has other claims against the tenant.

## 3. EVIDENCE—ACCOUNT BOOKS—PROOF OF CORRECTNESS.

It is error to admit an account-book in evidence without preliminary proof of its correctness.

## 4. WITNESS—EXAMINATION—WRITTEN CONTRACT.

It is error to permit a witness to testify as to what was meant by a written contract.

Appeal from county court, Macon county; W. H. HURT, Judge.

Indictment of Wesley Powell for selling or removing cotton upon which another had a lien. Defendant was convicted, and appeals.

*Abercrombie & Bilbro* and *P. S. Holt*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

STONE, O. J. The judgment of conviction in this case must be reversed for several reasons. The defendant was indicted for selling or removing seed cotton, to which Letcher "had a lawful and valid claim under a written instrument, lien created by law for rent and advances, or other lawful and valid claim, verbal or written." Code 1886, § 3835. The indictment follows the form, and is sufficient. Form 77. In *Smith v. State*, 84 Ala. —, ante, 683, we reviewed *Ellerson v. State*, 69 Ala. 1, and qualified it in part. The lien, attempted to be established by the testimony in this case, was asserted in three forms: *First*. A claim for rent of land in 1886,—the land on which the cotton was said to have been grown, which defendant was charged with removing. The testimony shows this lien existed to the extent of \$20. *Second*. It was attempted to be shown that Letcher had made advances to defendant in 1886. And, *third*, that defendant was indebted to him for unpaid rent and advances made to him in 1885. On these several accounts it was claimed that defendant was indebted to Letcher in the sum of about \$100. The statutes on which the validity of Letcher's alleged lien must depend are the following sections of the Code 1886: Sec. 3056. "A landlord has a lien \* \* \* on the crop grown on rented lands for the current year, and for advances made in money or other thing of value, \* \* \* for the sustenance or well-being of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market," etc. In *Cockburn v. Watkins*, 76 Ala. 486; *Thompson v. Powell*, 77 Ala. 391; and *Mooney v. Hough*, ante, 19,—we interpreted the foregoing section of the Code, § 3058. "When the tenant fails to pay any part of

such rent or advances, and continues his tenancy under the same landlord, on the same or other lands, the balance due therefor shall be held and treated as advances to him by the landlord for the next succeeding year, \* \* \* for which a lien shall attach to the crop of such succeeding year." This statute we have also construed in some of its bearings. *Cockburn v. Watkins*, 76 Ala. 486; *Gunter v. Du Bose*, 77 Ala. 326; *Thompson v. Powell*, Id. 391. It is not every advance a landlord may make, even to his tenant, that comes within the statute. It must be of some one or more of the articles enumerated, and for some one or more of the purposes mentioned in the statute. Without this there is no lien. The testimony tends to show that the advances made to the defendant in 1886 were made to him as a hired laborer, to be paid for by his labor. For this the statute gives no lien. As for the alleged balance for advances in 1885, the testimony does not enable us to affirm there was any lien for them. The only lien proved in this case was for rent, and the cotton delivered must be applied to it. As the testimony appears in this record, there is no sufficient proof of any other lien, and the cotton delivered more than paid the rent. The account-book, without proof of its correctness, was improperly admitted in evidence. *Hirschfelder v. Levy*, 69 Ala. 351. Nor should Letcher have been permitted to prove what was meant by the written contract. Its meaning was for the court to determine, from the language in which it was expressed. Of course, witnesses could testify whether or not it had been complied with. The bill of exceptions recites that it contains all the evidence, and it contains no proof either of venue, or that the cotton had value. These questions should be looked to on another trial. Reversed and remanded.

(85 Ala. 67)

**PENNY et al. v. JACKSON et al.**

(*Supreme Court of Alabama. July 20, 1888.*)

**1. EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—PURCHASE BY ADMINISTRATRIX.**

Land belonging to a testator's estate, when sold by the register under a decree in a suit by the executrix for the construction of the will, and the enforcement in her favor of a resulting trust in the land, may, in the absence of fraud, be bought by the executrix personally, and in such case her title will be free from any resulting trust in favor of the devisees.

**2. EQUITY—PLEADING—ALLEGATION OF FRAUD—EFFECT OF DEMURRER.**

An allegation of fraud in general terms, without stating the facts constituting it, is insufficient, and a demurrer to the bill is not a confession of the fraud.<sup>1</sup>

Appeal from chancery court, Madison county; THOMAS COBBS, Judge.

Bill by Sallie S. Penny and her husband, W. Eugene Penny, against Fannie Jackson, and her husband, James Jackson, and Annie D. Schoenberger, to have certain lands, belonging to the estate of George Schoenberger, which were bought by the defendant Fannie Jackson, while executrix of said Schoenberger, (who was her former husband,) declared to be held in trust by said Fannie Jackson for the benefit of the complainants and those interested in the same. Complainants appeal.

*Cabiness & Ward and D. D. Shelby*, for appellants. *Humes, Walker, Sheffey & Gordon*, for appellees.

CLOPTON, J. We do not construe the bill as seeking to impeach and set aside for fraud the decrees rendered in the chancery suit brought by the appellee Fannie D. Jackson, as executrix of the will of George Schoenberger, nor as seeking to vacate the sale made under the decrees. The manifest purpose of the bill is to raise a constructive trust, on the ground that Mrs. Jackson purchased the real estate in her character of executrix, and for the benefit

<sup>1</sup>See note at end of case.

of the estate of the testator. Its equity is rested on the general doctrine that a party, who is charged with a duty in regard to property, which is inconsistent with the character of a purchaser for his own use, will not be permitted to purchase an interest in the property, and hold it for his individual advantage. The special prayer of the bill is that Mrs. Jackson may be declared a trustee of the homestead for all the devisees to whom it was devised by the will, subject to the amount for which a resulting trust was decreed in her favor. It is unquestionable that a trustee is required to act, in all matters pertaining to the trust, with the utmost good faith, and solely for the benefit of the beneficiary; and will not be allowed to deal with the subject of the trust so as to gain, directly or indirectly, any advantage to himself. An advantage so gained will be construed as inuring to the benefit of the *cestui que trust*. Courts of equity will raise a constructive trust out of the fiduciary relation when, by virtue thereof, the trustee acquires title to the property under such circumstances that he should not, in equity and good conscience, hold and enjoy the beneficial interest thereof. The efficient administration of justice between the parties is the purpose of impressing the trust; and fraud, actual or constructive, as considered in equity, is an essential element. The existence of a fiduciary relation is not of itself sufficient. There must be an act or transaction in violation of some duty owed to another, whose beneficial ownership is thereby offended,—some use of the fiduciary functions to obtain an advantage inconsistent with the obligations of his position, which equity stamps as constructive fraud. Says Mr. Pomeroy: "An exhaustive analysis would show, I think, that all instances of constructive trusts, so called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source." 2 Pom. Eq. Jur. § 1044; 1 Perry, Trusts, § 166. Mrs. Jackson, as executrix, in March, 1879, filed a bill in the chancery court of Madison county for a construction of the will of the testator, the removal of the administration from the probate court, the administration of the estate in the chancery court, and for the enforcement in her favor of a resulting trust to the extent the money of her statutory separate estate had been used in discharging an incumbrance on the homestead by her testator, who was her husband and trustee. The court rendered a decree construing the will, and ordering a reference by the register to ascertain and report the amount of the indebtedness of the testator, the value of his real and personal property, and the extent of the incumbrances thereon. After the coming in of the report, a decree was made, in September, 1880, declaring a resulting trust in favor of the executrix as to a portion of the homestead, and ordering it sold in satisfaction thereof. In May following, such portion of the homestead was sold under the decree by the register, and purchased by Mrs. Jackson, to whom he subsequently made a conveyance. The complainant, Mrs. Penny and Annie D. Schoenberger, a defendant in the present bill, who are devisees under the will, were made parties to the former suit, and a guardian *ad litem* was appointed for them. The decrees in the former suit, though rendered against infant defendants, are as binding and conclusive as if they were adults, and can only be impeached upon grounds available to adult parties. They were represented by a guardian *ad litem*, who made defense under the supervision and protective care of the court, and could not have been permitted to impair or surrender any of their rights by his misfeasance or non-feasance. The presumption is that the court did its duty, and took care that the guardian *ad litem* observed his. *Waring v. Lewis*, 53 Ala. 615; *Chardavoyne v. Lynch*, 82 Ala. 376, 3 South. Rep. 98. The fact that Mrs. Jackson was executrix did not deprive her of the right to purchase the property, or render her purchase voidable. At an early day the principle was settled that a personal representative may purchase property at a sale made by himself under an order of the probate court, if he has an interest in the property, and that such purchase will be sustained if the sale is made in the

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ordinary mode, and there is an absence of all unfairness. *Brannen v. Olcott*, 2 Stew. 47. As respects executors and administrators, this rule has never been departed from. In *Harrison v. Mock*, 10 Ala. 185, the trustee, who had caused a sale of part of the trust property under execution for his own benefit, and became himself the purchaser, was considered as having purchased in his capacity as trustee for the benefit of those concerned in the trust. But the conclusion is based on the grounds that the deed of trust provided for the payment of all the creditors ratably, and that by accepting the trust the trustee waived his lien, and consented that his own debt should be thus apportioned. In the former suit, the chancery court had jurisdiction of the subject-matter and the parties; the proceedings appear to be regular; the sales were made by the register, and not by the executrix, in the ordinary mode, and under such circumstances as to command the highest price. So far as appears from the proceedings, Mrs. Jackson did no act, by directing or interfering with the sale, or otherwise, which was in violation of her duty as executrix, and did not use her relation or functions, as such, to gain any advantage to herself. She had the right to purchase for her own use and benefit, and her purchase will be sustained in the absence of fraud, either actual or constructive. The bill contains the general allegation that the proceedings in the suit were not had for the purpose of collecting her claim against the estate of the testator, but for the purpose of bringing about a sacrifice of the homestead for her benefit, and to defraud the other devisees of their interest in it, by imposition on the court and fraudulent abuse of its process.

An allegation of fraud in general terms without stating the facts constituting it, is insufficient, and a demurrer to such bill is not a confession of the fraud. *Flewellen v. Crane*, 58 Ala. 628. No act of imposition on the court, or of abuse of its process, is averred. It is not charged that Mrs. Jackson did anything which she had not a right to do, and which she did not do in a regular and legal manner. On the averments of the bill she cannot be considered as having purchased the land sold, in May, 1881, in her character of executrix, and for the benefit of the estate. As to the land sold in October, 1881, the allegations of the bill are too general and indefinite to justify us in an expression of opinion. If the decree of sale of July, 1881, was obtained by her without a necessity of sale, the property sold thereunder by her or by her direction, and purchased at a grossly inadequate price, it may be that she should be considered as having purchased it for the benefit of the estate. Affirmed.

## NOTE.

**FRAUD—PLEADING.** A suitor who seeks relief on the ground of fraud must state the facts which constitute the fraud, so that the person against whom relief is sought may know what he is called upon to answer. *Smith's Adm'r v. Wood*, (N. J.) 7 Atl. Rep. 881; *East St. Louis Connecting Ry. Co. v. People*, (Ill.) 10 N. E. Rep. 897; *Kerr v. Steman*, (Iowa,) 83 N. W. Rep. 654; *Mills v. Collins*, (Iowa,) 25 N. W. Rep. 109; *Misner v. Knapp*, (Or.) 9 Pac. Rep. 65. A mere allegation of fraud in general terms, without stating the facts upon which the charge rests, is insufficient. *Hazard v. Griswold*, 31 Fed. Rep. 178; *Mills v. Collins*, *supra*; *Pyles v. Furniture Co.*, (W. Va.) 2 S. E. Rep. 209; *Grosvenor v. Sickle*, 2 N. Y. Supp. 40. A mere written objection to the granting of a judgment for delinquent taxes on the ground that the valuation was so grossly excessive and oppressive as to be fraudulent is not sufficient. *East St. Louis Connecting Ry. Co. v. People*, (Ill.) 10 N. E. Rep. 897. Nor is an averment in a complaint to set aside a mortgage, that it was fraudulently given, with intent to hinder and delay creditors. *Fisher v. Byers*, (Ind.) 10 N. E. Rep. 306. Questions of fraud are generally questions of fact, and must be raised by suitable pleadings. *Hamilton v. Ross*, (Neb.) 37 N. W. Rep. 467, and note.

Although a complaint seeking a recovery for injuries arising from misrepresentation need not allege that the defendant knew that his representations were false, it is necessary that it should state facts showing that they were fraudulent. *Furnas v. Friday*, (Ind.) 1 N. E. Rep. 296. And it has been said that a declaration, in an action of deceit, for false representations concerning real estate, should state distinctly that such representations were false, that they were known to be false by the vendor, that the purchaser relied on and was misled by them, and they were representations of material facts. *Williams v. McFadden*, (Fla.) 1 South. Rep. 618. In an action upon an instru-

ment of writing for the sale of a boarding and lodging house, which expressly stipulated for an allowance of five days "to consummate the bargain," allegations that the defendant entered into the contract upon the faith of certain representations by the plaintiff as to the extent and prosperous character of the plaintiff's business; that the five days were allowed her to test the truth of these representations; that the defendant had since found that these representations were false; that the business was in fact a losing one; that the value of the business, as represented to her, was the chief consideration inducing her to enter into the contract; and that the person who acted as her friend in entering into the contract she had since discovered was in collusion with the plaintiff,—were held sufficient. *Hardt v. Reeves*, (Pa.) 8 Atl. Rep. 82.

(85 Ala. 85)

### STOUDENMIRE v. DE BARDELABEN.

(*Supreme Court of Alabama*, July 20, 1886.)

#### 1. APPEAL—MAY BE TAKEN, WHEN—FORMER DECISION.

Code Ala. 1886, § 688a, providing that "the supreme court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what in its opinion at that time is law, without any regard to such former ruling of the law by it," applies only where a case is brought up by a second appeal, involving the same principles and questions decided on the former appeal, and which must necessarily be reconsidered; and not to a case where a final decree settling the equities between the parties has been affirmed on appeal, the term of court has expired, and more than one year has elapsed, before the second appeal is sued out by the same party, from a subsequent decree merely ascertaining the account according to the provisions of the first decree; and in such case the assignments of error relating to the first decree will be stricken out.

#### 2. HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR WASTE—WIFE'S ASSENT.

On a bill by the sole devisee of a wife's statutory separate real estate, for an account of waste committed by her husband, by removing, with her consent, certain houses therefrom, plaintiff is only entitled to such damages as the testatrix could have recovered; which is the actual diminution in the market value of the land, occasioned by their removal, and not the entire market value of the houses, as for a conversion.

#### 3. SAME—MEASURE OF DAMAGES.

Nor is the availability of the houses as formerly located, for the use and occupation of laborers on plaintiff's river plantation, which was unsuitable for residence on account of unhealthiness, to be considered, as an element of damage, (the testatrix never having owned the river plantation,) except so far as such fact may enhance the value of the land on which the houses were situated.

Appeal from chancery court, Autauga county; S. K. McSPADDEN, Chancellor.

Bill in equity by J. D. Stoudenmire against Warren De Bardelaben, to compel an account for waste. Decree for plaintiff for \$1,621.85, from which he appeals.

*Brickell, Semple & Gunter*, for appellant. *Watts & Son*, for appellee.

CLOPTON, J. These are cross-appeals. J. D. Stoudenmire, who is complainant in the bill, makes a preliminary motion to strike out the assignments of error relating to the decree of February 8, 1886, assigned by defendant. The contestation on the motion is: Complainant insists that the decree is final, and, having been affirmed at a former term on appeal by the defendant, it is beyond the power of the court to open and reconsider it on this appeal; and defendant contends that, under the statute, it is the duty of the court to declare the law of the case without regard to any former ruling, or to the time when such ruling was made. The decree of February, 1886, affirmed that complainant was entitled to the equity he seeks by the bill. It settled the equities between the parties, and there only remained a reference by the register for the ascertainment of the amount. By all our decisions the decree was final, and would support an appeal. *Garner v. Prewitt*, 32 Ala. 13; *Jones v. Wilson*, 54 Ala. 50. More than one year had elapsed after its rendition before the present appeal was sued out; an appeal from the decree was barred. Under our uniform ruling and practice in such cases, the assignments predicated on alleged error in the decree of February, 1886, must be stricken out.

unless the statute invoked operates the abrogation or modification of such rule in cases where there has been a ruling on appeal from a final decree, and the case is again brought before the court by a subsequent appeal from the decree rendered on ulterior proceedings, and for the adjustment of incidental or dependent matters. *Bradford v. Bradley*, 37 Ala. 453; *May v. Green*, 75 Ala. 162. Section 683a, Code 1886, declares: "The supreme court in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at that time, is law, without any regard to such former ruling of the law by it." The manifest purpose of the statute is to abrogate the pre-existing rule, that the principles decided and the rulings made on appeal, however erroneous, were the law of the particular case, and governed the inferior court in all subsequent proceedings, and the appellate court on a subsequent appeal in the same case. *Moulton v. Reid*, 54 Ala. 320. But this is the full scope and operation of the statute, when construed in connection with other statutes regulating appeals. It was not intended to repeal *pro tanto* the statute of limitations restricting the right of appeal, nor to indirectly give the benefit of appeal, when the right is barred, by authorizing assignments of error purely retrospective in their effect and relation; nor to abrogate the well-established rule that a judgment of affirmance is beyond the power of this court after the expiration of the term when rendered, unless suspended by a proper and seasonable application for rehearing. By its terms, the statute only contemplated a case properly brought before the court for decision by appeal or other appropriate supervisory proceeding, and only has operation when the case thus brought before the court a second time involves the same principles and questions decided on the former appeal, and devolves on the court the necessity and duty to reconsider and affirm or overrule its former rulings. The defendant appealed from the decree of February, 1886, and it was affirmed by this court. 2 South. Rep. 488, (May 10, 1887.) The statute was not designed to impose on the court the duty *ex mero motu* to revise its former rulings, when the same rulings are not presented nor involved in the second appeal; and has no operation when a final decree on appeal has been affirmed, the term of the court has expired, and more than one year has elapsed from the rendition of such decree before the second appeal is sued out by the same appellant from a subsequent decree, merely adjusting the matter of account so as to enable the complainant to obtain the rights to which he is entitled under the first decree, and which does not alter or conflict with the first decree. The motion to strike out the assignments of errors must be granted.

Complainant seeks by the bill to compel defendant to account for waste committed by removing houses from the land of his wife, which was her statutory separate estate. Regarding, as we must, the first decree and its affirmance conclusive as to the liability of the defendant for the committed waste, the only question which we can properly consider on this appeal relates to the basis on which the amount of compensation should be ascertained. We do not propose to state or to attempt to formulate a rule applicable to all cases of waste, but merely to determine what is the proper rule of damages under the special circumstances of this case. At the time of the alleged waste, the land was the separate statutory estate of the wife of defendant, who was the mother of complainant. She was then living, and the waste was solely to her interest and estate in the land. The right of complainant to compensation is not founded on the ground that the waste was an injury to any interest or estate which he then owned in reversion or remainder, or by inheritance, but on the ground that he is the sole devisee of the real and personal property of his mother, including the claim for waste, and that there is no administration nor debts of the estate. *De Bardelaben v. Stoudenmire*, 82 Ala. 574, 2 South. Rep. 488. The complainant succeeded to and claims in right of his mother, and is only entitled to such damages as she could have recovered. Such be-

ing the nature and extent of his right, the availability of the land for use and occupation by the laborers on the river plantation of complainant, which was unsuitable for residence on account of unhealthiness, cannot be regarded or estimated as an element of damage. The river plantation was not owned by the mother of the complainant during her life-time, and the impairment of the availability of the land for such use by the laborers on the river plantation was not an injury to her interest or estate, except that the contiguity of the land to an unhealthy place may be a proper consideration in estimating the market value of the land at the time of the removal of the houses, but cannot be otherwise taken into account in adjusting the compensation to be allowed complainant. The evidence shows that the houses were removed with the consent, if not by direction, of the wife of defendant. It is true the defendant has the benefit of the houses, being located on his land, but this does not of itself make him responsible for the value of the houses, as for a conversion. If removed with her consent, there was no conversion as against the mother of complainant. Evidence of their value may be relevant as affecting the inquiry in regard to the injury done to the land. But should the value of the houses be adopted as the rule of damages the complainant would recover, as shown by the evidence and the report of the register, compensation for the waste committed by their removal, exceeding the entire value of the land with the houses remaining on it; which would be unjust to defendant. Under the circumstances of the case, shown by the evidence, the complainant is not entitled to recover more than the actual damages suffered by the mother, which consists in the injury done the land—its diminution in value—by the removal of the houses; that is, the difference between the market value before and after the houses were removed. *Chipman v. Hibberd*, 6 Cal. 162; *Achey v. Hull*, 7 Mich. 422; *Clark v. Zeigler*, 79 Ala. 346. The register reported that the difference in value, with and without the houses, is, according to the testimony of defendants' witnesses, including interest, \$1,621.85, and that complainant offered no testimony as to such difference in value. The chancellor decreed this amount in favor of complainant, and, on a consideration of the entire evidence, his decree appears substantially correct. Affirmed.

(84 Ala. 600)

#### **HANDLEY et al. v. HEFLIN et al.**

(Supreme Court of Alabama. July 20, 1883.)

##### **1. DISCOVERY—IN EQUITY—EXAMINATION OF EXECUTOR.**

Where an executor conceals from creditors the amount, condition, and whereabouts of the assets of the estate, declines to administer on a large portion of them, but collusively allows the legatees to take possession of such portion in prejudice of the creditors' rights, and refuses to allow inspection of a book containing a memorandum of testator's advancements to his children, a creditor may compel a discovery in equity, though the statute permits the examination of the executor as a witness in proceedings at law.

##### **2. PRINCIPAL AND SURETY—CONTRIBUTION—ENFORCEMENT IN EQUITY.**

Where some of the sureties on a bond have been compelled to pay more than their share of the principal's debt, they may compel contribution in equity from the deceased co-sureties' estate.

##### **3. CREDITORS' BILL—PARTIES—CHILDREN OF DECEASED INSOLVENT.**

Children of a deceased insolvent, to whom it was alleged decedent had conveyed lands without consideration as advancements, are proper parties to a bill by creditors for settlement of the estate; as Code Ala. 1836, § 1926, providing that advancements shall be considered as a part of the estate, and must be taken by the person to whom they are made towards their share of the estate, makes them interested in the adjustment of the estate; and as the property conveyed to them is a secondary fund which cannot be subjected by creditors, unless there is a deficiency of assets in the executor's hands, they are interested in taking the account of the primary fund.

##### **4. SAME—PARTIES—LEGATEES.**

A legatee of such estate who has prematurely received his legacy, and who has participated with the executor in concealing assets of the estate from creditors, is a proper party defendant to such bill.

5. **SAME—PARTIES—FRAUDULENT GRANTEES OF DECEASED INSOLVENT.**

Such bill properly joins fraudulent grantees of such decedent as parties defendant.

6. **SAME—PERSONAL REPRESENTATIVE OF DECEASED INSOLVENT.**

The personal representative of such fraudulent grantor is a proper party to such bill.

7. **EXECUTORS AND ADMINISTRATORS—PREMATURE PAYMENT OF LEGACY.**

Under Code Ala. §§ 2161, 2191, *et seq.*, regulating the distribution of estates, an executor who prematurely assents to a legacy, and permits assets to pass to the legatee which should go to creditors of the estate, is responsible for such *devastavit*, without regard to directions of the will.

8. **EQUITY—PLEADING—BILL—WHEN NOT MULTIFARIOUS.**

A creditors' bill for the settlement of an estate, to compel a discovery by the executor and to hold him liable for a *devastavit* in prematurely assenting to certain legacies, and to pursue property fraudulently conveyed by decedent to his children, by way of advancements, is not multifarious.

9. **APPEAL—PRACTICE—WHEN RETURNABLE.**

An appeal taken on February 17th, and made returnable to the following March 19th, which came on Monday, and was the first Monday after the lapse of 20 days from date of appeal, complies with Code Ala. 1886, § 3620, making appeals "returnable to the first Monday of the term next after the expiration of 20 days from the date of the appeal."

Appeal from chancery court, Randolph county; S. K. McSPADDEN, Chancellor.

Bill by John T. Heflin and others, creditors of decedent's estate, against the executor, William A. Handley, and others, for settlement of the estate. There was a demurrer to the bill, which was overruled, and defendants appeal.

*Smith & Lorce* and *Smith & Smith*, for appellants. *Heflin & Bulger*, for appellees.

SOMERVILLE, J. The present bill is filed by certain creditors of a decedent's estate. Its purpose is to remove the settlement of the estate from the probate to the chancery court, with a view of enforcing a final settlement in the latter tribunal; to enforce contribution from the personal representative of a co-surety of the complainants; to compel him to discover important facts alleged to be indispensable to justice; to hold the executor liable incidentally for a *devastavit*, by reason of his premature assent to certain legacies left by the testator to his widow; and to pursue the property of the deceased debtor fraudulently conveyed by him during his life-time to his children, by way of alleged advancements made to them. The bill, in our opinion, has equity, and is not subject to the objection of multifariousness, as taken by the demurrer of the appellants. It is clearly sustainable upon the strength of the following peculiar equities:

1. The complainants were joint sureties with the deceased testator, Peter Mitchell, on a certain guardian bond executed by them with one Towles, as principal and guardian; and as such became liable for about \$18,000, which sum was paid by complainants to Towles' ward, one Phillips, who had recovered a judgment against them for the amount. No rule is better established than that a surety who has paid more than his just share of the principal's debt may go into equity for the purpose of enforcing contribution from his co-sureties, as well as from their common principal. The less adequate remedy existing at law for this purpose is held not to affect the more efficacious jurisdiction of equity. Adams, Eq. (6th Ed.) \*268, \*269; 1 Story, Eq. Jur. (12th Ed.) §§ 492, 498.

2. Another ground of equity is the necessity of discovery in aid of the relief prayed. Many facts are stated in the complainants' bill, which show a concerted effort on the part of the executor, Handley, to keep all parties interested in the estate as creditors in complete ignorance as to the amount, condition, and whereabouts of the assets of the estate. A large portion of these he declined to administer on, but allowed them to pass into the hands of the widow of the testator, Mary M. Mitchell, who was a legatee under the will,

with a knowledge that they were subject to the payment of debts due the complainants and other creditors, and for the collusive purpose of aiding such legatee in securing the property for her own uses to the prejudice of such creditors. Discovery is sought also as to the contents of a book in the hands of the executor, in which the testator had entered a memorandum of advancements made to his children, an inspection of which had been denied by said executor to complainants on their request. It thus satisfactorily appears that the facts sought to be discovered are of the most material character, and that they cannot be otherwise proved than by the defendant's answer. The bill shows, in other words, that the discovery prayed is indispensable to justice, and this is all that is required to justify the intervention of this arm of equity, as auxiliary to any proper relief. *Insurance Co. v. Webb*, 54 Ala. 688. Nor is this head of jurisdiction affected by statutory provisions authorizing the examination of the defendant as a witness in proceedings at law. *Schakelford v. Bankhead*, 72 Ala. 476; 1 Pom. Eq. Jur. §§ 193, 197, note 1, p. 184.

3. In this phase of the case, the executor would be accountable for his premature assent to any legacy disposing of the assets of the estate, subject to administration, whereby they were permitted to pass into the hands of a legatee. It was his duty to apply the personal property of the decedent, over and above exemptions, to the payment of debts in the order of their priority, and the risk of voluntary premature distribution would be his own; rendering him responsible for a *devastavit* to the creditors to the extent of the value of such estate, without regard to the directions of the will applying it to other purposes. 2 Williams, Ex'rs, (6th Amer. Ed., Perkins,) p. 1474; *Willamson v. Mason*, 18 Ala. 87; Code 1886, §§ 2161, 2191, *et seq.*

4. And, in such case, the legatee who has become possessed of such assets, especially by collusion with the executor, and who by concert of action has participated with him in making way with them in order to avoid their being subjected to the just debts of the decedent, would be a proper party defendant to the bill. Story, Eq. Pl. (9th Ed.) § 179. Under this principle, Mrs. Mary Mitchell would be properly joined as a co-defendant with the executor Handley.

5. It is no objection to this bill that the several alleged fraudulent grantees of the deceased debtor, whose estate is sought to be settled, are made parties defendant to the settlement. In this phase of the case, the suit incidentally becomes a creditors' bill, which in this state may be filed by a simple contract creditor, or one without a lien, and to be good must aver a deficiency of legal assets. 3 Brick. Dig. p. 340, § 186, and cases cited. Unless this averment is made and satisfactorily proved, the assets in the hands of a fraudulent grantee or donee cannot be reached. These conveyances are not only alleged to have been made without consideration, but it is averred that they were made by the deceased debtor as advancements to his children, for which they are liable to account on settlement of the administration. Such advancements are required by statute to be "considered as a part of the estate, so far as regards the division and distribution thereof among the children [of a decedent] or their descendants, and must be taken by such child or descendant towards his share of the estate of the deceased." Code, 1886, § 1925. These donees were, therefore, proper parties to this settlement, being interested, as they are, in the ascertainment and adjustment of the whole question of advancements. They could be joined as defendants on another ground. The property conveyed to them, being a mere secondary fund, could not be subjected by creditors, as we have said, unless there was a deficiency of the legal assets in the hands of the testator's executor; and these defendants were interested in the taking of the account as to the primary fund from which the complainants' demands were first to be satisfied. Either of these reasons would justify their joinder as defendants in the present proceeding.

6. To an ordinary creditors' bill it is no objection that a large number of fraudulent grantees or donees are made parties defendant, although they claim

different portions of the property by distinct conveyances. It has long been held in this state that this does not render such a bill multifarious. In such cases a unity of fraudulent design is held to permeate the whole transaction so as to impart to the suit a singleness of object and purpose. *Hinds v. Hinds*, 80 Ala. 225; *Russell v. Garrett*, 75 Ala. 350; *Holt v. Wilson*, Id. 58; *Lehman v. Meyer*, 67 Ala. 396; *Allen v. Montgomery Railroad Co.*, 11 Ala. 437; *Bump. Fraud. Conv.* (3d Ed.) p. 551, note 2, and cases.

7. And the personal representative of the fraudulent grantor would also be a proper, though not a necessary, party defendant, at the option of the complainant. *Coffey v. Norwood*, 81 Ala. 512; *Houston v. Blackmen*, 66 Ala. 559. Under a proper application of these principles, it necessarily follows that the chancellor did not err in overruling the demurrer to the bill.

8. The motion to dismiss the appeal is overruled. It seems to be sued out in precise conformity to the requirements of section 3620 of the present Code, regulating appeals taken during term-time, and making them "returnable to the first Monday of the term next after the expiration of twenty days from the date of the appeal." The appeal was taken on February 17, 1888, and made returnable to March 12, 1888, which came on Monday, and was the first Monday after the lapse of 20 days from the date of the appeal. Code 1886, § 3620. Affirmed.

(84 Ala. 489)

LEHMAN *et al.* v. ROBERTSON.

(Supreme Court of Alabama. July 20, 1888.)

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT—LOSS OF ASSETS BY ROBBERY.

An administrator collected \$2,890 in the country near where he lived, which was 14 or 15 miles from the county-seat, kept the same in his possession for a few weeks, and, on going to make his settlement at the county-seat, was robbed of the amount. Held, that the failure to deposit the money in bank was not gross negligence, and that the amount was properly allowed the administrator on his account.

2. APPEAL—APPEALABLE ORDERS—DECREE OF PROBATE JUDGE.

Code Ala. § 3640, providing that an appeal may be taken "from any final decree of the court of probate, or from any final judgment, order, or decree of the judge of probate," allows an appeal from a decree of a probate judge rendering judgment in favor of each creditor of an insolvent estate for his *pro rata* share, and authorizing execution to issue thereon against the administrator.<sup>1</sup>

Appeal from probate court, Bullock county; S. T. FRAZER, Judge.

Appeal by Lehman, Durr & Co. and others, creditors of the estate, from an allowance by the probate court of a credit of \$2,890 on the administrator's account.

*Tompkins, London & Troy*, for appellants. *Flemming Law*, for appellee.

SOMERVILLE, J. The motion is made to dismiss the present appeal on the ground that the settlement of the insolvent estate of Johns by the probate court, which took place on January 14, 1888, was partial, and not final, in its character. While the settlement is partial, and has in view only a partial distribution of the funds of the estate among creditors, the decree or order of distribution is nevertheless, in our opinion, final, within the meaning of the statute relating to appeals from courts of probate in this state. An appeal lies to the supreme court "from any final decree of the court of probate, or from any final judgment, order, or decree of the judge of probate." Code 1886, § 3640. There are other special cases in which the right of appeal is secured without regard to the finality of the decree rendered, but these we need not particularly discuss. Id. § 3641. In the present case, a judgment is rendered in favor of each creditor for his *pro rata* share of the moneys then ascertained to be in the hands of the administrator, and upon these judgments

<sup>1</sup>As to what orders are appealable, see *In re Bellow's Estate*, (Vt.) 14 Atl. Rep. 697, and cases cited in note.

executions are authorized to be issued against the administrator for their enforcement. Id. §§ 2248. This completely fixes the rights of the parties, so that the court has nothing to do in order to determine or adjust their legal relations, in reference to the particular matter in dispute, unless its jurisdiction is invoked to re-examine upon final settlement some item of the administrator's account included in the previous partial settlement, as provided for by section 2149 of the Code, (1886.) This right to restate the administrator's account, which may never be exercised, does not, however, change the final nature of these final decrees or orders upon which executions can be issued. They still have, in other respects, the force and effects of judgments at common law. Where this is so, as under the act of 1843, relating to annual settlements of decedent's estates, an appeal will lie as from a final judgment rendered on such annual or partial settlement, as held in *Savage v. Benham*, 11 Ala. 49. In *Harrison v. Meadors*, 41 Ala. 274, a decree of partial distribution in favor of the distributees of an estate, upon which executions were authorized to be issued, was held to be final, and as such sufficient to support an appeal. If the probate court had gone no further than to allow or disallow any one or more items of the administrator's account, on a partial or annual settlement, and had stopped there, without rendering decrees in favor of creditors, on which executions could lawfully issue, it is clear that the decree of the court would be interlocutory and not final, and no appeal would lie from it. The case of *Thompson v. Hunt*, 22 Ala. 517, was one of this kind. The decree in question, being final, will support an appeal, and the motion to dismiss must be overruled.

The only question remaining for decision is the allowance of a credit of \$2,890 to the administrator, for money in his hands, belonging to the estate of which he had been forcibly robbed. The circumstances of the robbery are given in detail, and there is nothing in the record to impeach the truth of the testimony on this subject as given by the administrator himself. He resided in the country, 14 or 15 miles from Union Springs, the county-seat of Bullock county, where he was to make the settlement of the estate on the day of the misadventure. He had the money about his person, and had started on his journey to town. He was suddenly assailed by three men, who, after pulling him from his horse, stunned him to unconsciousness by a violent blow, and robbed him of the money. It is insisted by the appellants that the probate court erred in allowing him credit for the amount thus lost, on the ground that he had been negligent in keeping so much money about him at his home; that he should have deposited it in a solvent incorporated bank, which the evidence shows existed at Union Springs. The liability of an administrator as to the money of an estate in his hands is that of an ordinary bailee for hire. He is not regarded as an insurer, and is not liable for the loss of such property where he has shown good faith, and has acted with the diligence usual with good business men under similar circumstances. Ordinary diligence, or that which persons of the same class, of average prudence, are accustomed to bestow upon their own property of like kind, and under similar circumstances, is all that the law exacts of him. And this rule is to be practically applied by a common-sense standard of comparison. What is common or ordinary diligence, or the lack of it, is more frequently a question of fact than of law. "And," says Mr. Story, "in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions, peculiar to the age. So that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live." Story, *Bailm.* (9th Ed.) § 11. We cannot say that an application of this rule to the present case would impute to the appellee a want

of ordinary diligence, as bailee or custodian of the money in question, such as would render him liable for its loss. The forcible taking of the money is certainly an excuse for its loss, unless it was brought about by a want of ordinary care on his part. It does not appear how the persons perpetrating the robbery had become cognizant of the fact that the appellee, Robertson, would that day carry the money to town with him. This information may have come to them without any fault on his part. Nor is it shown that the loss occurred by the mere keeping of the money at the home of the administrator for the few weeks during which he had it after collection. He had collected all of it, except about \$280, in the country, near where he lived. We cannot know that the peril of his being robbed would not have been quite as great had he attempted at any time to take the money to Union Springs for the purpose of depositing it in bank. Whether he was going there to make a settlement or to deposit the money would not seem to increase or diminish the hazard of its loss by robbery in any perceptible measure. Hence we cannot say that his failure to deposit it, as it is contended he should have done, contributed to its loss. It may be seriously questioned, moreover, whether it would be a want of ordinary care for one residing in the country to keep so much money in his custody instead of depositing it in an incorporated bank in a small town or village, which is merely shown to be solvent, without regard to the reputation of its officers, or the known character of its management, as to which the evidence in this case shows nothing.

There is no merit in the other suggestions of error in the record. The probate judge properly allowed the administrator credit for the item of \$2,890, of which he is satisfactorily shown to have been robbed, and the judgment must be affirmed.

(35 Ala. 11)

#### LANE v. STATE.

(*Supreme Court of Alabama. July 20, 1888.*)

**1. HOMICIDE—ASSAULT WITH INTENT TO KILL—PROOF OF INTENT.**

On trial for assault with intent to kill, committed by striking a man on the head with an iron weight, an instruction that, in order to constitute such an assault, the proof must show that defendant intended to commit murder, is misleading, since the intent may be inferred from the nature of the weapon used or from the character of the assault.<sup>1</sup>

**2. SAME—PROOF OF MALICE—PASSION CAUSED BY INSULTING WORDS.**

In such a case, sudden passion, arising from an immediate verbal insult, is not enough to repel the imputation of malice.

**3. SAME—WHAT CONSTITUTES ASSAULT.**

An assault is an intentional attempt to strike, within striking distance, which fails of its intended effect, either by preventive interference or by misadventure.

**4. TRIAL—ARGUMENTS OF COUNSEL.**

It is error to allow counsel for the state to comment on the prosecuting witness as a poor man, and the employer of the defendant as rich.<sup>2</sup>

**5. SAME—INSTRUCTIONS—ARGUMENTS OF COUNSEL.**

When such statements are made by counsel, it is error to refuse to instruct the jury that the state must prove its charge beyond a reasonable doubt by evidence, and that the assertions of counsel are not evidence.

Appeal from circuit court, Cherokee county; JOHN B. TALLEY, Judge.

The appellant, William H. Lane, was indicted, tried, and convicted of an assault with intent to murder one Thomas J. Woodward, and was sentenced

<sup>1</sup>Every person is presumed to intend what his acts indicate his intention to have been, *People v. Langton*, (Cal.) 7 Pac. Rep. 848; but this intent must be gathered from all the circumstances taken together, *Krum v. State*, (Neb.) 28 N. W. Rep. 278; see, also, cases cited in note to *Id.*; *State v. Ward*, (Nev.) 10 Pac. Rep. 133, and note. See, also, as to the presumption of intention and malice, *Territory v. Hart*, (Mont.) 17 Pac. Rep. 718, and note.

<sup>2</sup>On the subject of misconduct of counsel in argument, see *Kline v. City of Troy*, 1 N. E. Supp. 596; *Battisill v. Humphreys*, (Mich.) 38 N. W. Rep. 581, and cases cited in note.

to hard labor for the county for a term of two years. On the trial there was evidence for the state tending to show that the said Woodward came up to the scales of the Bass Furnace Company, in whose employ the defendant was, with a load of ore to be weighed; that defendant, after weighing the ore, went to his desk to put the weight down on a piece of paper; that while at the desk Woodward came in the office to look at the weight, as registered on the beam of the scale; that, upon being asked by defendant what he was doing, Woodward said to him that he wanted to see that he got fair weights and justice; that he only wanted fair weights and justice; that defendant said that was what he got there, that Woodward then said that he had not been getting it; that thereupon defendant called him a liar; Woodward called him another; that the defendant ordered him out of the office; that Woodward turned and went out; that when he got out some distance from the office the defendant struck him on the head with one of the iron weights used in weighing on the scales, and then went back in the office, got his pistol, and drew it, when Woodward told him not to shoot; that he had already knocked a hole in his head. The defendant introduced evidence tending to show that Woodward, as he walked out of the office, called him "a son of a bitch;" that he had on previous occasions told different persons that he was going to have fair and just weights, or the defendant would have him to whip; and there were many such threats made by Woodward against the defendant brought out in the evidence for the defense. In the argument of the case before the jury, the attorneys for the state drew a strong contrast and comparison between the "rich corporation," the Bass Furnace Company, and the poor old man, Woodward, and among other things said: "Gentlemen of the jury, when it comes to this, that a poor laboring man, hauling ore to a rich corporation, or to anybody else, for that matter, cannot look at the beam that he may see he gets just weights, and, when he does do it, he must be knocked down with an iron weight, then farewell to liberty and rights." And then, referring to the defendant as being in the employ of a rich corporation, the solicitor further says: "He is a nice fellow, [referring to the defendant;] he thinks because he is in the employ of the Bass Furnace Company his weights must not be called in question. This poor man must be kicked out like a dog, and as he goes away must be knocked in the back of the head with a weight; and he throws himself back upon the dignity of his position, and expects money to turn him loose. Backed by a rich corporation, he can do as he pleases, and money can do anything." To these and like statements in the argument of the counsel for the state defendant excepted, and asked charges to be given by the court to raise the question of the propriety of their being used before the jury, among which was the one copied in the opinion. The defendant asked the court to give the following charges, which were refused: "The jury must believe from the evidence, beyond a reasonable doubt, that the defendant intended to murder Woodward, before they can find defendant guilty as charged in the indictment." "If, from all the proof, it is shown that defendant, in the heat of passion, from an immediate insult, threw a weight at Woodward, with no intention to kill him, then they must acquit the defendant." "That sudden passion, upon an adequate provocation, may deprive an assault of its felonious intent." "An assault is an attempt to strike another, in striking distance, which, if not prevented, would result in a battery." "In order to constitute an assault with intent to murder, the proof must show that the defendant intended to commit murder by the assault."

*Walden & Son, for appellant. T. N. McClellan, Atty. Gen., for the State.*

STONE, C. J. The defendant presented the following written charge, and asked that it be given to the jury: "The state must prove its charge, and prove it beyond a reasonable doubt, by evidence. The assertions of counsel are not evidence." This charge ought to have been given. *Coleman v. State*, 59

Ala. 52; *Tatum v. State*, 68 Ala. 147. There was certainly no evidence that the Bass Furnace Company, or Woodward, the prosecuting witness, was either rich or poor. Such testimony, if offered, would have been illegal. Counsel, in argument, should not have been allowed to comment on the one as rich and the other as poor. *Cross v. State*, 68 Ala. 476; *Insurance Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202. It is true that intent is matter of fact, and cannot be implied as matter of law. It may be, and frequently is, inferred from the employment of an instrument or weapon calculated to produce death, or from an act of violence, from which, ordinarily, in the usual course of events, death or great bodily harm may result. *Harrington v. State*, 83 Ala. 9, 3 South. Rep. 425. Charges asked, seeking to raise this question, were calculated to mislead, and were rightly refused on that account. So, the charges which assert that an actual intent to kill is a necessary ingredient of the offense charged are equally faulty. "Sudden passion from an immediate insult" is not enough to repel the imputation of malice. Mere words never reduce a homicide from murder to manslaughter. An assault is an intentional attempt to strike within striking distance, which fails of its intended effect, either by preventive interference or by misadventure. There is nothing in the other questions presented. Reversed and remanded.

#### SANDLIN v. SOUTHERN WAREHOUSE CO.

(Supreme Court of Alabama. July 26, 1888.)

##### COSTS—SECURITY FOR—DISMISSAL OF ACTION.

Under Code Ala. 1886, § 2858, providing for the dismissal of a suit by a non-resident, unless security for costs is given at the commencement of the suit, or within such time thereafter as the court may direct, the court may refuse a motion to dismiss a suit begun without security for costs, and allow the plaintiff thereupon to give such security. Following *Ex parte Jones*, 3 South. Rep. 811.

Appeal from circuit court, Coosa county; JAMES W. LAPSLEY, Judge.

This was an attachment suit, commenced by a complaint on a promissory note, by the Southern Warehouse Company against R. C. Sandlin. The plaintiff made affidavit and gave bond for the issuance of attachment, but did not give any security, and did not have any security for costs indorsed on the writ of attachment. The defendant moved to dismiss the suit on the ground that plaintiff did not have security for costs indorsed on the writ of attachment. The court refused to grant the motion, and the defendant excepted. The plaintiff then asked leave to give security for costs, which the court allowed, and the defendant excepted. There was judgment for plaintiff, and the defendant appealed, and assigns the rulings of the court upon his motion to dismiss the suit, and the court's allowing plaintiff to give security at that stage of the proceedings, as error.

*Watts & Son and Parker & Parker*, for appellant. *H. C. Tompkins*, for appellee.

STONE, C. J. There is nothing in the errors assigned in this case. *Ex parte Jones*, 83 Ala. 587, 3 South. Rep. 811. The circuit court did not err in allowing security for costs. The transcript contains a complaint, which is sufficient, and counts on a promissory note made by defendant. The complaint was marked, "Filed October 4, 1887." The judgment was rendered October 5, 1887; and the action being founded on an "instrument of writing, ascertaining the plaintiff's demand," there was no error in rendering judgment final without a jury. Code 1886, § 2740. Affirmed.

(85 Ala. 192)

ROBERTS v. BURGESS.

(Supreme Court of Alabama. July 26, 1886.)

## 1. ATTACHMENT—TRIAL OF RIGHT OF PROPERTY—EVIDENCE.

Upon a statutory trial of the right to attached property, when the claimant, to disprove plaintiff's *prima facie* case, introduces in evidence certain transfers under which she claims title, plaintiff may show in rebuttal that, before the levy of the attachment, the defendant mortgaged the property to another creditor with the claimant's knowledge and consent, without producing the mortgage.

## 2. SAME—JUDGMENT.

Plaintiff in such case, if the issue is found in his favor, is entitled to a judgment that the property is subject to his attachment and to the satisfaction of his judgment, if one has been or shall be obtained, though at the time of trial of the claim suit no judgment had been rendered in the attachment suit.

## 3. TRIAL—CONDUCT OF—MOTION TO EXCLUDE EVIDENCE.

A motion to exclude evidence is properly overruled when part of the evidence in question is legal.

Appeal from circuit court, Chambers county.

This is a statutory trial of the right of property attached by W. H. Burgess in his suit against John T. Roberts, and claimed by Dora Roberts. Plaintiff obtained judgment. Claimant appeals.

*Oliver & Oliver*, for appellant. *N. D. Denson*, for appellee.

CLOPTON, J. In this proceeding, which is a statutory trial of the right of property, the issue joined was whether the property levied on is the property of the defendant in attachment, and liable to its satisfaction. The claimant, for the purpose of disproving the *prima facie* case made by the plaintiff, introduced in evidence certain transfers under which she claimed to have acquired title. In rebuttal, it was admissible for the plaintiff to show the exercise of acts of ownership by the defendant in attachment, of which the claimant had knowledge, and to which she made no objection. Proof that, before the levy of the attachment, he mortgaged the property to another creditor, and that claimant was present and consented to the same, was competent and relevant. There was no attempt to prove the contents of the mortgage; and that proof of the mere fact of execution, when the mortgage comes in question collaterally or incidentally, may be made without its production, has been settled in several cases. *Green v. Jordan*, 83 Ala. 220, 3 South. Rep. 513; *Hancock v. Kelly*, 81 Ala. 368, 2 South. Rep. 281; *Snodgrass v. Bank*, 25 Ala. 161. If conceded that the evidence relating to the mortgage made after the levy was illegal, it not appearing that claimant had knowledge thereof, the motion to exclude goes to the whole evidence respecting both mortgages; and, a part being legal, the court committed no reversible error in overruling the motion. *Glass v. Blake*, 56 Ala. 379; *Hayes v. Woods*, 72 Ala. 92. There is nothing objectionable in the form of the judgment. When an attachment is levied on property to which a claim is interposed under the statute, it is immaterial whether or not, at the trial of the claim suit, a judgment has been rendered on the attachment. Whether or not rendered, the plaintiff is entitled, if the issue is found in his favor, to a judgment that the property is subject to the levy of the attachment and of condemnation to the satisfaction of the judgment, if one has been or shall be obtained. Such is the effect of the judgment in this case. The record does not show that a judgment had or had not been rendered in the attachment suit; but, if not, the claimant can suffer no injury, since no execution, except for costs, can issue until there is a recovery of judgment against the defendant in attachment. *Seamans v. White*, 8 Ala. 656. The value of the different items of property was assessed separately, in substantial conformity to the statute. Code 1886, § 3007; *Townsend v. Brooks*, 76 Ala. 308. Affirmed.

(85 Ala. 123)

## DAVIS v. CURRY et al.

(Supreme Court of Alabama. July 26, 1893.)

## EJECTMENT—AGAINST PERSONS IN POSSESSION—CONVEYANCE PENDING ACTION.

As a sale of lands held adversely does not vest in the grantee a right to maintain an action in his own name for their recovery, defendants in ejectment, who are in possession under claim of right, cannot interpose as a defense that plaintiff has conveyed, since action brought, all his interest in the premises.

Appeal from circuit court, Chilton county; JAMES W. LAPSLEY, Judge.

This was a statutory real action in the nature of ejectment, by Charles L. Davis against Samuel Curry and W. C. Hester, to recover a certain tract of land described in the complaint. During the pendency of the suit the plaintiff sold his right, title, and interest to the property in controversy to one Reynolds; and when the case came on for trial the defendants put in their plea "since the last continuance." Issue was joined on this plea; and it appearing that plaintiff had executed a deed, conveying all the right, title, interest, and estate he had in the land sued for to the said Reynolds, the court charged the jury, at the request of the defendant, in writing: "If they believe the evidence in the case, they will find for the defendant." To this giving of this charge the plaintiff excepted, and assigns the giving of the same as error.

W. S. Cary and Watts & Son, for appellant. Henry Wilson, for appellees.

STONE, C. J. This case went off in the court below on the defense that, after the suit was brought, Davis, the plaintiff, sold and conveyed all his interest in the land to one Reynolds. This was interposed as a full defense, by plea "since the last continuance." To this it was replied that at the time of the sale and conveyance the defendants were in the adverse possession under claim of right. Their plea of not guilty was an admission that they were in possession, and a denial of plaintiff's right to recover. *McQueen v. Lampley*, 74 Ala. 408. There can be no question that when lands are in the adverse possession of another, holding under claim of right, they cannot be sold and conveyed, so as to vest in the grantee a right to maintain an action in his own name for their recovery. The reason is that such conveyance is void as against the adverse holder. 3 Brick. Dig. p. 18, § 51. As between the parties, however, and all persons other than the adverse holder, the sale is legal and binding. After such sale the vendor or original owner may maintain an action in his own name for the recovery of the possession; and, if his title was originally good, his sale and conveyance oppose no obstacle to his right of recovery. The reason is this: The conveyance being made pending the adverse holding, is, as to the defendant, the same as if none had been made. It is void as to him. It confers no rights against him, and he can claim no benefits or defenses under it. *Bernstein v. Humes*, 60 Ala. 582; *Farborough v. Avant*, 66 Ala. 526; *Johnson v. Cook*, 78 Ala. 537; Sedg. & W. Tr. Title Land, § 190; *Jackson v. Van Dusen*, 5 Johns. 159; *Livingston v. Proseus*, 2 Hill, 526; *Farnum v. Peterson*, 111 Mass. 148; *Steeple v. Downing*, 60 Ind. 478. Such facts constitute a seeming exception to the rule that in ejectment suits it is not enough that plaintiff has a title when he commences his action. He must remain the owner up to and including the final trial. If his title terminates pending the suit, the general rule is, he cannot recover the lands, though in some cases he may recover meane profits. *Hairston v. Dobbs*, 80 Ala. 589, 2 South. Rep. 147; *Oandler v. Jost*, 81 Ala. 411, 2 South. Rep. 82. There is sound sense as well as justice in this rule. By the sale of property adversely held, the purchaser acquires no title which will maintain an action in his name against the adverse holder. If in such case suit cannot be maintained in the name of the vendor, no one can assert right resting on his title, no matter how complete it may be. We have shown that if this suit had been

instituted in Davis' name after the sale and conveyance to Reynolds, the present defendants could not have defended on the ground that he, Davis, had parted with his title. As to them he had not parted with it. It certainly needs no argument to prove that such defense must be equally unavailing, when pleaded in bar of the further maintenance of the suit. Reversed and remanded.

(85 Ala. 240)

THOMPSON v. GREENE *et al.*

(Supreme Court of Alabama. July 26, 1888.)

## 1. REPLEVIN—PLEADING—TITLE UNDER MORTGAGE.

Under Acts Ala. 1882-83, p. 31, providing that, in suits where plaintiff's title is derived from a mortgage, defendant may put in issue the amount due thereon, and that, should the verdict be for plaintiff, then, on payment of such amount and costs, defendant may retain the property, a suggestion by defendant, in a suit for personal property, that plaintiffs derive title from a mortgage, is tantamount to an admission of record that plaintiffs have title, unless it has been divested by payment of the mortgage debt, leaving as the only issue what amount, if any, is due on such debt.

## 2. SAME—SUBMISSION TO ARBITRATORS—ENTRY OF AWARD AS JUDGMENT OF COURT.

In such case, submitting to arbitrators the question of the amount due, though done without an order of court, and allowing the award of such arbitrators to be entered, without objection, as the judgment in the action, amount to a confession of judgment for the sum found by the award.

## 3. SAME—VALUE OF PROPERTY—WHEN NEED NOT BE ASCERTAINED.

In such case, an assessment of the value of the property is not necessary, since the sole reason for requiring such an assessment is that defendant may discharge himself from the operation of a *distringas* in case he cannot produce the property, which reason does not exist where the defendant is relieved, by said statute, from restoration of the property by paying the sum found due.

## 4. SAME—JUDGMENT—WRIT OF POSSESSION.

In such case, a provision in the judgment for a writ of possession, if defendant fails to pay the amount due on the mortgage, is mere surplusage, not prejudicial to defendant.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge.

Statutory action for the recovery of personal property, brought by R. M. Greene & Co. against J. C. Thompson. Plaintiffs obtained judgment, and defendant appeals, assigning as errors the submission of the determination of the amount due to arbitrators; the court making the award of the said arbitrators the judgment of the court; that in final judgment, as shown by the judgment and the award of the arbitrators, the value of the property sued for was not ascertained; that by the award and judgment it is shown that only one question was submitted to the arbitrators,—the state of the accounts between the plaintiffs and the defendant; and that the court erred in the final judgment in directing a writ of possession to be issued by the clerk.

J. M. Chilton, for appellant.

CLOPTON, J. In this suit, which is a statutory action for the recovery of personal property brought by appellees, the defendant suggested that the plaintiffs derived title from a mortgage, and put in issue the amount due thereon. No other plea was filed nor defense interposed. The statute in force at the time the suit was commenced, provided "that, in suits where the title of the plaintiff is derived from a mortgage, the defendant may put in issue the amount due upon the mortgage, and may also plead and give in evidence any matter that might have been pleaded and given in evidence had such action been to recover the debt incurred by such mortgage; and, should the jury find for the plaintiff, then, upon payment of such amount, besides costs, within thirty days thereafter, the defendant shall have the title and possession of the property." Acts 1882-83, p. 31. The suggestion was tantamount to an admission of record that plaintiffs had title to the property, unless it had been divested by payment of the mortgage debt, leaving only the

issue whether any and what amount was due on the mortgage. The purpose of the statute is to exempt the mortgagor from a compulsory restoration of the property by paying the amount which may be found due on the mortgage and the costs of suit.

During the pendency of the action, the parties, by agreement in writing, but without an order of court, submitted the determination of the amount due on the mortgage to five selected persons as arbitrators, who made an award. On motion of plaintiffs, the award was made the judgment of the court, and a judgment thereupon rendered in favor of the plaintiffs for the property, which provided that it might be satisfied by paying the amount awarded by the arbitrators. The defendant was present by his attorney, and made no objection to the judgment. The submission to arbitrament was equivalent to an agreement that the sum awarded by the arbitrators should be regarded as the agreed amount due on the mortgage; and allowing it to be entered in the judgment entry, without objection, was in the nature of a confession of judgment for such sum, and, in connection with the admission of record that the plaintiffs had title to the property, dispensed with any necessity of submitting to a jury the issue of either title or amount due. The sole reason for requiring an assessment of the value of the property is that the defendant may discharge himself from the operation of a *distringas* in the event the property cannot be produced. *Miller v. Jones*, 29 Ala. 174. The reason does not exist, when the suit is by a mortgagee against the mortgagor, and the amount due on the mortgage put in issue. In such case, the statute relieves the mortgagor from compulsory restoration, if he pays the amount found to be due on the mortgage. The failure to assess the value, furnishes the defendant no cause of reversal; it does not and cannot injure him. The statute gives the plaintiff the right to compel the restoration of the property when practicable by a writ of *distringas*, or by motion for an attachment. Code 1886, § 2723. The provision of the judgment, that a writ of possession be issued, may be regarded as surplusage, conditioned as it is on the failure of defendant to pay the amount due on the mortgage within the time prescribed. There is nothing in the judgment of which the defendant can complain.

Affirmed.

(85 Ala. 114)

**MOHR *et al.* v. SENIOR *et al.***

(Supreme Court of Alabama. July 26, 1888.)

**HUSBAND AND WIFE—POWER OF WIFE TO CONTRACT—FRAUDULENT CONVEYANCES.**

A married woman who has been relieved of her disabilities as to her statutory and separate estate, as provided by Code Ala. 1876, § 2731, has capacity to contract a debt, for the purchase of merchandise, which shall be a personal obligation, and on which the creditor can maintain a bill to subject to its payment property fraudulently conveyed by her.<sup>1</sup>

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Judge.

Bill by A. Senior & Son against Semira Mohr and Marcus Mohr to set aside as fraudulent a deed from said Semira Mohr to said Marcus, and subject the property conveyed to the payment of a debt due complainants from the grantor. The chancellor overruled a demurrer to the bill, and defendants appeal.

*Watts & Son* and *Williamson & Williams*, for appellants. *Tompkins, London & Troy*, for appellees.

CLOFTON, J. Mrs. Mohr, being a married woman, was relieved of the disabilities of coverture under the provisions of section 2731 of the Code of 1876. Her petition, which alleges that she owns a statutory separate estate consist-

<sup>1</sup>As to the validity of the contracts of married women under the various statutes, see *Littlefield v. Dingwall*, (Mich.) 39 N. W. Rep. 33, and note; *Kilbourn v. Brown*, (Conn.) 14 Atl. Rep. 743.

ing of a stock of merchandise, is sufficient to give the chancellor jurisdiction, and the proceedings and decree appear to be in substantial conformity to the statute, and regular. *King v. Bolling*, 75 Ala. 306; *Meyer v. Sulzbacher*, 76 Ala. 120. After the rendition of the decree, Mrs. Mohr purchased goods, wares, and merchandise of appellees during the life-time of her husband; and, after his death, made a voluntary conveyance of real estate to her son, Marcus Mohr. The bill is filed by appellees, and seeks to annul and set aside the conveyance, and to condemn the real estate to the payment of their claims. The appeal is taken from a decree of the chancellor overruling a demurrer to the bill. The main question presented for decision is whether a married woman, who has been relieved of the disabilities of coverture under the statute, has capacity to contract a debt, in consideration of the purchase of goods, wares, and merchandise, on which the creditor can maintain a bill, under section 3544 of Code 1886, to subject to the payment thereof property fraudulently transferred or conveyed by the married woman; the answer to which depends on the question whether such debt creates a personal obligation, on which a personal judgment can be rendered. In *Parker v. Roswald*, 78 Ala. 526, it was held that a married woman, whose disabilities of coverture had been removed, could be sued at law on a debt afterwards contracted in a purchase of merchandise, for the purpose of carrying on business in her own name as a sole trader, and a personal judgment rendered against her. As the statute under consideration has been repealed, and therefore ceased to be of future practical importance, we should have contented ourselves with resting on the decision in *Parker v. Roswald*, had it not been assailed by counsel, in an elaborate and exhaustive argument, as in conflict with, and a departure from, the principles of previous decisions, in which the statute received interpretation. By the uniform construction of the general statutes creating and regulating the separate estates of married women, they were regarded as enabling, but not enlarging the wife's capacity to contract, even in reference to her separate estate, except in the mode and for the purposes prescribed and defined. While the statutes created a liability for articles of comfort and support of the household, and the tuition of the wife's children, she could not otherwise make a contract which would charge her estate, or on which a personal judgment could be rendered against her. Her capacity at common law to acquire property by purchase was not enlarged, and she had no power of disposition, except by the joint sale and conveyance of herself and husband, or by will. After the general statutes had been in force for many years, and their effect and operation discovered, the legislature deemed it expedient to provide for the enlargement of the wife's capacities in certain respects and for specific purposes. To this end the act of February 10, 1875, amending the former act of April 15, 1878, was passed, conferring jurisdiction on the chancellor to remove the disabilities of coverture, with authority to act in term-time or vacation. The amendatory act constitutes section 2731 of Code 1876, and precisely defines the power as follows: "To relieve married women of the disabilities of coverture as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued as *femes sole*." Like the general statutes, this statute has been uniformly construed as enabling in its purpose, and as authorizing the exercise only of the specified powers, and only in reference to statutory or other separate estates. It was not intended to vest a married woman with all the rights of a *feme sole*, nor to constitute her a free dealer, nor to remove the trusteeship of the husband, or deprive him of the right to receive the rents, income, and profits. She can make contracts touching and concerning property only; the power to contract generally being withheld. Neither does the statute operate to change the character of the estate,—to convert a statutory into an equitable separate estate. On this uniform construction of the statute, counsel base their contention that the case

of *Parker v. Roswald*, *supra*, is inconsistent with the principles settled by the former decisions, and cannot be sustained without ignoring all previous cases. The first argument is that it is apparent, from the petition of Mrs. Mohr, that her purpose in procuring the removal of the disabilities of coverture was to engage in a mercantile business, and that the right to carry on such business, or to buy goods for that purpose, is tantamount to capacity to make general contracts, which the chancellor has no authority to confer. The vice of the argument consists in the failure to regard the questions decided, the manner in which they arose, and in the misinterpretation and misapplication of some expressions contained in the opinions delivered in the cases of *Ashford v. Watkins*, 70 Ala. 156, and *Falk v. Hecht*, 75 Ala. 298, which are cited and mainly relied on. In the first case, the mortgage in question rested on the validity of a decree of the chancellor, which declared Mrs. Ashford "to be a *feme sole* only so far as to invest her with the right to mortgage her said house and lots, in order to obtain an addition to her stock of goods and merchandise." The decree was held invalid, and the reason assigned is, "The want of jurisdiction to change, temporarily and partially, the status of the appellant, as a married woman,—to convert her into a *feme sole* for a specific purpose and as to specific property,—renders the decree void." The principle underlying the decision is that, as a married woman has not capacity, either at common law, or under the statutes creating separate estates, to engage as a sole trader in merchandise, the chancellor had no jurisdiction to confer only this partial and specific right, and that all the powers prescribed by the statute must be conferred as an entirety. It was not intended to decide what would be the capacity of the wife in this respect under a valid decree rendered on a sufficient and proper petition. Equally invalid would have been a decree removing her disabilities of coverture so as to invest her solely, separately, and specifically with a right to sell, convey, and mortgage property for any other specific purpose, for the reason that the chancellor has no jurisdiction to convert a married woman into a *feme sole* for any one of the statutory purposes singly. In the last case cited, the decree was in the words of the statute, but was rendered on a petition, the prayer of which was that a decree be rendered declaring Mrs. Falk "a free dealer, relieving her of the disabilities of coverture, as to her said statutory separate estate, so far as to invest her with the power to mortgage the same, to enable her to invest her means in purchasing a stock of goods and groceries." The decree, though following the statute, was held invalid, on the ground that "it passes beyond the petition, confers capacity, and works a change in the status of the wife, to which she did not express her assent, as the statute requires its expression, and which the chancellor could not impose upon her *in invitum*." The sole question was the power or jurisdiction of the chancellor to render such decree on such petition. What would have been the effect had the petition conformed to the statute may be inferred from the following observations in the opinion: "It is insisted, however, and such was the view of the court below, that the decree of the chancellor, relieving Mrs. Falk of the disabilities of coverture, so far as to invest her with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued as a *feme sole*, empowered her to execute the mortgage without the concurrence of her husband. Such, it may be admitted, is the effect and operation of the decree, if it is valid,—if the chancellor had power and jurisdiction to render it. The power and jurisdiction, if it exists, must be derived from the statute." Neither of those cases involved the question of the right of a married woman, who had been relieved of the disabilities of coverture by a valid decree under the statute, to contract a personal obligation in the purchase of goods for the purpose of carrying on a mercantile business. The question arose more directly in *Meyer v. Sulzbacher*, *supra*, where a decree was upheld which was rendered on a petition setting forth in what the separate estate consisted, and

expressly stating "that your petitioner wishes to employ her said separate estate in merchandising, as her husband is experienced in that business, and can in this way best employ her said means;" notwithstanding the part of the decree which conferred power "to contract and be contracted with" was held invalid. The wife's purchase of a stock of merchandise from her husband was sustained.

It is further insisted that *Parker v. Roswald* is inconsistent with the interpretation of the statute; that it does not remove the trusteeship of the husband, nor deprive him of his right to the rents, income, and profits of his wife's statutory separate estate, as held in *Cook v. Meyer*, 78 Ala. 580. The principle on which that decision rests is that the general statute which constitutes the husband trustee is not repealed by the later statute, expressly or by implication. But it is also said: "An enlargement of the capacity of the wife may render less valuable, and may result in impairing or defeating, the right of the husband to the rents, income, and profits of her statutory estate; but, while the statute remains, the trusteeship of the husband, and the consequent right to the rents, income, and profits, are not inconsistent or repugnant to the capacity of the wife. Upon fair and just construction, the statute conferring on him the right can be reconciled with the later statute, conferring enlarged capacity on the wife." In *Cohen v. Wollner*, 72 Ala. 233, it was held that the later statute authorized the wife, when relieved of the disabilities of coverture, to do the acts enumerated therein as a *feme sole*, "without the concurrence, and against the consent, of her husband." And in *Robinson v. Walker*, 81 Ala. 404, 1 South. Rep. 347, it was held that a married woman, relieved of the disabilities of coverture, "could exercise each of these powers severally; in her own discretion, just as if she were a *feme sole*." The statute should not be construed to destroy or impair the rights of the husband and trustee, further than its words, when fairly and reasonably construed, clearly imply. The trusteeship of the husband is terminated, not by the statute itself, but by the co-operative effect of the execution of a power authorized, which is inconsistent with its continuation. His trusteeship continues until the wife exercises some right conferred. If she buys property, which thereby becomes her statutory separate estate, the husband becomes the trustee thereof; and if she sells and conveys property his trusteeship, *ipso facto*, terminates, the same as when, under the general statute, the husband and wife united in a sale and conveyance of property. The operation of the later statute is to lessen and restrict the right of the husband to manage and control the statutory separate estate of the wife, in so far that he cannot defeat or prevent the execution of the specific powers conferred on her, when relieved of the disabilities of coverture under the statute. The manifest purpose of the statute was to provide a well-defined alteration of the *status* of a married woman, having a separate estate, by relieving her of the disabilities of coverture, and enlarging her capacity beyond the provisions of the general statute, to the extent prescribed, and for the purposes specified. "While it does not constitute a married woman a free dealer, it clothes her, as far as the statute extends, with all the civil powers of a *feme sole*." *Dreyfus v. Wolffe*, 65 Ala. 496. She has therefore power to buy property, without limitation as to kind or character, or other than real and personal, or restriction as to mode,—a right to buy, take, and hold the property thus purchased as her separate estate. She may buy in any of the usual modes, for cash or on credit, or both; and if purchased on credit, in whole or in part, the debt contracted constitutes, under the statute, a personal obligation, the same as if she were a *feme sole*. She may purchase without the husband's concurrence and against his dissent. The statute thus enlarges her capacity at common law to purchase property, and converts the purchase money, which was otherwise a charge on the property merely, into a personal obligation. Such contracts of purchase touch and concern property, and relate to the wife's separate estate; and power to make such special con-

tracts is not an equivalent of capacity to make contracts generally. When, in addition to the power to contract such debts, the statute provides that she may sue and be sued as a *feme sole*, the logical sequence is that a personal judgment may be rendered, which, like judgments against parties *sui juris*, will be enforced against any property she may own liable to execution, without reference to the time when acquired. As there is nothing in the statute indicating a contrary purpose, a judgment against her, founded on an authorized contract, has the same force and effect as other personal judgments rendered in actions at law, and will be enforced in the same manner. *Caldwell v. Walters*, 55 Amer. Dec., note 608, where the authorities are cited. It follows that the demands of complainants, having been incurred by Mrs. Mohr after being relieved of her disabilities of coverture, constitute a claim, on which complainants may maintain the bill to subject property fraudulently transferred or conveyed, which would have been liable to execution on a personal judgment against her. Affirmed.

(85 Ala. 221.)

GREENE v. LEWIS.

(Supreme Court of Alabama. July 26, 1883.)

1. DETINUE—INSTRUCTIONS—SALE OF PROPERTY.

In detinue for a horse, where the evidence tended to show that plaintiff had sold and delivered the horse to defendant for a reasonable price, to be afterwards agreed upon, it was error to refuse an instruction that, if they should so believe, the jury should find for defendant, though it appeared that the parties could not afterwards agree upon such reasonable price.

2. SAME—JUDGMENT—FORM.

The judgment in such case should be for the property sued for, or its alternate value, with damages for its detention to the time of trial.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge.

Action of detinue, brought by John F. Lewis against A. M. Greene, for the recovery of a horse. The defendant pleaded the general issue, and issue was joined thereon. Plaintiff's evidence tended to show that he rented the horse in controversy to defendant in the spring of 1882, but did not agree upon a price therefor; that the defendant kept the horse until the early part of the year 1885, when, upon refusal to give it up, plaintiff brought this action. Defendant's evidence tended to show that the plaintiff, after renting the horse to the defendant for the year 1882, came to defendant's lot in the fall of the same year, (1882,) and said to defendant, while they were looking at the pony, "I will sell you Patsey [the pony's name] at a reasonable price, and allow \$25 for the trouble of breaking her;" that to this offer defendant replied, "I will take her on those terms;" that the pony was then left in the possession of defendant until the early part of the year 1885, when plaintiff came to defendant's house, and said to defendant, "I have come after pay for the pony;" that, upon the defendant suggesting that the plaintiff had never fixed any price upon the pony, the plaintiff then told him that he would take \$60 for her; that defendant told plaintiff that he would give him that for her, but that he wanted plaintiff to allow him in payment for the horse an account he held against his wife for a small amount; that plaintiff said that he would not allow it, and rode off; that in a few days plaintiff sent defendant word that he would allow the account, but that he (defendant) must give him \$75 for the pony. There was also some evidence that on one occasion defendant told plaintiff that he had given the pony to his little boy, whereupon plaintiff said to him, "You consider that you have bought her, then;" to which remark the defendant replied that "he did;" and, further, that the defendant retained possession of the pony continuously from the spring of 1882 to the early part of 1885; and that the plaintiff never asked him for any rent or pay for the pony during the whole of that time. Among other charges given and refused by the court, the defendant asked the following, which was in writ-

ing: "(3) If the jury believe, from the evidence, that Lewis sold the pony to Greene, and delivered her to him, and for a reasonable price, to be afterwards agreed upon, then they must find for the defendant. And the fact that they could not agree afterwards on a reasonable price makes no difference." The court refused to give this charge, and the defendant excepted. There was a verdict and judgment for plaintiff. Defendant appeals.

*W. J. Sanford*, for appellant. *Geo. P. Harrison, Jr.*, for appellee.

SOMERVILLE, J. The plaintiff's right of recovery in this case depends on the inquiry as to whether he had sold the horse in controversy to the defendant. If he had, he thereby parted with his title to the property, and could not recover in this action; otherwise he could. There is a phase of the evidence which not only tends to prove a sale, but tends also to prove that the price of the horse was left open for future adjustment between the parties. The rule is settled that the title to personal property may pass to a vendor, without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties. *Shealy v. Edwards*, 73 Ala. 175, 75 Ala. 411; *Wilkinson v. Williamson*, 76 Ala. 163. It is sufficient, for the purposes of this case, to decide that the circuit court erred in refusing to give the third charge requested by the defendant. As the whole case turns mainly on the question whether there was a sale of the horse at a price to be agreed on in the future, or on credit and for a *quantum valebat*, and this is rather a question of fact than of law, under proper instructions from the court, we will not notice the other charges. The judgment, being in *delinque*, should have been "for the property sued for, or its alternate value, with damages for its detention to the time of trial." Code 1886, § 2719; *Wittick v. Keiffer*, 81 Ala. 199; *Auerbach v. Blackman*, 57 Ala. 616; *Robinson v. Richards*, 45 Ala. 354; 1 Brick. Dig. p. 577, §§ 99, 107, 108; 3 Brick. Dig. p. 308, § 40 *et seq.* All mention of alternate value is omitted from the judgment, although specified in the verdict. We call attention to this error that it may not be repeated on another trial.

Reversed and remanded.

(38 Ala. 125)

**LEHMAN *et al.* v. HUDMON *et al.***

(*Supreme Court of Alabama. July 26, 1888.*)

**1. GARNISHMENT—JUDGMENT BY DEFAULT—MAY BE ENTERED, WHEN.**

A judgment by default may be entered against garnishees when they do not appear and support the truth of their answer, when contested.

**2. SAME—INDEBTEDNESS OF GARNISHEES—TRIAL OF ISSUE.**

Though the garnishees are in default, an issue as to their indebtedness, which is denied by their answer, may properly be made up under the direction of the court, and tried by a jury, under Code Ala. 1886, § 2961, providing that such issue shall be made up, and, when requested by either party, tried by a jury.

**3. SAME—TRIAL ON APPEAL FROM JUSTICE—FAILURE OF GARNISHEES TO APPEAR.**

Where garnishees, having filed a written answer in a justice's court, fail to appear in the circuit court, and claim their privilege of filing a new answer, they cannot object that a trial was had without a continuance, to enable them to make further answer.

Appeal from circuit court, Coosa county; JAMES W. LAPSLEY, Judge.

Hudmon Bros. & Co. recovered a judgment before a justice of the peace against one Lewis S. Driver. A garnishment on said judgment was issued and duly served upon Lehman, Durr & Co., who filed an answer in writing, denying any indebtedness to the said Driver, or any liability whatever. On the same day the plaintiffs filed an affidavit contesting the truth of the answer. Upon the trial of this contest by the justice a judgment was rendered in favor of the contestants, and from this judgment the defendants appealed to the circuit court. This is the second appeal taken to the supreme court in this case. For former appeal, see 79 Ala. 532. After the cause was re-

manded by the supreme court, the garnishees failed to appear, and a judgment by default was rendered against them; and from this judgment Lehman, Durr & Co. prosecute this appeal. Code Ala. 1886, § 2981, provides that "the plaintiff, his agent or attorney, may controvert the answer of the garnishee, by making oath, at the term the answer is made, that he believes it to be untrue; and thereupon an issue must be made up, under the direction of the court, in which the plaintiff must allege in what respect the answer is untrue; and, if required by either party, a jury must be impaneled to try such issue."

*Rice & Wiley*, for appellants. *Felix L. Smith*, for appellees.

SOMEVILLE, J. There is, in our opinion, no error in the judgment rendered against the garnishees. The case stood for trial *de novo* before the circuit court on appeal from the justice's court. The plaintiff had controverted the answer of the garnishees, which denied the fact of indebtedness to the defendant, and an issue was thereupon made up under the direction of the court, as required by the statute, which was properly tried by a jury. Code 1886, §§ 2981, 2982. The garnishees having failed to appear and support the truth of their answer, the plaintiff was entitled to claim a judgment by default against them, such as the record shows was taken. A garnishee who is negligent can claim no more favor at the hands of the courts, nor is he entitled to greater protection, than any other negligent party. He is required to use the same diligence in protecting himself against an improper judgment that is exacted of other defendants. If he fails to do so, he is without relief. *Drake*, Attachm. (6th Ed.) § 658e. But the court, notwithstanding, properly proceeded to try the issue of indebtedness *vel non* before the jury, which issue was found against the garnishees and in favor of the plaintiffs. In the absence of any bill of exceptions showing the evidence introduced, and the rulings of the court on the trial, we must presume that this judgment was fully authorized by the facts, and that the answer was not sustained. Code, § 2983. The garnishees, having filed their written answer in the justice's court, had the right to make additional answer had they appeared at the trial in the circuit court and claimed the privilege. But they were in default, failing to appear for any purpose. They cannot now complain that the circuit court allowed the plaintiffs to proceed to trial without continuing the cause, in order that they might appear and make further answer at the next term. This was entirely discretionary with the court, and its decision in the matter is not revisable. *Gould v. Meyer*, 36 Ala. 565; *Case v. Moore*, 21 Ala. 758. So far as we can see, the plaintiffs in the court below appear to have followed the statutory requirements regulating the trial of contests of garnishees' answers, and to have avoided the errors pointed out by us on the last appeal in the case. *Lehman v. Hudmon*, 79 Ala. 532; Code 1886, §§ 2981-2983.

Affirmed.

(34 Ala. 606)

MOSES v. SCOTT *et al.*

(Supreme Court of Alabama. July 26, 1888.)

CONTRACTS—VALIDITY—RESTRAINT OF TRADE.

Certain stockholders agreed to place their stock for three years in the hands of trustees, with power to vote the same at all stockholders' meetings, during such time, the stock only to be sold subject to the agreement; and they further agreed to sell to one another in preference to any third person, provided they could obtain the price offered for it by outsiders. *Held*, that the contract, being a restraint on the alienation of property, would not be enforced in equity.<sup>1</sup>

Appeal from chancery court, Morgan county; THOMAS COBB, Chancellor.

<sup>1</sup>As to the validity of contracts in total or partial restraint of trade, see *Lumber Co. v. Hayes*, (Cal.) 18 Pac. Rep. 891, and note; *Hodge v. Sloan*, (N. Y.) 17 N. E. Rep. 385.

Bill by A. H. Moses against John F. Scott and others for specific performance of a contract. From an order dissolving a preliminary injunction complainant appeals.

*Brickell & Harris and J. H. Nathan*, for appellant. *Roquemore, White & Long and Kirk & Almon*, for appellees.

STONE, C. J. In January, 1887, a joint-stock company was formed, incorporated, and organized, under the general statutes enacted for the purpose, with the corporate name of "The Sheffield & Tuscumbia Street-Railway Company." The bill in this case avers that "the object and purpose of the company were the construction, maintenance, and operation of street railways in the towns or cities of Sheffield and Tuscumbia, in the county of Colbert, in the state of Alabama, and connecting the said towns or cities." The bill further avers that "the capital stock of said company was and is fifty thousand dollars, divided into one thousand shares, of the value of fifty dollars each." The bill then avers that on March 3, 1887, the complainant, Moses, John F. Scott, and other named stockholders of the corporation, entered into a written agreement, subscribed by them severally, by which they bound themselves, and the stock they severally held in the corporation, for the term of three years from the date of the agreement, to the observance of certain stipulations. Among them are the following: *First*. That their respective amounts of stock were thereby placed in the hands of Alfred H. Moses, John F. Scott, Joseph H. Nathan, and Arthur H. Kellar, as trustees, "with power to vote said stock at all meetings, whether regular, called, or special, as they or a majority of them should deem best." *Second*. That this agreement should continue for three years, unless rescinded by unanimous consent. *Third*. That the vote should be cast as a unit, as three-fourths of the trustees might determine; or, if they failed to agree, as those holding three-fourths of the stock represented might determine. *Fourth*. That during the three years the shareholders had the right to sell their stock in whole or in part, but not the power to sell the right to vote it; and, during that term, the transferee would only obtain the transferor's right, namely, the right to own, but not to vote, the stock. *Fifth*. That, during the three years, the right of the shareholder to sell his stock was further restricted, as follows: "That in the event any or either of the parties should, at any time during the continuance of the said trust, offer his stock for sale, subject to the condition of said trust, he should give the refusal to purchase the same to the other parties to the agreement, or to such of them as were willing to buy, at the price offered *bona fide* therefor, and at which he was willing to sell." The present bill charges that Scott, disregarding the terms of the said agreement, has sold his stock to Tompkins, who purchased with knowledge of the terms under which Scott held it, and that Tompkins claims the right to hold and vote the stock, relieved of the said trust. The bill further avers that Moses is willing, able, and prepared to purchase and pay for the stock at the price Tompkins agreed to give for it; that he has made such offer to Scott, and requested to be informed of the price at which he had agreed to sell to Tompkins; but that Scott refused to give the information, and refused to sell him the stock. The object of the bill is to obtain specific execution of the said agreement or trust to have the stock decreed to him, Moses, on his making payment at the price Tompkins agreed to give, and to enjoin Tompkins from voting the stock. There was a preliminary injunction, which, on demurrer, was dissolved. From that order the present appeal is prosecuted.

A very able argument has been submitted to us in maintenance of the injunction. The view we take of the case renders it unnecessary that we should express our views on several of the points urged. The general rule is that chancery will not lend its aid for the enforcement of an executory agreement to purchase personal property. The reason is that the purchaser can

obtain other property of like kind, and, in an action for the breach of the contract, a court of law will award him ample compensation for the damage he has sustained. 5 Wait, Act. & Def. 766; 2 Story, Eq. Jur. § 718; 3 Pom. Eq. Jur. §§ 1401, 1402; *Morris v. Manufacturing Co.*, 83 Ala. 565, 3 South. Rep. 689. But when the reason on which the rule rests does not exist, the rule does not apply. Where the article contracted to be purchased is one of mere taste, an heirloom, a family relic, or, from some other cause, is not measurable by a money standard, specific performance is generally decreed, as the only adequate remedy the case is susceptible of. And specific performance of contracts for the purchase of stock is frequently decreed on the same ground. 2 Story, Eq. Jur. § 719; 3 Pom. Eq. Jur. § 1408; 5 Wait, Act. & Def. 766, 767; Tayl. Corp. § 790; *Duncraft v. Albrecht*, 12 Sim. 189; *Cheale v. Kenward*, 3 De Gex & J. 27; *Todd v. Taft*, 7 Allen, 371; *Cushman v. Manufacturing Co.*, 76 N. Y. 365; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; *Chater v. Refining Co.*, 19 Cal. 220. We cannot say there is anything *per se* illegal in an agreement entered into by and between certain stockholders in a joint stock company, by which they promise to vote together as a unit, in all matters pertaining to the government of the corporation. Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct, or gainsay his discretion. And it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote when cast is but the expressed wish of the stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases. *Cook, Stocks*, § 618; *Faulds v. Yates*, 57 Ill. 416, 11 Amer. Rep. 24; *Barnes v. Brown*, 80 N. Y. 527; *State v. Smith*, 48 Vt. 266; *Woodruff v. Wentworth*, 183 Mass. 309; *Pender v. Lushington*, 6 Ch. Div. 70. Whether an agreement to vote as a unit, or as an agreed majority may dictate, for any given length of time, is a contract so binding in its terms that no party to it can withdraw from it, or disregard it, without the consent of his fellows, may be a very different question. Possibly public policy may exert an influence in the solution of this problem. *Coal Co. v. Coal Co.*, 68 Pa. St. 178; *Railroad Co. v. Cromwell*, 91 U. S. 643; *Moon v. Crowder*, 72 Ala. 79; *Danforth v. Railway Co.*, 30 N. J. Eq. 12. And even if such contract be lawful, and, upon its naked face, exert a continuing force, the grave question comes up, will a court of chancery, in its enlightened discretion, lend its aid in the enforcement of a contract of so doubtful policy? *Fisher v. Bush*, 35 Hun, 641; *Railroad Co. v. Cromwell*, 91 U. S. 643. It is not our intention to answer these questions. One feature of the agreement we are asked to specifically execute forces us to deny the relief prayed for. True, the agreement authorizes any member to withdraw from it, and to sell his stock. How withdraw? How sell his stock? Withdrawing does not withdraw his stock. That is tied up in the trust, so called. It does not entitle him to vote his stock. That is bargained away for three full years. If he sells his stock, he does not invest the purchaser with the attendant privilege of voting it, so as to guard and protect the investment. He sells "subject to the conditions of said trust." That is, he sells the nominal ownership, with no voice in its administration,—no power for its protection. This is securely lodged in trustees for three years. It requires no argument to show that an offer to sell stock thus hampered could not meet with an inviting bid from an outsider. And, no matter how pressing the owner's desire or necessities for a sale may become, he must first offer it to an outsider for such bid as he can obtain, and even then cannot sell to him until he first "gives the refusal to purchase the same to the other parties to the agreement, or to such of them as are willing to buy, at the price offered *bona fide* therefor." This is a palpable, universal restraint on the alienation of property, which equity

not only will not enforce, but is condemned by the principles of the common law. *Fisher v. Bush*, 35 Hun. 641; *Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Foll's Appeal*, 91 Pa. St. 362, 36 Amer. Rep. 671; 2 Pars. Cont. 748; *Wonson v. Fenno*, 129 Mass 405; *People v. Railroad Co.*, 55 Barb. 844. Affirmed.

(85 Ala. 80)

O'NEAL et al. v. SEIKAS.

(Supreme Court of Alabama. July 19, 1888.)

1. MORTGAGES—REQUISITES—DESCRIPTION OF PROPERTY.

A written agreement by a debtor to transfer to his creditor "a lot of land near Florence, north of the fair-grounds, containing 85 acres, more or less," the same to be sold in payment of the debt, the excess, if any, to be returned to the debtor, is not void for uncertainty, it appearing that the debtor owned but one such lot in that vicinity, but may be aided by parol evidence; and it is not necessary that the creditor should have been placed in actual possession.

2. SAME—WHAT CONSTITUTES—AGREEMENT TO CONVEY.

Such instrument conveys an equitable interest in the land, and is entitled to record, under Code Ala. § 1810, providing that "instruments in the nature of a mortgage of real property" are void as to purchasers, mortgagees, and judgment creditors, having no notice, unless recorded within 80 days from their date.<sup>1</sup>

3. SAME—FORECLOSURE—PLEADING.

A bill to foreclose such instrument, which denies that defendant acquired any title by his purchase from a person claiming title from the original debtor, and alleges that such person had no title and was not in possession when he conveyed to defendant, alleges facts which, if true, show that defendant is not a *bona fide* purchaser of the legal title whose equities are superior to plaintiff's.<sup>2</sup>

4. SAME—PARTIES—ADMINISTRATOR OF DECEASED GRANTEE.

The personal representative of such debtor's wife, the debtor having subsequently conveyed the land to her, and she having devised the same, has no interest in such foreclosure, and is not a necessary party.

5. VENDOR AND VENDRE—BONA FIDE PURCHASERS—QUITCLAIM DEED.

A grantee of lands under a quitclaim deed is put upon inquiry, and is not a *bona fide* purchaser without notice.<sup>3</sup>

6. ASSIGNMENT—OF MORTGAGE NOTE BY PAROL—VALIDITY.

The transfer of a mortgage note by delivery, without written assignment, is an equitable transfer of the mortgage, and authorizes the transferee to foreclose the same.<sup>4</sup>

7. HUSBAND AND WIFE—CONVEYANCE TO WIFE—LIMITATION TO ACTION BY CREDITORS.

A deed made by a husband directly to his wife, in consideration of the rents and income of the wife's separate estate, conveys only an equitable estate, is fraudulent and void as to the husband's creditors, and does not put in operation the statute of limitations as against such creditors; it not appearing that the possession under the deed was open, notorious, and uninterrupted.<sup>5</sup>

Appeal from chancery court, Lauderdale county; THOMAS COBBES, Chancellor.

<sup>1</sup> A power of attorney executed by a debtor to his creditor, authorizing the latter to convey the debtor's property, unless he should pay the debt by a certain time, is, in legal effect, a mortgage. *Pemberton v. Simmons*, (N. C.) 6 S. E. Rep. 123. As to what agreements relating to land constitute a mortgage, and what a conditional sale, see *Howe v. Austin*, (La.) *ante*, 815; *Turpie v. Lowe*, (Ind.) 15 N. E. Rep. 834, and note; *Booth v. Hoskins*, (Cal.) 17 Pac. Rep. 225, and cases cited in note; *Rogers v. Beach*, (Ind.) 17 N. E. Rep. 609, and note; *Knaus v. Dreher*, (Ala.) *ante*, 287; *Eisaman v. Gallagher*, (Neb.) 37 N. W. Rep. 241.

<sup>2</sup> As to how far possession of land is notice of the rights of the occupant, so as to protect his equities as against a purchaser from one not in possession, see *Clendenning v. Beel*, (Tex.) 8 S. W. Rep. 824, and cases cited in note; *Phelan v. Brady*, 1 N. Y. Supp. 626; *Daniel v. Hester*, (S. C.) 7 S. E. Rep. 65.

<sup>3</sup> One who takes a mere conveyance of another's interest in real property, or a quitclaim thereto, is not a *bona fide* purchaser for a valuable consideration, so as to be protected in equity against a prior right of which he had no notice. *Gest v. Packwood*, 34 Fed. Rep. 383, and cases cited in note.

<sup>4</sup> The purchaser of a note secured by mortgage becomes the equitable owner of the mortgage. *Harman v. Barhydt*, (Neb.) 31 N. W. Rep. 488, and note.

<sup>5</sup> As to when a conveyance from a husband to his wife will be upheld, as against the husband's creditors, and when declared fraudulent and void, see the cases cited in note to *Whaun v. Atkinson*, (Ala.) *ante*, 681.

Bill filed by Henry O. Seixas, as transferee of a mortgage, against Emmet O'Neal and others, to have the description of the lands attempted to be conveyed corrected, and the lands sold for the payment of the debt secured. The bill alleges that one Neander Rice, being indebted to Isaacson, Seixas & Co., executed to them on the 24th day of August, 1875, a mortgage on certain real estate, in words and figures as follows: "*The State of Alabama, Lauderdale County*: For and in consideration of the sum of one hundred and sixty 25-100 dollars, with interest, which I am indebted to Isaacson, Seixas & Company, of New Orleans, La., I hereby agree that if said debt shall not be paid on or before the 1st January, 1876, to turn over to them a lot of land near Florence, north of the fair-grounds, containing 35 acres, more or less, to be sold by said Isaacson, Seixas & Co. or their attorneys for the satisfaction of said debt; and the excess, if any, after the payment of the said debt, to be refunded to the undersigned. *This August 24, 1875. [Signed] N. H. RICE,*"—and attested by Emmet O'Neal and E. A. O'Neal. The bill further alleges that the mortgage was probated and recorded, and described the property therein sought to be transferred more definitely and correctly; and that the said Rice conveyed the lands to his wife, Lucy E. Rice, who died in 1882, and bequeathed the same to the other defendants in the bill, except the appellant O'Neal; that the said mortgage note was transferred to complainant for a valuable consideration, and that the appellant Emmet O'Neal claims an interest in the said lands by virtue of a quitclaim deed made to him by one Crow; that at the time of this conveyance, or pretended conveyance, of interest in the land, by the said Crow, the said O'Neal had full knowledge of said mortgage; and that the said Crow was not in possession of the said lands at the time he attempted to convey them to O'Neal, nor did he have any right to or interest therein, but claimed a right thereto by a verbal agreement to purchase the lands from said Rice, which agreement was never consummated. The defendant O'Neal demurred to the bill on the ground that the mortgage sought to be enforced was void for uncertainty and misdescription; and on the further grounds of the statute of limitations of ten years; that the bill showed on its face that the defendant O'Neal was an innocent purchaser; that the alleged transfer of the said mortgage to the complainant was not shown to have been in writing, but must have been done verbally, and that such verbal transfer would not authorize complainant to institute this suit; and that the personal representative of Mrs. Lucy E. Rice was not made a party to these proceedings. The chancellor overruled all of these demurrers, and the defendant appealed, and assigns the ruling of the chancellor on the said demurrers as error.

*Emmet O'Neal*, for appellant.

SOMERVILLE, J. 1. The land is described in the mortgage of the complainant as "a lot of land near Florence, north of the fair-grounds, containing 35 acres, more or less." A more accurate description of it is given in the bill, coupled with the averment that this was the only such lot situated in that locality of which the mortgagor, Neander H. Rice, was seized and possessed at the time of the execution of the mortgage, on August 24, 1875. The description is not so vague and indefinite as to be incapable of being aided by parol evidence of identification, when read in the light of the circumstances surrounding the contracting parties at the time the conveyance was made. Nor would it be necessary that the mortgagee should have been placed in actual possession of the premises, that being only one of the usual, but not indispensable, modes of identifying lands conveyed by uncertain terms of description. *Chambers v. Ringstaff*, 69 Ala. 140; *Ellis v. Martin*, 60 Ala. 394; *Varnum v. State*, 78 Ala. 28; *Meyer v. Mitchell*, 75 Ala. 475; 2 Washb. Real Prop. (5th Ed.) 535, 536. The first five grounds of demurrer, based on this phase of the mortgage, were properly overruled.

2. The mortgage in question did not, it is true, convey to the mortgagee the legal title, but only an equitable estate in the land. Yet it was "an instrument in the nature of a mortgage," and such instruments are authorized to be recorded so as to be brought within the benefits of the registration statute, and when recorded in time may operate as constructive notice to subsequent purchasers. This has been the law in this state since the Code of 1852, although the rule prior to that time was different. Code 1886, § 1810; Code 1852, §§ 1287, 1288; *Fash v. Ravesties*, 32 Ala. 451. The present statute is, in substance, the same as that in New York, which was construed, as far back as the year 1815, to embrace equitable mortgages. "The statute," it was observed, "speaks of any writing in the nature of a mortgage, and these words may reach to any agreement creating an equitable incumbrance. The design of the statute was that every purchaser should look to the registry of mortgages, and see whether there was any mortgage, or any writing in the nature of a mortgage, previously executed by the grantor." *Parkist v. Alexander*, 1 Johns. Ch. 394, 399; *Hunt v. Johnson*, 19 N. Y. 279; Thomas, *Mortg.* (2d Ed.) § 458. In *Pierce v. Jackson*, 56 Ala. 599, an equitable mortgage was held to be such a conveyance as was authorized to be recorded under our statutes of registration. The *dictum* to the contrary in *Bailey v. Timberlake*, 74 Ala. 221, 224, ignores the present statute, and is based on decisions which arose under the old law, prior to 1852. The record of this mortgage operated as constructive notice of its contents to all persons purchasing after its registration, including the appellant.

3. The bill also negatives the fact that the defendant O'Neal acquired any title whatever to the land by his purchase from Crow on January 8, 1886. It alleges that Crow had no title himself, and was not in possession when he made the deed. If this be true, O'Neal could not be a *bona fide* purchaser of the legal title, and nothing less will be available against a secret equity. *Craft v. Russell*, 67 Ala. 9.

4. The deed to O'Neal, moreover, was a mere quitclaim, and a purchaser under this form of conveyance is held to be put on inquiry as to, and is not, therefore, protected against, latent outside equities. It stamps the acquired title as suspicious, and one who holds under it cannot claim protection as a *bona fide* purchaser without notice. *Barclift v. Lillie*, 82 Ala. 319, 2 South. Rep. 120; *Derrick v. Brown*, 66 Ala. 162.

5. The transfer of the mortgage note to the complainant by delivery merely, without assignment in writing, operated as an equitable transfer to him of the mortgage by which the debt is secured, and authorized the transferee to file the present bill to foreclose such mortgage; the debt being the principal, and the mortgage its mere incident. *Duval v. McLoskey*, 1 Ala. 708; 3 Brick. Dig. 640, § 99; *Williams v. Cox*, 78 Ala. 325.

6. The assignments of demurrer, raising the question of the statute of limitations of 10 years, were properly overruled. The bill fails to allege that there was any actual adverse possession of the land by Mrs. Rice under the conveyance made to her by her husband on March 1, 1876. This deed, being based on no other consideration than that recited,—the rents and income of the wife's statutory separate estate,—was fraudulent and void as against existing creditors of the grantor, including the complainant. *Early v. Owens*, 68 Ala. 171; *Wing v. Roswald*, 74 Ala. 346. The deed, moreover, being made directly from husband to wife, could create in the vendee only an equitable, and not a legal, estate. It was void at law, and good only in equity. *Lehman v. Bryan*, 67 Ala. 558. Nothing could have put in operation the statute of limitations, as against the complainant, who was a mortgagee, except 10 years of adverse possession by the vendee of the mortgagor, and those claiming under her, which must have been open, notorious, and uninterrupted. *Smith v. Gillam*, 80 Ala. 301; *State v. Conner*, 69 Ala. 212; *Snedecor v. Watkins*, 71 Ala. 48; *Barclay v. Smith*, 66 Ala. 230. This fact not appearing on the

face of the bill, if true, could be made to appear only by plea or answer introduced by way of defense.

7. The personal representative of Mrs. Rice had no interest in the present suit, and there was no necessity for making him a party defendant to it. She had parted with whatever interest she had in the land by making her will devising the premises to her husband for life, with remainder to her children. Nor had she any connection with the mortgage debt, which was exclusively that of her deceased husband, whose administrator is made a party to the bill. The decree of the chancellor overruling the demurrer to the bill, in all its assignments, is free from error, and must be affirmed.

(35 Ala. 286)

*JOHNSTON et al. v. JONES et al.*

(*Supreme Court of Alabama. July 26, 1883.*)

1. FRAUDS, STATUTE OF—AGREEMENTS RELATING TO LANDS—DEED EXECUTED FOR FUTURE DELIVERY.

Deeds describing the land, naming the parties, and expressing the consideration and all the details and terms of the contract, when signed and acknowledged by the vendors, and placed in the hands of a third party, to be delivered on compliance by the vendees with the terms of payment, are sufficient to take the contract out of the statute of frauds.<sup>1</sup>

2. TENANCY IN COMMON AND JOINT TENANCY—CONTRACT OF SALE—RATIFICATION.

Deeds executed by tenants in common, and placed in the hands of a third person for delivery, constitute a ratification of a previous contract of sale entered into by one of them, upon the terms and to the parties named in the deed, and not a mere offer of sale which may be revoked before acceptance.

3. SPECIFIC PERFORMANCE—DELAY BY COMPLAINANT—WHEN NOT A BAR.

Delay in performance by the vendees is no bar to an action for specific performance, where it was occasioned by the vendors tendering a deed defectively acknowledged by one of them, and in which the wife of one did not join.<sup>2</sup>

4. SAME—OFFER OF DEFECTIVE DEED—TENANTS IN COMMON.

Where, upon a joint contract by tenants in common to convey their land, the deed is defectively executed by one of them, the vendees are not bound to accept it as performance on the part of the other, but may maintain an action for specific performance against both.

5. SAME—PLEADING—VARIANCE.

Where a bill for specific performance avers that the contract was made September 30, 1885, while the proof shows that it was made September 30, 1886, the variance is fatal.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This was a bill for the specific performance of a contract for the sale of land, filed by the appellees, Jones and Williams, against the appellants, C. A. and H. R. Johnston.

*Ward & Head* and *Webb & Tillman*, for appellants. *J. B. Knox*, for appellees.

CLOPTON, J. The evidence establishes, beyond a reasonable controversy, that a contract for the sale of the land, mentioned in the bill to appellees, was made by W. C. Smith, as the agent of appellants, at the price and upon the terms substantially corresponding with the allegations of the bill as amended. There is no contention that the contract is not plain and certain in its terms, fair, just, and reasonable in its provisions, and founded on an adequate consideration. Neither is there any pretense that it was obtained by any undue advantage, accident, or surprise, or that it is affected by any inequitable feature. The contestation of appellants is that it is not a valid contract, because

<sup>1</sup> See note at end of case.

<sup>2</sup> As to what constitutes laches, sufficient to preclude equitable relief, and what will rebut the imputation thereof, see *Requa v. Snow*, (Cal.) 18 Pac. Rep. 863, and cases cited in note; *Le Gendre v. Byrnes*, (N. J.) 14 Atl. Rep. 631; *Mitchell v. Farrish*, (Md.) id. 712.

not in writing, and, if valid, that complainants, who are appellees, seeking its specific execution, have deprived themselves of a claim to equitable interposition by unjustifiable default and inexcusable delay in performing the contract on their part, which now causes its specific performance to work hardship or injustice to defendants.

The first material question is whether the facts constitute a valid contract under the statute of frauds. The statute declares that "every contract for the sale of lands, or of any interest therein, except leases for a term not longer than one year, is void, unless the contract, or some note, or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing; unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller." Code 1886, § 1732. The defendants were joint owners of the land; and it is not claimed that H. R. Johnston ever authorized, in writing, Smith to sell the same, or ever signed any contract, note, or memorandum, except the conveyances hereafter referred to. Passing, therefore, the letter of authority given Smith by C. A. Johnston, and the telegrams and correspondence which passed between them, the sufficiency of the conveyance to withdraw the contract from the operation of the statute of frauds is directly brought into consideration. Whether a deed, prepared, signed, and acknowledged, for future delivery, answers the requirements of the statute, was fully considered in *Jenkins v. Harrison*, 66 Ala. 345. After an exhaustive discussion, and a review of the authorities, the conclusion of the court is expressed as follows: "A deed, drawn and executed with the knowledge of both parties, with a view to the consummation of the contract of sale, which, in itself and of itself, embodies the substance, though not all the details or particulars, of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered, and its delivery postponed until the happening of some future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and the purposes of the statute of frauds." In the present case, the deeds were prepared by direction of C. A. Johnston, and sent to him. They were executed and acknowledged by both defendants and the wife of H. R. Johnston, and forwarded to the Alabama State Bank, at Birmingham, Ala., where the land is situated, with directions to deliver them to complainants on the cash payment being made and the notes for the deferred payments executed. They describe the land, name the parties, and express the consideration and all the details and terms of the contract plainly and definitely. On the authority of *Jenkins v. Harrison*, *supra*, we hold that the deeds, having been signed and acknowledged by the vendors, with a view to the consummation of the contract of sale, and sent to the bank to be delivered on the happening of a future event, withdraw the contract from the operation of the statute of frauds.

The defendants further contend that, if the deeds avoid the operation of the statute of frauds, they should be regarded as constituting the only contract, without reference to any preceding negotiations or transactions; and, so regarded, they merely constitute an offer to sell the property to complainants upon the terms stated therein,—an option, for which no consideration having been paid, defendants had the right to revoke, and did revoke, before acceptance. This position is untenable. By the letter of September 16, 1886, C. A. Johnston authorized Smith to sell the lot of land at a price and upon terms stated therein which correspond with the aggregate price and the terms expressed in the deeds. Smith proposed to sell to Williams at the price and upon the terms stated in the letter, who accepted the offer, only modifying it by the request that two deeds be made, dividing the lot in a designated manner. This modification was consented to by Johnston when communicated to him. Under these circumstances, the preparation, execution, and acknowledgment of

the deeds were tantamount to ratification of Smith's contract of sale, and related to the time when there was a concurrence of the minds of the contracting parties. The deeds did not constitute the contract, but supplied the evidence of a previously completed oral contract, which only remained to be reduced to writing, and were intended as the execution thereof.

The further defense is that complainants delayed performance of the contract of sale without excuse, and thereby authorized defendants to treat it as rescinded, and to recall the conveyances. Time may be regarded of the essence of a contract for the sale of land when a large cash payment is to be made, and the deferred payments bear interest. It may be conceded that in such case a court of equity will refuse to decree specific performance, if there is unjustifiable default, or inexcusable negligence in performing the contract on the part of the purchaser. He is required to be desirous, ready, and prompt to perform. The question then, is, who was at fault for the postponement of performance? The evidence clearly shows that the first default was on the part of defendants in sending conveyances without C. A. Johnston's wife's relinquishment of dower, and without any explanation why she did not sign them. In the absence of an express agreement, the parties are presumed to contract with reference to an unincumbered and indefeasible legal estate, and complainants had the right to require deeds conveying such estate. *Goodlett v. Hansell*, 66 Ala. 151. The time of sending the conveyances to the bank was peculiarly within the knowledge of defendants, and, if they wished to place complainants in default, it was their duty to notify them of the fact. Immediately, on receiving information, Williams went to the bank, and inspected the deeds, and made objections thereto that they were defectively executed by C. A. Johnston, and that his wife had not joined in their execution. They were acknowledged before a clerk of the chancery court in Mississippi, where they were signed by C. A. Johnston, who is not authorized by the statute to take acknowledgments of deeds when executed without the state. Code 1886, § 1800. Though, having an attesting witness, the deeds may operate to pass the legal title, the objections cannot be considered as not made in good faith, when the attorneys who prepared them, by direction of Johnston, expressed the opinion that the objections were well founded. At this time C. A. Johnston was in the city of Washington, and, on being informed of the objections, wrote that he could not obtain his wife's signature because of her mental disability, and suggested that the matter be held up until his return to Birmingham, about the 4th of November, when he would stop on his way home. He arrived in Birmingham on the 2d of November, two days prior to the appointed time. Williams was informed on the 3d of his arrival, when he immediately went to Birmingham on the 4th, and found that Johnston had left the day preceding. Up to this date there can be no pretense that the complainants were guilty of laches or unnecessary delay. Williams went that night to Tennessee, on important business, having first endeavored to see the attorney of Johnston, and failed. He returned on the 7th, and after having an interview with the attorney, whom Johnston had consulted, expressed a willingness to waive, under the circumstances, the signature of Mrs Johnston, if he would properly acknowledge the execution of the conveyance, and so informed Smith, and requested him to notify Johnston. The complainants were certainly entitled to a reasonable time to determine whether they would accept the conveyance without the relinquishment of dower. On the 8th day of November the deeds were recalled by defendants, without further response or notice to complainants. On this state of the facts, it cannot be reasonably said that the complainants were at fault. They were prepared to make the cash payment, and constantly pressed the closing of the contract, while the defendants not only acquiesced, but suggested the delay.

It is further insisted that, the deeds having been properly executed and acknowledged by H. R. Johnston and his wife, the complainants were bound to

accept them as performance of the contract on his part, and that, having refused to do so, the court will not decree specific performance by him. The contract of sale was joint, and the deeds were jointly executed by the defendants. The complainants could not accept them as performance by one without also accepting them as performance by the other. H. R. Johnston concurred in recalling the deeds, and now refuses to perform the contract under any circumstances. Though he had properly executed and acknowledged the deeds, complainants' declination to accept them, under the circumstances, furnished no ground to treat the contract as rescinded, and no excuse for recalling them from the bank.

But the bill avers that the contract of sale was made September 30, 1885, while the proof shows that it was made September 30, 1886. There is no class of cases in which correspondence between the allegations of the bill and the proof is more rigidly exacted than in suits for the specific performance of contracts. The allegation of the time when the contract was made is descriptive of that which is material, and the variance between the allegation and proof is fatal, without an amendment of the bill. For this the decree must be reversed. There are no averments in the bill on which a claim for the allowance of rents can be founded, and it is therefore unnecessary to consider this question. The complainants can take nothing by their assignments of error. Reversed and remanded.

## NOTE.

**FRAUDS, STATUTE OF—CONTRACT RELATING TO REALTY—SUFFICIENCY OF MEMORANDUM.** A valid contract for the sale of land may be embraced wholly in letters written concerning such land; and it is not absolutely essential that the letters should be addressed by one of the contracting parties to the other. *Hollis v. Burgess*, (Kan.) 15 Pac. Rep. 536.

Letters from a vendor to his agent may constitute a sufficient "memorandum or note" of an agreement to convey land, if, from such letters, the terms and proposal of sale, the description of the property, and the affirmation of a sale made by the agent can be gathered. *Lee v. Cherry*, (Tenn.) 4 S. W. Rep. 885.

A memorandum for the sale of land as follows: "LANCASTER, June 28, 1887. Received from H. Morrison forty dollars on my place, known as the 'James Perry Tract of land,' which tract I have sold to him for forty-five hundred dollars, part cash, and the balance to bear interest at ten per cent. per annum until paid," and signed by the vendor, —is a sufficient writing, under the statute of frauds, both as to description of the land, and as to the terms of the contract. *Morrison v. Dailey*, (Tex.) 6 S. W. Rep. 426. See, also, cases cited in note to Id.

While the contract may consist of two or more writings, they must be connected by clear reference in one to the other; and parol evidence is inadmissible to connect them, but it may in such case be resorted to, to identify the writing referred to. *Insurance Co. v. Oliver*, (Ala.) 2 South. Rep. 445; *Duff v. Hopkins*, 83 Fed. Rep. 599.

Where the written agreement executed upon the sale of land stipulated that the purchase money should be paid on such time as the vendee, and one who held a mortgage on the land, might agree, and they afterwards agreed on the time, the mortgagee signing a separate writing, which he delivered to the vendee, held that the statute of frauds was satisfied, although parol evidence was necessary to connect the two writings, and settle the time of payment. *Camp v. Moreman*, (Ky.) 2 S. W. Rep. 179.

A writing, purporting to be a promise to execute a contract for the sale of land, which does not specify the purchase price, nor the times of payment, is insufficient, under the statute of frauds, and is not aided by a subsequent letter of the party sought to be charged, instructing his agent how to fill out the contract, if one should be executed. *Webster v. Brown*, (Mich.) 84 N. W. Rep. 678.

A contract to dispose of property in a particular way by last will and testament is in writing, within the requirements of the statute of frauds, where the contract can be extracted from letters written by parties during the course of a correspondence through which the negotiations were carried on. *Roehl v. Haumeaser*, (Ind.) 15 N. E. Rep. 245.

The North Carolina statute of frauds only requires a contract for the sale of land to be signed by the party to be charged therewith, or some one authorized on his behalf. Such contract, therefore, if signed by the vendor only, is binding upon him, but the vendee is not chargeable with its obligations. *Love's Ex'rs v. Welch*, (N. C.) 2 S. E. Rep. 242. The memorandum of a contract for the conveyance of lands, signed by an auctioneer, which fails to show who the owner or vendor was, or to suggest his name by any reference, does not satisfy the statute of frauds. *O'Sullivan v. Overton*, (Conn.) 14 Atl. Rep. 800. See, also, cases cited in note. But see *Mentz v. Newwitter*, 1 N. Y. Supp. 73; *Quinn v. Champagne*, (Minn.) 37 N. W. Rep. 451.

The statute of frauds is not satisfied by a memorandum on the books of a real-estate agent which simply gives the date of the sale, and the price, but omits terms for payment, and which was made by the agent after notice of a sale of the premises to another party. *Elliot v. Barrett*, (Mass.) 10 N. E. Rep. 830.

A contract for the sale of lands, witnessed by a memorandum, drawn by one not a party to it, and signed by him only, is within the statute of frauds and void. *Welch v. Darling*, (Vt.) 7 Atl. Rep. 847.

In an action of contract for breach of an agreement to take a lease, it appeared that the defendants' agent wrote to the defendants a letter containing a description of the premises, and stating the annual rent for a term of five years, the questions of the letter being whether the premises and amount of rent were satisfactory to the defendants; but the letter did not state or refer to the particular terms or conditions of a lease. The defendants, in answer, sent the following telegram: "If basement included at four thousand, secure five years' lease." A letter sent by the agent to the defendants, on the day the telegram was received by him, stated that the lease at \$4,000 included the basement, and that he would close the matter the next day. The agent had no authority to accept a lease. Held, that there was not a sufficient memorandum in writing to satisfy the statute of frauds. *Hastings v. Weber*, (Mass.) 7 N. E. Rep. 846.

An agreement for the sale of land, under the statute of frauds, will be held sufficient, as to its description of the land to be conveyed, if it so describes a particular piece or tract of land that it can be identified, located, or found. A detailed description is not necessary, where the description shows that a particular tract is within the minds of the contracting parties, and intended to be conveyed. *Lente v. Clarke*, (Fla.) 1 South. Rep. 149; *Hollis v. Burgess*, (Kan.) 15 Pac. Rep. 536; *Alpena Co. v. Fletcher*, (Mich.) 12 N. W. Rep. 849; *Doherty v. Hill*, (Mass.) 11 N. E. Rep. 581; *Morrison v. Dalley*, (Tex.) 6 S. W. Rep. 436; *Dougherty v. Chesnutt*, (Tenn.) 5 S. W. Rep. 444. Parol evidence may be resorted to, to apply the description or identify the tract, though such description be somewhat general. *Lente v. Clarke*, *supra*; *Tice v. Freeman*, (Minn.) 15 N. W. Rep. 674.

(85 Ala. 137)

#### PERKERSON v. SNODGRASS.

(*Supreme Court of Alabama. May 11, 1888.*)

##### 1. ATTACHMENT—PLEADING—VARIANCE.

There is no variance between an affidavit for attachment which alleges that defendant is indebted to plaintiff in the sum of \$250, for rent of land due November 1, 1885, and a complaint therein which claims the sum of \$250, due on defendant's bond, payable November 1, 1885; it not appearing that the bond is a different contract from that set forth in the affidavit.

##### 2. SAME—COMPLAINT—TIME OF FILING—DISCRETION OF TRIAL COURT.

Code Ala. 1886, § 2995, which requires plaintiff in attachment to file his complaint "within the first three days of the return-term," is directory, and the court may allow such complaint to be filed after the required time.

##### 3. LANDLORD AND TENANT—ACTION FOR RENT—REDEMPTION FROM MORTGAGE SALE.

Where the mortgagor of land sold under the mortgage leases the same from the purchaser, and redeems within the statutory period, but after the rent is due, such redemption is not a defense to an action for the rent.

##### 4. SAME—PAYMENT OF RENT TO PRIOR MORTGAGEE.

Neither is it a defense to such action that the mortgagor, after such redemption, had paid rent for the premises to a prior mortgagee during the time for which plaintiff claimed rent, as such payment was voluntary; the mortgagee not having entered for condition broken.

##### 5. TRIAL—INSTRUCTIONS—MISLEADING CHARGE—HARMLESS ERROR.

The giving of a misleading charge is not reversible error.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

This was an attachment action brought by the appellee, Nat. H. Snodgrass, against the appellant, James E. Perkinson, and was founded on a note given by the defendant to the plaintiff for the rent of a certain tract of land for the year 1885. The said note was given March 2, 1885, and was made payable November 1, 1885. The land rented to defendant was land which formerly belonged to him, which was sold under power contained in a deed of trust, and purchased by the plaintiff. On the day of the purchase, March 2, 1885, the plaintiff rented it to the defendant, and took the note which is the foundation of this suit. On November 3, 1885, the defendant redeemed the property from the plaintiff. There was verdict and judgment for the plaintiff, and the defendant appealed.

*W. L. Martin*, for appellant. *J. E. Brown*, for appellee.

CLOPTON, J. The defendant moved to dissolve the attachment, on the ground that the complaint was not filed within the time prescribed by the statute, which provides: "The plaintiff must, within the first three days of the return-term of the attachment, file his complaint, and the cause stands for trial at such return-term, if the levy is made, and notice thereof is given, twenty days before the commencement of such term." Code 1886, § 2995. The writ of attachment was sued out November 9, 1885, returnable to the succeeding term of the circuit court, and the complaint was filed August 17, 1887. In construing the statute, we should consider the construction which has been placed upon similar statutes relating to the same subject-matter, before its adoption. In *Sally v. Gooden*, 5 Ala. 78, speaking in reference to the statute of 1839,—“to abolish attorney’s fees in certain cases,”—it is said: “The language of the second section, which declares the defendant’s right to make defense forfeited, when he has omitted to plead to the merits within the first week of the appearance term, is express, and, if literally interpreted, is decisive of the case at bar. But the subject-matter of the statute, the pre-existing laws, and rules of court regulating the practice in this respect, all seem to us to require such a construction to be given to the act as will not divest the court of all discretion as to the time of pleading.” A rule of practice which declared that “no plea in abatement shall be received, if objected to, unless by the indorsement of the clerk it appears to have been filed within the time allowed for pleading,” was construed not to be so imperative as to require a literal compliance with its terms; and that the court may, for good cause, permit a plea of abatement to be filed, although the first term may have passed. *Cobb v. Miller*, 9 Ala. 499; *Massey v. Steele*, 11 Ala. 340. Also the statute, which provides that a plea to an indictment, on the ground that the grand jurors were not drawn in the presence of the officers designated by law, must be filed at the term at which the indictment is found, was held not to prohibit, peremptorily and absolutely, the filing of the plea at a subsequent term. *Russell v. State*, 33 Ala. 366; *Harrington v. State*, 83 Ala. 9, 3 South. Rep. 425. Statutes, in respect to the time in which pleas shall be filed, have been uniformly construed as directory. We must presume that it was intended that the same construction should be placed on the section of the Code in regard to the time the complaint must be filed in a suit commenced by attachment.

The defendant pleaded in abatement a variance between the affidavit for the attachment and the complaint, which variance is alleged in the plea as follows: “Said affidavit alleges that the defendant is indebted to the plaintiff in the sum of two hundred and fifty dollars for rent of land due November 1, 1885, for which the attachment was sued out against the crop of defendant, and levied upon the same, and said complaint claims the sum of two hundred and fifty dollars, due by bond executed by defendant, payable to plaintiff on 1st day of November, 1885.” The plea does not aver that the bond is a different contract from that set forth in the affidavit. The affidavit and complaint set forth a cause of action corresponding in amount and in the time when payable. From the affidavit and complaint alone there does not appear to be such variance as would authorize the court to quash the attachment. *Morrison v. Taylor*, 21 Ala. 779; *Smith v. Wiley*, 19 Ala. 216. It is not essential to allege in the complaint, in terms, that the cause of action set forth therein is identical with the cause of action mentioned in the affidavit, but a departure should not appear by a comparison of the affidavit and complaint.

The defendant set up, in bar of the action, that about March 2, 1885, the land rented was sold under a power contained in a deed of trust executed by him to E. H. Caldwell, at which sale the plaintiff was the purchaser, and received a conveyance from the trustee. After the sale, the defendant, in or-

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der to preserve the statutory right of redemption, rented the premises from the plaintiff, and gave the bond sued on for the rent; and that on November 3, 1885, defendant redeemed the land, and plaintiff executed to him a conveyance. The sale under the deed of trust effectually cut off the equity of redemption, and the purchaser became entitled to the possession and rents until the land was redeemed. The only interest which remained in the mortgagor was the naked statutory right of redemption. By the contract of rent, the relation of landlord and tenant was created between plaintiff and defendant, with all its rights, incidents, and burdens. By the exercise of the right of redemption, the defendant was reinvested with the title, was restored to the right of possession he had at the time of the sale, and came into the estate as if there had been no mortgage nor sale. The lease was merged in the reversion, and the relation of landlord and tenant was terminated. As a general proposition, the lessor's transfer of the reversion carries with it the rent, which is a part of the estate, unless reserved or severed. The rule definitely and properly stated is that whoever owns the reversion at the time the rent becomes due is entitled to the entire sum then due. *English v. Key*, 39 Ala. 113. The rent, which follows the reversion as an incident, is the rent which falls due subsequent to the transfer. In the present case, the rent was past due when the land was redeemed by the defendant. If the lessor dies before rent is payable, it descends to his heirs, who are the reversioners; but if he dies after it is due, it goes to his personal representative, as part of his personal estate. It seems to have been long and well settled that a general grant of the reversion does not pass the rent past due. Such rent is a debt due to the lessor, and a part of his personality. *Burden v. Thayer*, 3 Metc. 76; *Bank v. Wise*, 8 Watts, 394; *Van Wicklen v. Paulson*, 14 Barb. 654. There is nothing peculiar in the nature of the statutory right of redemption, or in the relation of the parties, which modifies or changes this rule of law. The rent was not extinguished by the redemption of the land after it was past due.

The defendant set up the further defense that, prior to the mortgage under which the land was sold and purchased by plaintiff, he had executed to W. F. Hurt a mortgage on the same land, to secure a debt payable January 3, 1882; and that on November 23, 1885, the mortgage debt being unpaid, the executor of the mortgagee, who had died in the mean time, collected from him the sum of \$250, as the value of the rent of the land for the year 1885; which he collected by virtue of his right to the possession,—a right superior and paramount to the right of the plaintiff to the rent. Unquestionably, after the law-day of the mortgage and condition broken, the mortgagee is entitled to possession and the rents, but he is required to be active in making his claim. When there is no specific lien on the rents, he cannot claim them as an incident to the mortgage, but takes them in consequence of his entry and possession, actual or constructive. *Scott v. Ware*, 65 Ala. 174. He may claim them without suit, from a tenant of the mortgagor, by giving notice and requiring the rent to be paid to him. But, if the mortgagor is suffered to remain in possession, he is regarded as the owner of the estate, except against the mortgagee and those claiming under him, and is entitled to the rents and profits until intercepted by the mortgagee, and may make a valid and effectual attornment to a purchaser under a junior mortgage. *Know v. Easton*, 38 Ala. 345. A mortgagor himself in possession is not liable for rent, unless the mortgagee enters, or brings his action to recover possession, or has a receiver appointed on a bill to foreclose. The mortgagee cannot make the mortgagor account for past rent, as he is in possession in his own right. As said by Chancellor KENT: "The contract between the parties is for the payment of interest, not for the payment of rent." 4 Kent, Comm. 156, 165; *Gilman v. Telegraph Co.*, 91 U. S. 603. The defendant, having redeemed the land from the plaintiff before the payment was made to the executor of the first mortgagee, was at that time in possession as mortgagor in respect to the first

mortgage. The payment of the rent to the executor was voluntary. He could not have compelled its payment by suit, and as to the plaintiff it must be regarded merely as payment on the mortgage debt, and did not operate to discharge the defendant from liability to plaintiff for the past rent. The only objection urged to the charges given is that they are misleading. By the settled practice of this court, the giving of a misleading charge is not a reversible error. Affirmed.

(35 Ala. 254)

BYARS v. STUBBS.

(Supreme Court of Alabama. July 26, 1888.)

SPECIFIC PERFORMANCE—GOOD FAITH OF COMPLAINANT—CONCEALMENT OF FACTS.

Defendant, by letter, requested plaintiff, who lived about 100 miles distant, and near the land in question, to sell the same, offering to allow him, as compensation, whatever was realized over \$500. Plaintiff immediately procured from defendant an agreement to sell the land at \$500, if paid within three weeks. A company had been organized to purchase land in the vicinity of the land in question, thus materially increasing its value, which was known to plaintiff, but not to defendant. *Held*, that equity would not enforce performance of the contract, plaintiff having failed to communicate the fact of rise in value to defendant.<sup>1</sup>

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

On November 22, 1886, Thomas J. Byars made a written proposition to James T. Stubbs to sell his (Byars') interest in certain lands for a stipulated consideration, provided the money was paid to him by the 15th day of December, 1886. Without replying to this proposition, which was made to him by letter, the said Stubbs went, the next morning, to see the said Byars at his home, about 100 miles distant, and procured from him the following written instrument: "By this agreement I propose to sell to J. T. Stubbs four and two-thirds shares in the following described real estate, to-wit, [here follows a description of the land;] and also my mother's life-time right to the above-described land,—for and in consideration of the sum of five hundred dollars, to be paid by the 15th day of December, 1886. By this agreement, if the land is not sold by the 15th of December, 1886, this obligation is null and void. November 22, 1886. [Signed] T. J. BYARS Attest: JOHN W. WHITE." This present bill is filed for specific performance of the above instrument. It is conceded that no money was paid to appellant, the defendant below, for this option, and no deed tendered him for execution. The appellant also denies that tender of the money was ever made to him. Upon final hearing, the chancellor decreed that the complainant have the relief prayed for; and from this decree the defendant appealed.

*Martin & McEachin*, for appellant. *Mr. Van Hoose and W. M. Brooks*, for appellee.

CLOFTON, J. The proposal of defendant to sell complainant the land in controversy was in writing, and is plain and certain in its terms. It may be regarded as a continuing offer to sell, not being revoked, until the expiration of the time allowed complainant in which to accept and comply with the conditions of sale. If accepted by him in accordance with the provisions of the proposal, it became a completed contract of sale, mutually obligatory; specific performance of which would be decreed, if it possesses all the essential elements and incidents, as a matter of course. *Linn v. McLean*, 80 Ala. 360. But the right to specific execution is not absolute, and a decree therefor does not necessarily follow, though the contract may be plain and certain in its terms, and may be obligatory on both parties. Its enforcement rests on the sound discretion of the court,—a judicial discretion, to be exercised according to the established principles of equity. An agreement may be valid at law,

<sup>1</sup>See note at end of case.

and there may not be sufficient grounds for its cancellation in equity, and yet, upon a fair and just consideration of the attendant and collateral circumstances, and sometimes of subsequent events, the court will abstain from its enforcement. An essential element is that the contract must be fair, just, and reasonable in all its provisions, and its specific performance must be exempt from hardship or injustice to either of the parties. The court will refuse to enforce the contract if it be founded in mistake or surprise, or is obtained by any sharp practice, trickery, or undue advantage of position, or by non-disclosure of material facts known by one party and unknown to the other, or is affected by any inequitable feature. *Cowan v. Sapp*, 81 Ala. 525; *Hesse v. Briant*, 6 De Gex, M. & G. 623. In 2 Pom. Eq. Jur. § 905, the author states the doctrine as follows: "The suppression of a material fact, or the failure to communicate a material fact, by the vendor, without any purpose of deceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground for its cancellation in equity, because not fraudulent, may still render the agreement so unfair, unequal, or hard that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled." In the view we take of this case, we do not deem it necessary to consider and decide whether complainant accepted the proposal and tendered the purchase money within the time limited, or whether defendant refused to accept it, and make the deed, as to which matters there is much conflict in the evidence. We prefer to rest our decision on the application of the foregoing principles to the case made by the evidence, as to which there is no serious dispute. The complainant lived in the vicinity of the land, which is situate in Jefferson county, and the defendant resided in Franklin county, about 100 miles distant. In this respect, the complainant had great advantage of situation, and of opportunity of knowing the circumstances which materially affected the value of the land. The first information which complainant received of the amount of the defendant's interest, and the price at which he was willing to sell, was through a letter written by the latter in November, 1886, requesting complainant to sell his interest, and offering to pay for his services all he could get over \$500. This communication and authority to sell implied confidence. Without replying to the letter, or attempting to ascertain whether the land could be sold, and at what price, the complainant, the morning after the reception of the letter the evening previous, went to see the defendant in person at his home in Franklin county, and procured from him the agreement to sell complainant his interest in the land for \$500, to be paid by December 15, 1886; and, if not sold by that time, the agreement to be void. According to complainant's own testimony, his sole business and purpose in going to see defendant was to obtain an option on his interest in the land. Why this great haste to procure an option rather than undertake the agency to sell? The question is readily answered by the surrounding circumstances. Prior thereto, a company, called the East Lake Company, had been organized, and had commenced making purchases of land for development in that vicinity, and was producing what some of the witnesses call "a sort of a boom." This proceeding materially affected the value of the lands in the neighborhood. They began to increase in value, and continued to rapidly enhance up to the time in which the option of claimant was to be exercised, as specified in the proposal to sell. The evidence as to the value of the land greatly differs; the estimates of the witnesses ranging from ten to fifty dollars per acre. It is manifest, however, that the surrounding circumstances were such as would largely influence an owner of land in that section in determining whether he would sell, and in fixing the price at which he would be willing to sell. It is true, the relation of principal and agent was not consummated between complainant and defendant; but the proposition of

the latter to employ the former as agent to sell the land placed them in a relation, each to the other, which demanded open and fair dealing. We do not mean to say that there was fraud or trickery in procuring the option. What we decide is that, under the circumstances, the complainant should have disclosed to defendant the material facts. Instead of so doing, he availed himself of the information communicated by defendant's letter, hastens in person, and obtains an option running through three weeks, without paying any consideration therefor, and which did not bind him in any respect, and suppressed the facts which had so materially affected the present and prospective value of the land; for he testifies that he made no representation of its value. In this he took an undue advantage of his position and knowledge. The contracting parties did not stand on an equality, and the defendant entered into the agreement in ignorance of the facts. Such being the nature of the contract, and the circumstances under which it was made, a court of equity, in the exercise of its discretion, should abstain from granting a specific performance, and leave complainant to his legal remedies. The decree is reversed, and a decree here rendered dismissing the bill.

## NOTE.

**SPECIFIC PERFORMANCE—ENFORCEMENT—UNCONSCIONABLE BARGAIN.** Where one who is secretary of a stock company agrees with a stockholder to buy his stock, and, during the negotiations, endeavors to convince the vendor that the stock is not worth par, and that he does not know where he can place it, while in fact he wishes it for himself, and from his official position knows the stock is of much greater value, and when he has made no payment on the stock, specific performance will not be decreed, but the vendee will be left to a suit at law to recover any damages he may have suffered from the breach of contract. *Iron Co. v. Todd*, (Del.) 14 Atl. Rep. 27.

Plaintiff made a contract with a party by which the plaintiff was to move, with his wife, to the house of such party, and cultivate his land, and support him till his death, in return for which the latter executed his bond, the conditions of which were that, when said contract was fully entered into, he would convey certain lands to plaintiff's wife. Seventeen days after executing his bond he died. Held, that a court of equity will not decree a specific performance against the executors, although plaintiff may have entered upon the fulfillment of the contract. *Ramsay v. Gheen*, (N. C.) 6 S. E. Rep. 75.

A tract of land, worth a little over \$3,000, was subject to a first mortgage of \$1,800, a second mortgage of \$2,000, and to judgments aggregating \$400, and improvements on the land to a chattel mortgage of \$1,050. The holders of the second mortgage foreclosed, and made all those interested parties, except the first mortgagee, who, for the purpose of protecting his mortgage, as he thought, authorized a bid for him to an amount not exceeding \$3,500, and at the sale the premises were struck off to him. On application to show cause why he should not be required to pay his bid, held, that as he was not a party to the foreclosure suit, and the bid was made in an honest mistake as to his interest, which would involve him in an unconscionable loss for the benefit of the applicants, who were also holders of the chattel mortgage, a specific performance would not be decreed. *Sullivan v. Jennings*, (N. J.) 14 Atl. Rep. 104.

Specific performance will not be decreed when for any reason it would be inequitable. *Iron Co. v. Todd*, *supra*, and cases cited in note. See, also, *Vaught v. Cain*, (W. Va.) 7 S. E. Rep. 2.

(34 Ala. 393)

**ABNEY et al. v. DE LOACH et al.**

(Supreme Court of Alabama. July 26, 1888.)

**1. ADOPTION—DECLARATION—STATEMENT OF CHILD'S AGE.**

Under Code Ala. § 2867, providing that a person adopting a child may make a written declaration setting forth its name, sex, and age, a declaration of the adoption of "J. M., a male child of D. M. and N. M., of ——— years of age," imports that the adopted person is a minor, and is not objectionable as not stating his age, whether the statute allows the adoption of an adult or not.

**2. SAME—BY HUSBAND AND WIFE—VALIDITY.**

A declaration of adoption by husband and wife is good as to the husband, and will enable the adopted child to inherit his estate, though the statute (Code Ala. § 2867) makes no provision for such a joint form of adoption.

**3. SAME—ACKNOWLEDGMENT—RESIDENCE OF DECLARANT.**

A declaration of adoption, beginning with the words, "*State of Alabama, M. County,*" and stating that J., "of said county and state," hereby declares, etc., and

acknowledged before the probate judge of M. county, sufficiently shows compliance with Code Ala. § 2367, requiring the declaration to be acknowledged before the judge of probate of the county of the declarant's residence.

4. **SAME—FORM OF ACKNOWLEDGMENT.**

Code Ala. § 2367, providing for the adoption of a child by an acknowledged declaration, but prescribing no form for the acknowledgment, must be understood as referring to the form prescribed by section 1802 for ordinary conveyances.

5. **SAME—ACKNOWLEDGMENT—SUFFICIENCY OF CERTIFICATE.**

A certificate that an instrument bearing the same date was acknowledged on the day of its date is sufficient, though it does not state that it was made on "this day," as in the form prescribed by Code Ala. § 1802.

6. **SAME—INFORMATION AS TO CONTENTS.**

A certificate of acknowledgment that declarants, "being informed of the contents of the declaration, acknowledged before me that they executed the same," sufficiently complies with the form of Code Ala. § 1802, that the signer acknowledged that, being informed of the contents of the instrument, he executed the same, as against the objection that there is no acknowledgment that they were informed of the contents of the instrument.

7. **SAME—RECORDING DECLARATION—MINUTES OF PROBATE COURT.**

Under Code Ala. § 2367, by which a declaration of adoption, acknowledged and filed in the office of the judge of probate, and recorded on the minutes of his court, makes the child capable of inheriting the declarant's estate, a declaration otherwise sufficient, and filed in the office of the judge of probate, is not invalid because of its being recorded in the book of deeds and wills instead of on the minutes of the court.

Appeal from chancery court, Monroe county; THOMAS W. COLEMAN, Chancellor.

Bill by G. J. Abney *et al.*, nephew and nieces, and claiming to be heirs of John N. Sanders, deceased, against John De Loach, the administrator, Rebecca Sanders, the widow, and John Sanders Mims, *alias* John Sanders, as one who claims to be solely entitled to the estate, subject to the rights of the widow, for a settlement of the estate. A demurrer to the bill was sustained, and the complainants appealed. The declaration of adoption mentioned in the opinion, as set out in the bill, is as follows:

"*The State of Alabama, Monroe County:* Know all men by these presents, that we, John N. Sanders and Rebecca Sanders, his wife, of said county and state, do hereby declare, in the presence of W. C. Sowell and Arthur T. Sowell, that we desire to adopt and do hereby adopt John Sanders Mims, a male child of David Crocket Mims and Nancy Mims, of ——— years of age, so as to make him, the said John Sanders Mims, capable of inheriting our and each of our estate, real and personal; and we do further declare that it is our desire that the name of said child be changed from John Sanders Mims, its present name, to John Sanders. Made and signed this the 25th day of May, A. D. 1883.

"In presence of W. C. SOWELL.

J. N. SANDERS. [L. s.]

"T. A. SOWELL.

R. F. SANDERS. [L. s.]

"*State of Alabama, Monroe County:* Before me, W. C. Sowell, judge of probate in and for said county, personally appeared John N. Sanders and Rebecca Sanders, his wife, and who are known to me to be the declarants in the above and foregoing declaration, and, being informed of the contents of the declaration, acknowledged before me that they executed the same voluntarily on the day the same bears date. Given under my hand this, the 25th day of May, A. D. 1883.

"W. C. SOWELL, Judge of Probate, Monroe County."

*Cumming & Hibbard*, for appellants. *Watts & Son* and *N. Stallworth*, for appellees.

SOMERVILLE, J. The bill is filed by certain kindred of John N. Sanders, deceased, claiming to be heirs and distributees of his estate, and seeking to bring the administrator to a settlement of his trust in a court of chancery. The bill makes one John Sanders Mims, *alias* John Sanders, who is a minor, a party defendant, as one who claims to be solely entitled to the estate, subject to the dower and distributive rights of the widow of the deceased. This claim

is stated to be based on a declaration in writing, executed by John N. Sanders, the deceased, during his life-time, and attested, acknowledged, and filed for record in the office of the judge of probate of Monroe county; which instrument purports to adopt said minor as the lawful heir of the intestate, under the provisions of our statute regulating the mode of adopting children. Code 1886, §§ 2365-2368; Code 1876, §§ 2743-2745; Code 1852, §§ 2009-2011. Section 2365 of the present Code, which has remained unaltered in phraseology since the Code of 1852, (section 2009,) where the statute first appeared in its present form, has reference only to proceedings to legitimate bastard children. It declares that this may be done by the father of the bastard, by his making a declaration in writing, attested by two witnesses, setting forth certain specified facts, duly acknowledged by the maker, or probated by one of the attesting witnesses, "filed in the office of the judge of probate, and recorded on the minutes of his court." It is provided in the following section that "the father may, at the same time, change the name of the said child by stating in his declaration the name it is then known by and the name he wishes it afterwards to have." Code 1886, § 2366; Code 1876, § 2744. Then follows this section as to the mode of adopting any child of another into one's family, which is the law governing the rights of the parties in this case: "Any person desirous to adopt a child so as to make it capable of inheriting his estate, real and personal, or to change the name of one previously adopted, may make a declaration in writing, attested by two witnesses, setting forth the name, sex, and age of the child he wishes to adopt, and the name he wishes it thereafter to be known by; which, being acknowledged by the declarant before the judge of probate of the county of his residence, filed and recorded as in the two preceding sections, has the effect to make the child capable of inheriting such estate of the declarant, and of changing its name to the one stated in the declaration; and for the services under this chapter the judge of probate is entitled to a fee of one dollar." Code 1886, § 2367, (2745.)

Adoption is the taking into one's family the child of another as son and heir; conferring on it "a title to the privileges and rights of a child,"—an act, in other words, "by which a person appoints as his heir the child of another." *Russell v. Russell*, 84 Ala. 48, 3 South. Rep. 900. The right with us is purely statutory, and was never recognized by the rules of the common law. It was, however, a feature of the Roman law, and obtains in Germany and France, and some other continental nations of Europe, whose jurisprudence in this respect has followed the civil law. It prevailed also as a custom among the ancient Jews. Statutes regulating different modes of adoption prevail in, perhaps, a dozen or more of the American states. In this state, prior to the Code of 1852, the right of adoption was limited to the legitimization of bastard children by their fathers. The mode of procedure was for him "to file in open court, in either the county or circuit court" of the county in which he resided, a declaration or statement in writing, setting forth the name and age of the child, and the name of the mother, and his recognition of it as his natural child; which, after being signed by the father, was required to be attested by the clerk of the court in which it is filed, and "entered at full length of record." Clay, Dig. (1843,) p. 185, § 9. In most of the states, the mode pursued is by petition to the probate or other like court, stating the requisite facts, with the name and description of the child, and the desire of the petitioner to adopt it, alleging the consent of the child's parents or guardian to the act of adoption, and usually the child's consent, if over 14 years of age. A decree is made by the court on these facts, which judicially confers on the child the capacity or qualification to inherit, and other incidents of the *status* authorized by the statutes of the particular states where the proceeding is had. This is a judicial procedure, involving the rendition of a judgment by the court by which the new *status* of the child is determined, and from which an appeal is usually authorized to some superior tribunal. This course is pur-

sued in Massachusetts, Pennsylvania, Kansas, Illinois, and other states. The other mode is the one now authorized in Alabama, Texas, California, Iowa, Vermont, and other states, which is intended to be more simple and inexpensive. It consists of a written instrument, declaration, or statement, more in the nature of a deed than anything else, which is required to be executed, attested, acknowledged, and filed for record in the probate or other court of cognate jurisdiction. This is nothing judicial connected with this simple procedure. Even the taking of the acknowledgment by the probate judge is purely a ministerial, and not a judicial, act. *Halso v. Seawright*, 65 Ala. 482. The maker or declarant is analogous to the grantor in an ordinary deed; the adopted child is the grantee; and the thing granted is the irrevocable right, capacity, or qualification to inherit or succeed to the property of the adopter, in case he should die intestate. This *quasi* deed is to be recorded, rather as a perpetual memorial of the fact of adoption than to subserve the purpose of constructive notice, as in the case of the conveyance of property. *Ross v. Ross*, 129 Mass. 243, 87 Amer. Rep. 321; *Ballard v. Ward*, 89 Pa. St. 358; *Bancroft v. Bancroft*, 53 Vt. 9; *Ortiz v. De Benavides*, 61 Tex. 60; *Pina v. Peck*, 81 Cal. 359; *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. Rep. 902; Schouler, Dom. Rel. § 314; 2 Kent, Comm. \*212 *et seq.* While these statutes authorizing adoption are in derogation of the common law, and for this reason are, in some respects, to be strictly construed, their construction cannot be narrowed so closely as to defeat the legislative intent which may be made obvious by their terms, and by the mischief to be remedied by their enactment. So much for the provisions and purposes of the statute, and the rule and analogies by which we are to be governed in its construction and application.

The declaration of adoption, with other accompanying papers, is set out in the bill *in hæc verba*. It is signed by both J. N. Sanders, the intestate, and his wife, R. F. Sanders, and appears to be the joint and several act of each. It is attested by two witnesses, acknowledged, and filed for record with the probate judge of Monroe county, and was by him recorded, not "on the minutes of his court," but in a book kept by him for the recording of deeds and wills. The proceedings are in due form, unless some one of the objections specially taken to them by demurrer is well taken. These we proceed to consider.

It is first objected that the written declaration fails to state the age of the child, this being left blank. This does not, in our opinion, invalidate the proceeding. If it be conceded that, contrary to the rule of the Roman law, no adult can be adopted under our statute, and that it applies exclusively to minors,—which we do not decide,—the word "child" used in describing the adopted person would *prima facie*, at least, import an infant, or very young person; and the bill shows that the claimant in this case was over 14 and under 21 years of age. The written declaration, moreover, sets forth his full name and sex, and describes him as the child of David Crocket Mims and Nancy Mims. Here is a complete identification of person, beyond any reasonable possibility of mistake, accompanied by terms which indicate that the person adopted is a minor, under 21 years of age. This, we think, is sufficient, and accomplishes every reasonable intentment which the law-maker had in view. *Jones v. Morris*, 61 Ala. 518; *Sewell v. State*, 82 Ala. 57, 2 South. Rep. 622.

The further objection is taken that the acknowledgment of the instrument before the probate judge is fatally defective. No particular form of acknowledgment is given by the statute, but the obvious reference is, by implication, to the form prescribed for ordinary conveyances, which must be understood as being adopted for this class of cases. Code 1886, § 1802, (2158.) The first defect insisted on is that the form in the record recites that the declarants "being informed of the contents of the declaration," acknowledged that "they executed the same voluntarily on the day the same bears date." The Code form reads that the signer acknowledged that, being informed of the contents

of the conveyance, he executed the same voluntarily. There is no acknowledgment, it is said, that they were informed of the contents of the paper; only an acknowledgment that they executed it. This criticism is too severe and technical. The certificate of the officer that the declarants were informed, does not differ in substance from their acknowledgment that they were informed; it being no uncommon thing for the officer himself to verify such information by personal instructions. The other objection is that the form fails to show when the maker made the acknowledgment, the words "this day" following the words "acknowledged before me" in the Code form being omitted. It has long been the settled law in this state, as to deeds, that when such an instrument is acknowledged by the grantor on the day of its date it is a sufficient compliance with the statute, although the certificate of acknowledgment does not state that he acknowledged that he executed it on the day of its date. *Bradford v. Dawson*, 2 Ala. 207; *Carter v. Chaudron*, 21 Ala. 72; *Parsons v. Boyd*, 20 Ala. 112; *Harbinson v. Harrell*, 19 Ala. 753.

The recital in the instrument that the makers were of "said county and state" obviously has reference to the county of Monroe, which appears in its margin, and must be construed to have reference to the county of the makers' domicile or residence. Such recitals in deeds and wills are ordinarily *prima facie* evidence of the fact of the declarant's domicile or residence, liable to be rebutted by proof to the contrary. *Merrill v. Morrisett*, 76 Ala. 433; *Ennis v. Smith*, 14 How. 400. The paper, therefore, shows *prima facie* a sufficient compliance with the requirement of the statute that it must be acknowledged by the declarant "before the judge of probate of the county of his residence." Code 1886, § 2367, (2745.)

It is further suggested, as appears from the bill, that the declaration of adoption was not "recorded on the minutes" of the probate court, as seems to be required by the statute. Section 2367 of the Code (1886) provides that the paper shall be "filed and recorded as in the two preceding sections," and that, conforming to the several requirements prescribed, it "has the effect to make such child capable of inheriting such estate of the declarant, and of changing its name to the one stated in the declaration." But one of the two preceding sections (section 2365) has any reference to the subject of filing and recording, and this provides that the written declaration, authorized to be made by the father of a bastard child for the purpose of legitimating it, after being properly executed and acknowledged, shall be "filed in the office of the judge of probate, and recorded on the minutes of his court." Code, § 2365. This inconvenient requirement seems to have been brought forward from the old statute found in *Olney's Digest*, (page 135, § 9,) where the declaration was required to be "filed in open court," either probate or circuit, "and entered at full length of record," analogous to the procedure in those states where adoption is effected by judicial decree. It appears that the paper was filed in the office of the judge of probate, but was not recorded "on the minutes of his court." It was recorded only in the book of wills and deeds. It is contended that the failure to record the instrument as required is fatal to its validity, because the statute in effect declares that when all these things are done the act of adoption is complete.

Admitting the correctness of the construction placed by appellants' counsel on the phrase, "recorded on the minutes of his court," which seems to be severely literal, and against which much can be urged, the inquiry arises, does the neglect of the probate judge to do his duty, by properly recording the paper, operate to destroy its legal validity, when the maker and beneficiary have done all that the law requires of them to do, and which they possibly can do, towards perfecting it? The purpose of recording such a paper cannot be to give notice of the act of adoption, or of the rights acquired under it, to any one. All it confers, as we have seen, is the capacity to inherit property. It does not affect the rights of creditors or subsequent purchasers in any re-

spect. The only object had in view by this legislative requirement must have been to furnish some definite evidence of the fact that the transaction was genuine and in good faith, and as a perpetual memorial of the fact that it is complete. There being nothing whatever judicial in the proceeding, and all the formalities attending its execution, attestation, and acknowledgment being analogous to those in reference to deeds of conveyance, to say nothing of the rights acquired under it, we can perceive no sound reason why the same analogies do not apply in reference to the act of recording. Statutes are to be given a reasonable construction, and every construction leading to an absurdity is to be avoided as far as it is possible to do without perverting the clearly expressed legislative intent. The rule settled in this state more than 50 years ago, and uniformly followed since, is that the failure of a recording officer to discharge his duty by registering an ordinary conveyance, which has been filed with him for record, in proper time, does not invalidate the instrument, or impair the rights of the parties under it, even as against subsequent purchasers. The case of *McGregor v. Hall*, 3 Stew. & P. 397, cited by appellees' counsel, is directly in point. The act of January, 1828, provided that "hereafter all deeds and conveyances of personal property, in trust, to secure any debt or debts, shall be recorded in the office of the clerk of the county court of the county wherein the person making such deed or conveyance shall reside, within thirty days, or else the same shall be void against creditors and subsequent purchasers without notice." The mortgage in question was left in the proper office, and with the proper officer, to be recorded, some four or five days before the 30 days had expired, but was not recorded until after the lapse of the 30 days required by the statute. The contention there, as here, was that there was no compliance with the statutory requirement, and that the statute made the conveyance void as to creditors, unless it was actually recorded. The court declared that to be governed by the letter of the statute would defeat the legislative intention. The purpose clearly had in view, involving the motive of the law-giver, which was to afford notice to creditors and subsequent purchasers, was rather to govern. It was said: "If the party in interest does all that he can to give such notice, especially if the act done be equivalent to the one required towards effecting that object, it would be wrong to injure him for the negligence of an officer, who has been regularly appointed, according to the laws of the land, for the purpose of discharging this duty, and may therefore be viewed in some measure as chosen by the parties to the instrument legally deposited with him for the especial purpose of putting them upon record." The court declined to visit the negligence of the recording officer on the grantee, and held that the proper filing of the mortgage for record was a compliance with the statute, and made it operative as constructive notice to creditors, although it was unrecorded. This ruling was followed in *Dubose v. Young*, 10 Ala. 365, (decided in 1846;) GOLDTHWAITE, J., observing as follows: "The decision made in *McGregor v. Hall*, 3 Stew. & P. 397, is conclusive that the deposit for record is equivalent, so far as the question is connected with registration, to the recording of the deed." These decisions were not based on any statute, but were afterwards carried into the Code of 1852, where the principle settled by them received legislative sanction by the provision there made that conveyances, required to be recorded in the probate office, are "operative as a record from the day of the delivery to the judge; and any one delivering a conveyance for registration may require a receipt for the same, describing it by date, parties thereto, and property conveyed." Code 1852, § 1270; Code 1886, § 1793. The statute is but a legislative adoption of the broad and just principle that, "when a party discharges a duty imposed by law, the omission or neglect of a public officer, in the discharge of a subsequent duty, shall not be invoked to his prejudice." *Floyd v. Clayton*, 67 Ala. 265; *Halfman v. Ellison*, 51 Ala. 543. A person who searches for the discovery of papers required to be recorded is thus required, not only

to search the proper records, but also to ascertain whether any such paper has been filed to be recorded. We are of opinion that the rule declared in *McGregor v. Hall*, *supra*, is sound, and is applicable with great force to the present case, where the failure to record the paper could by no possibility operate to prejudice third persons. *Jordan v. Farnsworth*, 15 Gray, 517; Gen. St. Mass. 1860, p. 766; *Dodge v. Potter*, 18 Barb. 193; *People v. Bristol*, 35 Mich. 28; Jones, Chat. Mortg. § 272. Any other construction of the statute would lead, not only to monstrous injustice, but to results little less than absurd. It would defeat the rights of the innocent beneficiary of the paper by many accidents, and even wrongful acts of the officer, for which there might be no remedy. The destruction of the paper by fire, or the purloining of it by an interested person, after delivery and before record, the intentional or fraudulent withholding or delay of its registration by the officer, a material error made in recording it, or the death of the maker during the progress of a *mandamus* proceeding to compel registration, with other like cases that would suggest themselves, might all be visited disastrously upon the adopted child, although entirely innocent of complicity in these various causes producing the failure of the registration officer to make the required record. We cannot believe that this was the legislative intent.

The cases of *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. Rep. 902, and *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. Rep. 907, construing the Iowa statute on the subject of adopting children, and cited by appellants' counsel, do not conflict with the views above expressed. That statute provided that, "upon the execution, acknowledgment, and filing for record of such instruments," the act of adoption should be complete. No question arose as to registration, for none was required by the statute. It was held that the failure to file the paper for record until after the death of the maker defeated the rights of the child, the adoption being incomplete without it. The filing was an act of the party interested. The recording is the act of an officer over whom the parties to the paper have no control. Those cases and this rest on entirely different principles.

But one other point remains for consideration. It is suggested in the bill that the adoption paper was signed by both John N. Sanders and his wife, and that the signature of the wife rendered it invalid as the joint act of both, — a form of adoption which, it is said, is unauthorized by the statute. We do not think that a valid juridical act by one person can be rendered invalid by the consent or signature of another. The most that can be urged is that the signature of the wife was mere surplusage. It could not vitiate the act of the husband, who was *sui juris*, and, as we have shown, who complied with every essential requisite of the statute in the proceeding by which he sought to adopt the child named in the instrument of adoption. We are of opinion that the demurrer to the bill was properly overruled, and that the decree of the chancellor must be affirmed.

(84 Ala. 612)

MOSES *et al.* v. TOMPKINS.

SAME v. WOODSON *et al.*

(Supreme Court of Alabama. July 26, 1888.)

1. INJUNCTION—TO RESTRAIN SALE OF CORPORATE STOCK—ELECTION OF DIRECTORS.  
Persons acting as directors of a street-railway company, alleged not to have been legally elected, will be enjoined from selling complainants' stock for non-payment of assessments and calls thereon, and from making other calls, and the validity of their election will be examined into, as collateral to the relief sought, though an original bill to test such election would not be sustained.
2. SAME—ACTION OF DIRECTORS—RIGHTS OF STOCKHOLDERS.  
The bill in such case also sought to enjoin the extension of the railway, and to prevent the directors from using the effects of the corporation for that purpose; alleging merely that such act was unauthorized, and contrary to the wishes of the majority of the stockholders, not that it was *ultra vires* or a breach of trust. Ad-

mitting the truth of such allegations, plaintiffs had an adequate remedy at law. *Held*, that the injunction will be dissolved so far as it restrains the use of the corporate property in extending the road. STONE, C. J., dissenting.

**3. HORSE AND STREET RAILROADS—DIRECTORS—FILLING VACANCIES IN BOARD.**

Under Code Ala. § 1924, providing that a majority of the directors of a street-railway company shall form a board, and may fill vacancies therein, where five of the seven directors designated by the act of incorporation become disqualified to serve as such, the two remaining directors cannot fill the five vacancies thereby occasioned.

**4. SAME—RATIFICATION BY STOCKHOLDERS—SPECIAL MEETING.**

Nor will the ratification of their act in filling such vacancies, by the stockholders in a special meeting afterwards held, validate it; the by-laws providing that directors can only be lawfully elected by the stockholders at their regular annual meeting.

**5. SAME—DIRECTORS DE FACTO—COLLATERAL ATTACK.**

Nor can the directors thus chosen be regarded as directors *de facto*, so that their acts cannot be collaterally called in question, as this rule is only for the protection of third persons dealing with the corporation, and is not applicable as between the directors and the stockholders. As to them such directors are usurpers, and the validity of their election and acts may be collaterally questioned.

Appeals from chancery court, Colbert county; THOMAS COBBS, Chancellor. Bills in equity, filed by H. B. Tompkins and by C. D. Woodson and others, against A. H. Moses and others, to enjoin defendants, as directors of the Sheffield & Tuscumbia Street-Railway Company, from selling the stock held by the plaintiffs, to pay assessments and calls thereon, and from making further calls thereon, and from further construction of a certain extension of their road. Defendants appeal from judgments overruling their motions to dissolve.

*R. C. Brickell and Roulhac & Nathan*, for appellants. *Roquemore, White & Long and Kirk & Almon*, for appellees.

CLOPTON, J. The appeal in each of the above-stated cases is taken from a decree of the chancellor, overruling a motion to dissolve a temporary injunction; the motion being rested on want of equity in the bill, and on the denials of the answer. The appeals were submitted, and will be considered together, involving mainly questions in common. The bills are filed by appellees, as shareholders of the Sheffield & Tuscumbia Street Railway Company, and seek to enjoin appellants, who claim to be directors of the corporation, from selling the stock of complainants for the payment of assessments and calls thereon; from making other calls; and from constructing, with material belonging to the corporation, a line or branch of the railway from the Memphis & Charleston Railroad to the main line of the company. When the motion to dissolve an injunction is founded on the ground that the bill is wanting in equity, the substance, the facts stated, and not the manner in which they are alleged, must be considered,—all amended defects should be regarded as amended; and, when the motion is based on the denials of the answer, the allegations of the bill will be taken as true, unless contradictory of each other, or positively denied,—matter in avoidance cannot be considered. Though generally, when the answer fully and unequivocally denies the material allegations of the bill, the injunction will be dissolved, the rule is not inflexible. The injunction will not be dissolved if any circumstances are apparent which called for a departure from the general rule. We eliminate from consideration all matters not proper to be considered under these rules. It is insisted that there is no independent equity in the bill, separated from the question of the legality of the election of the defendants. As a general rule, courts of equity will not take jurisdiction for the mere purpose of inquiring into the legality of the election of officers of a private corporation, nor of removing from office an officer in actual possession. In such case, a complaining shareholder must resort to the remedies at law,—an action of *quo warranto*, or the special proceedings provided by statute. But when an

independent and special ground of equitable interposition, on which the court may take rightful jurisdiction, exists and is shown, it will inquire into the legality of the election, coming in question collaterally and incidentally. *Nathan v. Tompkins*, 82 Ala. 437, 2 South. Rep. 747. The bills, as we interpret them, do not solely and primarily invoke the jurisdiction of the court to inquire into the legality of the election of the directors, nor to vacate their offices. The first special equity is to prevent the sale of the stock of the complainants for the payment of an assessment and call made and ordered by the defendants in the capacity of directors, who, it is alleged, were not legally elected or appointed; to prevent a threatened injury to a primary right, which, if consummated, will subject complainants to a multiplicity of suits, and to litigate their title to the stock under the disadvantages of embarrassment and complication by the claims of third persons who may become purchasers thereof. The special equity is that persons, assuming to act as directors without legal authority, are proceeding, *colore officii*, to do acts which will, primarily and directly, destroy or impair the proprietary rights of complainants as stockholders. In order that an assessment and call for the payment of subscriptions to the capital stock of a corporation may be legal and enforceable, it must, ordinarily, be made by the corporate authorities, in whom the power is vested by the charter or by-laws, or by the general laws. In *Mining Co. v. McLister*, 1 App. Cas. 39, a bill was filed to declare invalid a forfeiture of stock for the non-payment of calls, made by directors alleged to have been illegally elected. The question of the validity of the forfeiture ultimately depended on the validity of the election of the persons who, assuming to be directors, declared complainant's shares forfeited for non-payment of a call made by them. The bill was sustained, the declaration of the forfeiture declared invalid, and it was held that there must be properly appointed directors to make a call and to declare a forfeiture of shares for non-payment. It has also been held in other cases that the illegality of the election of the persons who, as directors, make a call, may be set up in resistance to a suit for its recovery. *Insurance Co. v. Westcott*, 14 Gray, 440. To prevent irreparable mischief, multiplicity of suits, the destruction and impairment of the primary rights of the stockholders equity will interfere, at the instance of a stockholder, and restrain the sale of his stock for the payment of a call made by illegally elected or appointed directors. The validity of the election of defendants, as directors, arises collaterally and incidentally, and the duty to inquire into and decide the question is necessarily involved.

The company was incorporated in January, 1887, under the general laws; and at the first meeting of the stockholders seven directors, being the number provided for by the by-laws, were elected, consisting of McMillan, Hull, Swartz, Russell, Almon, and the defendants A. H. Moses and A. H. Kellar. By the by-laws and the statutes their terms of office continued until the annual meeting of the stockholders in April, 1888, and until their successors were elected and qualified. Code 1876, § 1923. The by-laws further provide: "No person shall be elected, and if elected, shall serve, as a director, who does not own in his own name and right at least ten shares of stock in the company, and who shall have held said stock continuously since, at least, the preceding annual election of directors." McMillan, Hull, Swartz, and Russell sold their stock, and Almon sold all of his except four shares; thereby disqualifying themselves for serving as directors. In consequence thereof, Moses and Kellar, remaining directors, elected in May, 1887, their co-defendants, Nathan, Samuel Kellar, M. L. Moses, and A. J. Moses, to fill the vacancies. We shall not inquire whether such self-disqualification, and the failure to act as directors thereafter, were tantamount to a formal resignation, and operated to create a vacancy. Were such result conceded, the question still remains, did the two remaining directors have authority to fill the vacancy? By the by-laws, a majority of the board of directors constitute a quorum for the transaction

of business; and, by statute, "where the corporate powers are directed to be exercised by any particular body or number of persons, a majority of such body or persons form a board for the exercise of such powers." Code 1876, § 2024. And, in special reference to the incorporation of "street-railroad companies," the statute, after providing for the election of directors at the first meeting of the incorporators, expressly provides: "A majority of such directors shall form a board, and be competent to fill vacancies in their board, make by-laws, and transact all business of the corporation." Id. § 1924. It is manifest, from the provisions of the by-laws and the statutes, that no number of directors less than a majority, acting as a board, is empowered to transact the business of the corporation, or to fill vacancies in the board.

The next question is, does the ratification of their election by the stockholders, at the meeting in August, 1887, legalize and validate their appointment? It is unnecessary to inquire whether or not the meeting was called by proper authority, and in a legal manner, or whether or not the requisite majority of stock was represented. In either event, the result is the same. It was a special, as distinguished from an annual, meeting. By the statutes, the stockholders are authorized to elect directors, at the meeting called, in the first instance, for the organization of the company, and annually thereafter, at such time and place as the stockholders, at their first meeting, shall determine, or as the by-laws of the corporation may require. Id. §§ 1924, 1925. Vacancies occurring in the board of directors, in the mean time, are to be filled by the board. When the charter of a private corporation or the general laws invest the board of directors with the power to transact the business of the corporation, to manage its affairs, and to fill vacancies occurring in the board, the power is exclusive in its character. *Gashwiler v. Willis*, 83 Cal. 11. Had the persons elected by Moses and Kellar to fill the vacancies been originally elected by the stockholders, at the meeting in August, 1887, the election would have been invalid; and the stockholders cannot ratify an act which they have no power to do originally. When the board of directors was reduced below the number requisite to form a quorum, its power as a board to fill the vacancies was suspended. If it be said that a corporation may thus be left without proper officers or agents to manage its affairs and transact its business, it may be replied that such state of things need exist only until a meeting of the stockholders, at which they are authorized to elect a full board; and there may be other remedies which it is needless to point out. A board of directors is not essential to the existence of a corporation. The failure to hold annual meetings, or to elect directors regularly, does not operate a forfeiture of the corporate franchises. Those in office hold until the election or appointment and qualification of their successors. The corporation exists *per se* for the purpose of perpetual succession and of preserving its franchises. Code 1886, §§ 1679-1681. The condition of the Sheffield & Tusculumbia Street-Railway Company is somewhat anomalous, and presents a *casus omissus*,—a contingency not contemplated or provided for, but which may have been supplied by the provision of section 1610 of the Code of 1886, that "vacancies occurring in the board must be filled by the remaining directors;" but as to this we express no opinion, since the present cases do not fall within its provision.

It is further insisted that, though the persons appointed to fill the vacancies were not legally elected, they are actually holding and exercising the powers and functions of the office, and are directors *de facto*; and inasmuch as the power to make assessments and calls is vested in the board of directors, a call made by directors *de facto* cannot be collaterally called in question by a stockholder. To constitute an officer *de facto*, there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such length of time, without interference, as to justify the presumption of a due election or appointment. *Cary v. State*, 76 Ala. 78. The mere exercise of the functions of the office is in itself insufficient. The

bills allege only two official acts of the defendants as directors, and it may well be doubted whether the allegations make a *prima facie* case of directors *de facto*. The facts set up in the answers, on which this claim is rested by the defendants, cannot be considered on a motion to dissolve the temporary injunction. But, passing this question, we shall proceed to consider the right of a stockholder to set up the illegality of the election, though the persons may have become directors *de facto*, in resistance to an assessment and call on subscriptions to the capital stock. We are cognizant that some courts of the highest authority have held that the power of persons to act in behalf of the corporation, who have become directors *de facto*, cannot be collaterally questioned by a stockholder, without a judgment of ouster against them in a direct proceeding for that purpose. An analysis of the cases would show, we think, that in a majority of them the election was not illegal and void, but irregular and voidable, because of ineligibility or other cause; or, if originally illegal, that the shareholder assailing its validity had affirmatively acquiesced in their acts as directors. The doctrine of the validity of the acts of officers *de facto* rests on public policy and justice. The official dealings of directors *de facto* with third persons are sustained as rightful and valid, on the ground of continuous acquiescence by the corporation, and suffering them to hold themselves out as having such authority; thereby inducing others to deal with them in such capacity. The theory of the doctrine of officers *de facto*, and the principles sustaining the validity of their official acts, are that, though wrongfully in office, yet exercising power and functions appertaining to such office, justice and necessity require, for the protection and preservation of the rights and interests of third persons, that their acts, within the scope of official authority and duty, shall be sustained. The stockholders are not third persons in their relation to the corporation. If persons undertake to exercise the functions and discharge the duties of directors in opposition to the will of a majority of the stockholders, they are mere usurpers, and their acts cannot be deemed valid, when invoked for their own protection. Otherwise, the wrongful assumption of official authority and its exercise would operate to constitute the usurpers, as between themselves and the corporation and shareholders, a board invested with the power to transact its business and administer its affairs. In such case, the necessity and justice of the rule as to the validity of the acts of directors *de facto* do not exist, and the rule itself is inapplicable. The acts of officers *de facto* are only valid when third persons have rights and interests to be protected. By the terms of their contract an assessment or call, made by directors duly appointed, is essential to create a liability on the stockholders. The validity of the acts of directors *de facto* and their authority may be called in question by a stockholder whenever such acts are destructive or affect his proprietary rights, or impose a liability on him as such, and the rights of third persons do not intervene. *Thorington v. Gould*, 59 Ala. 461; *Insurance Co. v. Westcott*, *supra*.

The bill filed by Tompkins, referring to the defendants, alleges "that said individuals, claiming to be and to constitute the directory of said company, have resolved to build a branch road or track from the Memphis & Charleston Railroad in Tusculumbia, Ala., via Dickson and Fourth streets, using certain property of the corporation in its construction. Orator avers that the said parties are not the directors of said company, nor are they authorized to use or expend the property or effects of the corporation in constructing such branch, or in any other manner. He avers that such action is against the will and approbation of the holders of the majority of such capital stock, and is not beneficial to said corporation, or the stockholders thereof." The other bill contains substantially the same averments. It will be observed that it is not charged that such acts are *ultra vires*, or in violation of the chartered privileges and powers, or constitute a breach of trust. In this aspect, the bill merely presents a case of internal disputes and unfortunate and injurious

dissensions. Admitting the truth of the allegations, such use of the property and effects of the corporation is a conversion, an injury to the company, fastening a personal liability on the defendants, and redress for which should be primarily sought in the name of and by the corporation, and for which adequate legal remedies are provided. Equity will not interfere, at the instance of a stockholder, with the internal business management of a corporation by the directors, whether *de jure* or *de facto*, so long as it is kept within the scope of the chartered powers and the purposes of its creation, unless such administration of its affairs is destructive or injurious to the corporation, and the corporation itself refuses or is incapable to seek redress. The only ground on which the interference of the court is invoked is the illegality of the election of the defendants, and that their management does not accord with the will and approbation of a majority of the stockholders. To enjoin the defendants from any use of the property and effects of the corporation would, under the circumstances, be tantamount to their amotion from office. The complainants in the two bills, who are in accord and co-operating, claim to hold and own a majority of the capital stock. There is, therefore, no excuse for not seeking a remedy within and by the corporation. Had it been averred that the complainants, or either of them, had instituted an appropriate proceeding under section 3170 of the Code of 1886, or the corresponding section of Code 1876, or a *quo warranto*, to exclude from office the defendants unlawfully holding and exercising the office of directors, it may be that a court of equity would have enjoined them from using or appropriating any of the property and effects of the corporation in any manner, and from performing the functions of the office until the determination of the action. The bill filed by Tompkins alleges that he purchased the 20 shares of stock subscribed by Scott, paying therefor a valuable consideration, and had the same transferred to him on the stock-book of the company. This makes a case of *prima facie* ownership, and of the incidental right to vote the stock. The defendants set up in their answer an agreement between Scott and others, by which this stock was to be voted by trustees. The character of this contract was considered at the present term in another case between A. H. Moses and Tompkins, and was held to be voidable, and to have been avoided by Scott when he sold and transferred the stock. The bill further alleges the purpose of the trustees to vote the stock in a particular way, and that the effect of the vote will be to control the election of the directors. Under the circumstances, we think the injunction as to this matter should be retained until the final hearing of the case. The decree of the chancellor is modified, so far as it continues in force the injunction against using the property and effects of the company in constructing the branch road, and a decree here rendered dissolving the injunction to this extent. The decree of the chancellor, as thus modified, is affirmed.

STONE, C. J. My own opinion is that, when the board of directors was reduced to two out of seven members, the corporation was without power to discharge any corporate function, save, perhaps, to convene the stockholders for the purpose of electing other directors or making provision therefor. I am clearly convinced, and do not think my brothers differ with me in this, that the attempt made to fill the board of directors by the remaining two was utterly without authority, and confers on the persons attempted to be appointed no legal power to act as such. *People v. Railroad Co.*, 55 Barb. 344; *State v. Smith*, 48 Vt. 266. I further hold that any disposition made of the funds of the corporation by this irregularly constituted board is a conversion by them, and, if done in obedience simply to the orders of such board, it will fasten a personal liability on them. Taking the averments of the bill to be true, I think they present a sufficient excuse for not appealing for relief to the corporate authorities, if corporate authorities there be capable of render-

ing relief. To ask the only two remaining directors to take steps to prevent themselves from doing authorized acts, would certainly present an anomaly. Injunction is the only efficient remedy, and I think it should be retained until the rehabilitation of the corporation can be perfected by legitimate methods. I dissent from so much of the ruling of my brothers as modifies the injunction. *Pender v. Lushington*, 6 Ch. Div. 70.

(24 Ala. 540)

*Ex parte BARNES.*

(*Supreme Court of Alabama. July 26, 1888.*)

1. CONSTITUTIONAL LAW—EXEMPTIONS—LANDLORD'S LIEN.

Code Ala. 1886, § 8069, giving lessors of store-houses a lien for rent on the goods of their tenants, is not in violation of Const. Ala. 1875, art. 10, § 1, which exempts from levy and sale for the payment of debts \$1,000 worth of personal property of each resident of the state; and the landlord's lien in such case is superior to the tenant's claim of exemption, though the landlord had not contested the exemption claim before suing out an attachment to enforce his lien.

2. MANDAMUS—WHEN LIEN—TO COMPEL VACATION OF NON-APPEALABLE ORDER.

Where an interlocutory order is erroneously made in an attachment suit, directing the sheriff to pay to defendant, an insolvent, the proceeds of the attached property, the order not being appealable, *mandamus* will lie to compel the judge to vacate the order.

Original proceedings in *mandamus*.

Augustus Barnes, as administrator of the estate of J. B. Barnett, deceased, applies for a writ of *mandamus* to the Honorable J. M. CARMICHAEL, presiding judge of the circuit court of Lee county, commanding him to set aside and vacate a certain order made by him in a cause pending in said circuit court.

A. & R. B. Barnes, for petitioner. Geo. P. Harrison, Jr., and John M. Chilton, for respondent.

STONE, C. J. The act "to give to landlords of store-houses," etc., "a lien on the goods of their tenants for rents," was approved February 23, 1883, (Sess. Acts 175; Code 1886, § 8069 *et seq.*) The most important inquiry in this case is whether that act is violative of article 10, § 1, of the constitution of 1875, which exempts from levy and sale for the payment of debts personal property of every resident of this state of the value of \$1,000. The facts of this case, as shown in the petition and transcript, are that Lazarus was a merchant, engaged in business, and having a stock of drugs, medicines, and other merchandise in a store-house not his own, but the property of petitioner's intestate. Barnett, the decedent, was landlord, and Lazarus, the merchant, was his tenant. On October 31, 1884, Lazarus, the tenant, made out and swore to a claim of a part of his merchandise in store, valued at \$1,000, which he selected and claimed as exempt. This claim he filed in the office of the judge of probate. Afterwards, on the same day, he made a general assignment of his property for the benefit of his creditors, reciting that he was indebted to Barnett for rent. Afterwards, still on the same day, the attachment in this case was sued out in the name of Barnett against Lazarus, and levied on the goods in the store-house, which Lazarus had claimed as exempt. This was a special or exceptional attachment sued out under §§ 3070-3072, Code 1886, issued on an affidavit which averred the amount due and to fall due, that it was for rent of the store-house, describing it as the store-house in which Lazarus had been doing business, and affirming that he, Lazarus, had made an assignment for the benefit of his creditors, without the consent of said Barnett. The attachment describes and rests on the affidavit in its substantive averments, with sufficient fullness to show its nature and the ground on which it was sued out. In other words, it shows that it was an exceptional attachment, sued out by a landlord against his tenant, for the recovery of rent for the store-house in which the latter had his merchandise,

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and had been conducting a mercantile business. The creation of a lien was not the object of the suit. The statute, if constitutional, confers that. The attachment was resorted to as a means of enforcing a lien the law had declared. Counsel have referred us to no case directly in point, and in our own investigation we have found none. Questions have arisen and been determined, in relation to the landlord's lien on crops grown on rented land, for unpaid rent, declared to be paramount to other liens. Such liens have been maintained against exemption claims. Many reasons may be and are given why this should be so. The land is a very important factor in the growth and production of the crops on which the lien is asserted. And accepting a lease with a knowledge that the crop to be grown is not to become the absolute property of the tenant, but to remain under the paramount lien for the rent, is the equivalent of an express agreement that it shall be so. It is a surrender of that much of the ownership. *Thomp. Homest. & Ex.* § 377; *Tayl. Landl. & Ten.* (7th Ed.) § 424a; *Davis v. Meyers*, 41 Ga. 95; *Harrell v. Fagan*, 43 Ga. 339; *Prince v. Nance*, 7 S. C. 351; *Thompson v. Mead*, 67 Ill. 395. In the absence of statutory provision or contract giving such lien, the claim of exemptions will prevail over it. *Mason v. O'Brien*, 42 Miss. 420; *Swope v. Ross*, 29 Ark. 370. In the case we have in hand the statute declares the lien. Code 1886, § 3069. Taking a lease of the store-house, and placing merchandise in it under the lease, must be treated as the equivalent of a valid agreement giving a lien. In *Knighiton v. Curry*, 62 Ala. 404, speaking of the effect of a contract which, under the law, carries with it a lien, this court said: "The lien created \* \* \* is not that of an execution, a mere legislative remedy; but the bond of the tax collector being a contract by which the law had previously declared liens should be created, such lien is a lien by contract, so far as all parties to the bond are concerned. *County of Dallas v. Timberlake*, 54 Ala. 408; *Schuessler v. Dudley*, 80 Ala. 547, 2 South. Rep. 526. See *Tyler v. Jewett*, 82 Ala. 93, 2 South. Rep. 905. If in this case there had been an agreement, part of the terms of the lease, by which a lien was secured on the merchandise for the payment of the rent, that lien would have prevailed over the tenant's claim of exemption, so far as the merchandise is concerned. *Hale v. Bank*, 49 N. Y. 626; *McCaffrey v. Woodin*, 65 N. Y. 459; *Metcalf v. Fosdick*, 23 Ohio St. 114; *Booker v. Jones*, 55 Ala. 266; *Fowler v. Rapley*, 15 Wall. 328; *Longstreth v. Pennock*, 20 Wall. 575; 4 Wait, Act. & Def. 267. Under the facts shown in this record, the lien for rent was paramount to the claim of exemptions. And there is no hardship in this. The merchandise was intended for sale, with a view to the profits to be realized from the sale. A store-house for its preservation, exhibition, and sale was as necessary to the business as was the merchandise itself. The two together constituted an occupation, with probable emolument. Sound commercial morality forbids that all the advantages shall inure in one direction, while nothing but losses are entailed in the other. While the suit was pending, an interlocutory order was made, commanding the sheriff to pay over the proceeds of the merchandise to the defendant in attachment, on his claim of exemptions. The case not having been tried on the merits, or otherwise finally disposed of, an appeal would not lie from that interlocutory order. The defendant is insolvent. Should this order be complied with, it is manifest that appeal and reversal after final trial and judgment would give little promise of a recovery of the money; and the probable result would be that the plaintiff, though having a lien, would lose all means for its enforcement. Appeal is not an adequate remedy. We consider this a clear case for *mandamus*. *Ex parte Haralson*, 75 Ala. 543. Before the attachment was levied or issued in this case, Lazarus, the defendant, had made his selections and asserted his claim of exemptions, and had filed the same with the judge of probate for record. Code 1886, § 2515. No steps for contesting the claim had been taken by the plaintiff before suing out the at-

tachment. Section 2520: On this account it is urged that the levy of the attachment is invalid, and should be set aside. And, for the same reason, it is urged that the plaintiff is in no condition to claim the relief he here seeks. We have shown above that the attachment in this case shows on its face that it was for the collection of rent for the store-house in which the goods were found when they were levied on. This informed the sheriff that the claim of exemptions was groundless, and authorized him to disregard it, even if it had been brought specially to his notice, which it was not. *McLaren v. Anderson*, 81 Ala. 106. It is ordered and adjudged that the writ of *mandamus* issue to the judge presiding in Lee circuit court, commanding and requiring him to vacate the order made April 23, 1887, by which the sheriff was "ordered and required to pay over said sum of nine hundred and sixty-four dollars to the said E. W. Lazarus or his attorney of record." *Mandamus* granted.

(85 Ala. 137)

CLARK *et al.* v. JONES.

(*Supreme Court of Alabama. July 26, 1888.*)

1. **FRAUDS, STATUTE OF—PROMISE TO PAY THE DEBT OF ANOTHER—MECHANIC'S LIEN.**  
A promise by the owner of a house to a subcontractor to pay the amount due him from the principal contractor for work done on the house, if the subcontractor would not file a lien therefor, there being no agreement that the principal contractor should be discharged from liability, is the promise to pay the debt of another, within the meaning of the statute of frauds.<sup>1</sup> *STONE, C. J., dissenting.*
2. **SAME—PROMISE TO PAY DEBT OF ANOTHER—PROMISE TO DEBTOR.**  
A promise to pay the debt of another, when made to the debtor, is not within the statute of frauds.<sup>1</sup>
3. **CONTRACT—CONSIDERATION—PROMISE TO PAY DEBT OF ANOTHER.**  
A promise by one party to a contract to pay a debt due from the other party, if the latter would rescind the contract, is without consideration, when the other party has already put it out of his power to complete the contract, and there is nothing due him from the promisor on the contract.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Action of *assumpsit* by Clark & Wadsworth against W. B. Jones. Defendant had contracted with one Wright for the building of a house upon a stipulated price, and the payments therefor were to be made in installments. Clark & Wadsworth had sold Wright lumber for defendant's house prior to June 30, 1884, amounting to \$243.85. On that day Wright gave plaintiffs' agent an order on defendant for that amount. Between that day and July 10th plaintiffs furnished Wright with additional lumber to the amount of \$59, and Wright gave them an order on defendant for that amount. On August 14, 1884, Wright gave up his contract, as was shown in the record by a written instrument from him to that effect. The charges, as given by the court at the request of the defendant, raise the question of the statute of frauds, which was specially pleaded by the defendant. Among the charges asked by the plaintiff in writing, and refused by the court, to which reference is made in the opinion, are the following: (1) "If the jury believe, from the evidence, the defendant on the 10th day of July was indebted to Wright on the contract for building the house in a sum greater than the amount of the two orders, one for \$243.85 and the other for \$59, and if the defendant, upon Wright surrendering his contract, and as a consideration therefor, stated to Wright that he would have to pay the bills outstanding, including the orders of plaintiffs, then it was the duty of defendant to retain and pay these bills, including the orders of Wright to plaintiffs." (2) "If the jury believe, from the evidence, that the defendant at any time promised or agreed with Wright or Horton [plaintiffs' agent] that he would hold back or retain enough of the money to be paid on the contract to Wright to pay the claims or orders of plaintiffs, then

<sup>1</sup> As to what agreements are within the statute of frauds, as being promises to pay the debt of another, see *Stewart v. Jerome*, (Mich.) 88 N. W. Rep. 893, and note.

if the jury believe from the evidence that after that time the defendant became or was indebted to Wright in a sum as great as the sum of the orders, then it was the duty of the defendant to retain this amount, and, if he failed to do so, then the defendant would be liable." There was verdict and judgment for the defendant; whereupon the plaintiffs appealed, and assign the rulings of the court, and the giving and refusing of the respective charges, as error.

*Tompkins, London & Troy and Rice & Wiley, for appellants. Watts & Son, for appellee.*

CLOPTON, J. W. C. Wright was indebted to plaintiffs for lumber furnished to be used in building a house, which he had contracted with defendant to build for \$2,000, payable in five installments, the last of which, being for \$500, was payable on completion of the house according to the plans and specifications. The first claim of plaintiffs is that in July, 1884, the defendant promised the plaintiffs' agent, if they would not file a lien against the house for their claim, he would pay the same out of the next payment due Wright. The promise was not in writing. The instructions of the court present the question whether the promise is within the statute of frauds, which requires "every special promise to answer for the debt, default, or miscarriage of another" to be in writing, expressing the consideration, and signed by the party sought to be charged. The doctrine which distinguishes between an original promise—a new debt of the promisor—and a collateral undertaking—a guaranty or suretyship—for the debt of a third person is often difficult of application; but there are some tests which may be regarded of controlling, though not conclusive, consideration. The true test appears to be whether the undertaking of the promisor was essentially a new debt of his own, while the payment of the third person's debt was a collateral or incidental consequence, or was the latter its principal and direct purpose. Bish. Cont. §§ 12, 63. Generally, any promise to pay another person's debt, which is not discharged or released by the terms of the promise or other contemporaneous arrangement, is within the statute. To this rule there are exceptions. A party may make a valid oral contract, which operates to create a new debt of his own, if founded on a new and independent consideration, though the effect of the payment is to pay another's debt. In order, however, to have this effect, the essence of the new undertaking must be the payment of the promisor's own debt by paying the debt of a third person. The consideration relied on to support the promise of defendant, and to constitute it his own debt, is the forbearance of plaintiffs to file a lien for their claim. The plaintiffs had no lien on the property, and surrendered none. They were subcontractors, and, if they had filed the statement required to obtain a lien, they could only have subjected any unpaid balance in the hands of defendant, and would have acquired a lien on the property to secure the payment of the same only to that extent. Code 1876, § 3444. The forbearance to file a lien was not of benefit to the defendant, and filing it would not have operated as a detriment to him in the legal acceptance of the term. If filed, he could not have been made liable to pay more or otherwise than as provided by his contract. The plaintiffs would not have a lien to which his interest was subordinate. There being no agreement or understanding that the debt of Wright should be discharged or postponed, the undertaking of defendant did not constitute a new and substantive debt of his own, to which the payment of Wright was collateral or incidental, but rather the principal purpose. Forbearance to enforce a demand against the original debtor by suing out an attachment, it has been held, does not constitute an original promise on a new and independent consideration, so as to take it out of the operation of the statute of frauds, although the promisor had at the time a lien for advances subordinate to the lien of the promisee for rent. *Westmoreland v. Porter*, 75 Ala. 453. It is said: "The essential and

real function of such new agreement, however, is to pay a new debt contracted by the promisor upon a new consideration of benefit to himself, and moving from the promisee; and, although this becomes his own debt, he agrees to discharge it by paying a debt due by another, which is a mere incident of the transaction." Though the forbearance to file the lien may be a sufficient consideration to support a promise to pay the debt of Wright, such promise is required by the statute of frauds to be in writing, expressing the consideration.

Plaintiffs further claim that the defendant promised Wright to assume and pay their demand and the claims of others, in consideration that he would surrender his contract. This promise, not having been made to the plaintiffs or to any person representing them, is not within the statute of frauds. A promise by a person to pay the debt of another, if made to him and supported by a new consideration, is valid, though not in writing.

Undoubtedly the parties to a contract, before a breach, may rescind at pleasure, and their mutual assent is a sufficient consideration. There is evidence tending to show that Wright had committed a breach of the contract by abandoning it before the alleged rescission, and it is undisputed that it had become impossible for him to complete the house. An agreement made to prevent the breach of a contract, or after the breach to assume and pay the liabilities of the contractor, without other consideration than the mere agreement to rescind, is *nudum pactum*. *Burkham v. Mastin*, 54 Ala. 122. But if Wright, at the time of the rescission, left funds in the hands of defendant, from which he promised to pay the demands of plaintiffs, such promise would have been supported by a new and independent consideration, and the plaintiffs could have maintained an action thereon. If such had been the hypothesis of the charge, in reference to this promise requested by plaintiffs, it should have been given; but, framed as it is, it was properly refused. It is an uncontroverted fact that Wright surrendered his contract August 14, 1884. The charge bases the validity of the promise and the liability of the defendant on the rescission and an indebtedness existing more than a month previously,—July 10, 1884. There was evidence tending to show that no indebtedness existed at the time of the surrender of the contract. In order to support a promise to retain the money and pay the demand of plaintiffs, there must have been an indebtedness at the time the contract was rescinded, from which the defendant promised to pay their claim; thus constituting a promise to pay his own debt by paying the debt of Wright. The charge ignored the evidence of a previous payment of the indebtedness existing in July, and also of a breach of the contract before its rescission. It is abstract, and calculated to mislead. The rulings of the court are in accord with these views. Affirmed.

STONE, C. J., (*dissenting*.) I differ from my brothers in this case. As I understand it, the promise was an original one, based on a valuable, new consideration, of detriment to the promisee. *Rutledge v. Townsend*, 38 Ala. 706. That promise was not made dependent on Wright's failure to pay. It was a promise that Jones would pay, not a guaranty that Wright would pay. Wright's debt cut no figure in the case, except that it fixed the amount Jones agreed to pay. And the fact that Wright owed a debt of the same amount can make no difference. It is frequently the case that on a new promise, supported by a new consideration, a second debtor becomes liable to pay the debt of another without canceling the obligation of that other. *Dunbar v. Smith*, 66 Ala. 490, and *Coleman v. Hatcher*, 77 Ala. 217, were cases of that kind. In neither of these cases had the original debt been canceled. *Young v. Hawkins*, 74 Ala. 370, is another case which asserts the doctrine very fully. In neither of them was the contract so executed as to meet the requirements of the statute of frauds, if they fell within its influence, yet the contract in each case was held valid. As I understand the principle, it is as follows: "Wherever the promise is to pay absolutely, not as surety of another, nor as

guarantor that another will pay, and the promise is supported by a valuable consideration moving from the promisee or to the promisor, this is not within the statute of frauds, because it is not a promise to pay the debt of another. The fact that such payment incidentally discharged a debt for which another is bound cannot vary the nature of the contract, or convert the original, absolute promise into one of mere suretyship. *Browne, St. Fraud, (4th Ed.) § 212; Nelson v. Boynton, 3 Metc. 396.*

(84 Ala. 434)

## ROBINSON v. STATE.

(Supreme Court of Alabama. July 26, 1888.)

## 1. CRIMINAL LAW—INDICTMENT—SEPARATE OFFENSES IN ONE COUNT.

In Alabama, on an indictment charging burglary and grand larceny in one count, there may be a conviction of either offense, or a general conviction, with only one punishment.<sup>1</sup>

## 2. LARCENY—VARIANCE—HUSBAND AND WIFE.

Where an indictment for larceny lays the ownership of the articles stolen in the husband, and the proof shows that they belonged to the wife, the judgment will not be reversed on the ground of variance, where the record does not show whether the offense was committed before or after the act of February 28, 1887, (Code Ala. 1886, §§ 2341-2351,) defining the rights and liabilities of husband and wife.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

W. F. Johnson, for appellant. T. N. McClellan, Atty. Gen., for the State.

CLOPTON, J. The single count in the indictment combines a charge of two offenses, burglary and grand larceny. Upon such indictment a conviction may be had of either offense, or there may be a general conviction, in which event, however, only one punishment can be imposed. The ownership of the dwelling-house entered, and of the personal property stolen therefrom, is laid in W. H. Wooldridge. It is conceded that the house was his property, but the articles stolen were the property of his wife. The court instructed the jury, as to the offense of larceny, if they believed, beyond a reasonable doubt, that the defendant broke and entered into the dwelling-house of W. H. Wooldridge, with the intent to steal, and carried therefrom the articles described in the indictment, they were authorized to find him guilty, though the articles stolen were the property of Mrs. Wooldridge. Prior to the passage of the act of February 28, 1887, defining the rights and liabilities of husband and wife, which constitutes sections 2341-2351, Code 1886, we held that, in an indictment for the larceny of personal property, which was the wife's statutory separate estate, the ownership may be laid in the husband or wife, at the election of the pleader; when they lived together and had possession of the property. *Ellis v. State, 76 Ala. 90; Lavender v. State, 60 Ala. 60.* The bill of exceptions does not purport to set out the entire evidence. The only statement, as to the time when the offense was committed, is that it was within three years before the finding of the indictment, which was filed in court April 25, 1888. Were it conceded that, had the record shown that the offense was committed after the passage of the act of February 28, 1887, the charge would be erroneous,—as to which we express no opinion,—we must presume, in support of the rulings of the court, in the absence of an affirma-

<sup>1</sup> Where two or more offenses are charged in several counts joined in one indictment, and such offenses may be parts of one and the same transaction, and of such a nature that the defendant may be guilty of both, the prosecution will not be required to elect on which count they will proceed. Election will be required only where distinct offenses, not parts of the same transaction, are involved. *Andrews v. People, (Ill.) 7 N. E. Rep. 265.* See, also, on the general subject as to when an election will be required, effect thereof, etc., *Corley v. State, (Ark.) 7 S. W. Rep. 255; State v. Sorrell, (N. C.) 4 S. E. Rep. 680; Roberts v. People, (Colo.) 17 Pac. Rep. 637; Com. v. Sullivan, (Mass.) 15 N. E. Rep. 491; Black v. State, (Ala.) 3 South. Rep. 814; State v. Norton, (S. C.) 8 S. E. Rep. 330; State v. Mueller, (Minn.) 33 N. W. Rep. 691.*

tion otherwise, that the offense was committed before the passage of the act; in which case the ownership is properly laid in the indictment, and there is no variance between the averments of the indictment and the proof. Affirmed.

(84 Ala. 435)

MCQUIRK v. STATE.

(Supreme Court of Alabama. July 17, 1888.)

1. RAPE—EVIDENCE—CHARACTER OF PROSECUTRIX.

On a trial for rape, the character of the prosecutrix for chastity is a proper subject of inquiry, as bearing on the probability of her consent to defendant's act; and such character may be shown by evidence of her general reputation in that respect, or by proof of her previous intercourse with defendant, but not by proof of particular acts of unchastity with third persons.<sup>1</sup>

2. SAME—INSTRUCTIONS—CONSENT OF PROSECUTRIX.

In such case it is error to refuse to charge that, if the jury believe that the conduct of the prosecutrix was such towards defendant, at the time of the alleged rape, as to create in his mind the honest and reasonable belief that she had consented, or was willing to let him have connection with her, they must acquit.

3. SAME—INSTRUCTIONS—SANITY OF PROSECUTRIX.

Where the prosecutrix, though weak-minded, is not idiotic or *non compos*, it is error to refuse to charge that, if the jury have a reasonable doubt whether defendant did the act without her consent, they must acquit, though they may believe that there was force used, and that the prosecutrix was a woman of weak mind.

4. SAME—INSTRUCTIONS—PROOF OF FORCE.

In such case, where the indictment, as required by Crim. Code Ala. 275, form No. 69, charges that the defendant "forcibly ravished" the prosecutrix, it is error to refuse to charge the jury that, if they have a reasonable doubt whether the act was done with force, they must acquit, though the prosecutrix is a woman of weak mind.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Indictment for rape. Defendant requested the following instructions, which were refused: (2) "If the jury have a reasonable doubt that the act was done with force, they must acquit the defendant, although the prosecutrix is a woman of weak mind." (3) "If the jury have reasonable doubt that the defendant did the act with or without the consent of the prosecutrix, although they may believe there was force used, and that she was a woman of weak mind, they must acquit the defendant." (4) "If the jury believe, from the evidence, that the conduct of the prosecutrix was such towards the defendant, at the time of the alleged rape, as to create in the mind of the defendant the honest and reasonable belief that she had consented, or was willing for defendant to have connection with her, they must acquit the defendant."

*W. L. Parks* and *H. C. Wiley* for appellant. *T. N. McClellan*, Atty. Gen., for the State.

SOMERVILLE, J. The indictment, following the form authorized by statute, (Crim. Code 1886, p. 275, form No. 69,) charges that the defendant "forcibly ravished" the prosecutrix. It is an essential constituent of the crime of rape that the act should be intended to be done with force, actual or constructive, and without the woman's consent. The forms of indictment in the Code, both for rape and for an assault with intent to ravish, each use the word "forcibly," as necessary in the description of these offenses, and at common law it was equally regarded as an essential element in the description of this high crime against law and morality. *McNair v. State*, 53 Ala. 453; *Dawkins v. State*, 58 Ala. 376; 1 Whart. Crim. Law, (8th Ed.) § 562; *State v. Murphy*, 6 Ala. 765; *Lewis v. State*, 30 Ala. 54; *Waller v. State*, 40 Ala. 325. It is true that the element of force need not be actual, but may be constructive or implied. If the woman is mentally unconscious from drink, or asleep, or from other cause is in a state of stupefaction, so that the act of the unlawful carnal knowledge on the part of the man was committed without

<sup>1</sup> See note at end of case.

her conscious and voluntary permission, the idea of force is necessarily involved in the wrongful act itself,—the fact of penetration. But even in cases of this kind the intent to use force, if necessary to accomplish the offense, is essential to criminality. 1 Whart. Crim. Law, (8th Ed.) § 550. An acquiescence obtained by duress, or fear of personal violence, will avail nothing; the law regarding such submission as no consent at all. If the mind of the woman is overpowered by a display of physical force, through threats, expressed or implied, or otherwise, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape. 1 Whart. Crim. Law, § 557; 2 Bish. Crim. Law, (7th Ed.) § 1125; 3 Greenl. Ev. (14th Ed.) § 211. The mere fact that a woman is weak-minded does not disable or debar her from consenting to the act. It has been said that a woman with a less degree of intelligence than is requisite to make a contract may consent to carnal connection, so that the act will not be rape in the man; but, "if she is so idiotic as to be absolutely incapable of consent, the connection with her is rape." 2 Bish. Crim. Law, § 1121. The principle, as expressed by another high authority, is that "carnal intercourse with a woman, incapable, from mental disease, (whether that disease be idiocy or mania,) of giving consent, is rape." 1 Whart. Crim. Law, § 560. The evidence tends to show that the prosecutrix was weak-minded merely, not that she was idiotic or so *non compos* as to be incapable of giving consent to the act of carnal connection with the defendant. In view of this fact, and the principles above announced, we are of opinion that the circuit court erred in refusing the second and third charges requested by the defendant. The fourth charge requested by the defendant should also have been given. The consent given by the prosecutrix may have been implied as well as express, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act. Any resistance on the woman's part falling short of this measure would be insufficient to overcome the implication of consent. The circumstances under which it is permissible to prove the details of a complaint by a prosecutrix, as to an alleged rape, are fully discussed in *Barnett v. State*, 83 Ala. 40, 3 South. Rep. 612, and *Griffin v. State*, 76 Ala. 29; and the principles there announced will be a sufficient guide for the court on another trial. That the prosecutrix was a woman of chaste or unchaste character was perfectly competent evidence, under all the authorities, as bearing on the probability or improbability of her consent to the alleged act of intercourse with the defendant. The impeachment of her character in this particular must, however, be confined to general evidence of her reputation. Particular instances of her unchastity cannot be proved for this purpose, except that she may be interrogated as to her previous intercourse with the prisoner, although not as to particular instances with third persons. 3 Greenl. Ev. (14th Ed.) § 214; 1 Whart. Crim. Ev. (8th Ed.) § 568; *Boddie v. State*, 52 Ala. 395. We discover no other errors in the record than those above pointed out. The judgment is reversed, and the cause remanded. The prisoner will, in the meanwhile, be retained in custody until discharged by due process of law.

## NOTE.

**RAPE—EVIDENCE—CHARACTER OF PROSECUTRIX.** Evidence as to the previous moral character of the prosecuting witness, in trials for rape, is admissible for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will; upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste. But a common prostitute may still be the victim of a rape. *Anderson v. State*, (Ind.) 4 N. E. Rep. 68.

Evidence as to the character of the prosecuting witness for chastity must be confined to the time previous to the alleged rape. *State v. Ward*, (Iowa,) 35 N. W. Rep. 617.

Only evidence as to the general reputation of the prosecuting witness for chastity is admissible, and not as to particular acts of unchastity. *State v. Campbell*, (Nev.) 17 Pac. Rep. 620. See, also, *People v. McLean*, (Mich.) 33 N. W. Rep. 917.

The previous relations between defendant and the prosecutrix, whether friendly or otherwise, may always be shown, as tending to show the probability or improbability of the commission of such an offense as rape. *Hall v. People*, (Mich.) 11 N. W. Rep. 414. See, also, *State v. Cook*, (Iowa,) 22 N. W. Rep. 675.

(85 Ala. 250)

### LINN v. McLEAN.

(*Supreme Court of Alabama. July 17, 1883.*)

#### 1. VENDOR AND VENDEE—CONTRACT—OPTION TO PURCHASE.

Under Code Ala. 1886, § 1732, making oral contracts for the sale of land void, "unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller," the consideration paid for, and the possession taken under, a lease containing an option of purchase, are not sufficient to make the sale valid, where, upon the election, there is no visible change in the possession.

#### 2. STATUTE OF FRAUDS—AGREEMENTS RELATING TO LAND—OPTION IN LEASE.

An oral election to purchase, under an option contained in a lease under which the lessee is in possession of the land, is not sufficient to take the contract of sale out of the statute of frauds as to the lessee, and, if the election is made by an agent, his authority must be in writing as required by Code Ala. 1886, § 1732.

Appeal from chancery court, Elmore county; S. K. McSPADDEN, Chancellor.

The bill in this case is filed by the appellee, W. S. McLean, against the appellant, J. J. Linn, and seeks to enforce a vendor's lien upon certain lands described in the bill, for the payment of the purchase money alleged to be due thereon, and seeks to show a sale of the land by the complainant to the defendant. This case was, on a former term, before the supreme court on appeal, (80 Ala. 360.) On reversal and remandment, the answer of the defendant was amended by leave of court, for the purpose of interposing the defense of the statute of frauds. The appellant went into possession of the land in controversy as the tenant of the complainant, under a written agreement or contract of rent, and a deed from McLean and wife for all the ochre "in, on, or under the said tract of land," which the said Linn could mine during the term of the lease. The instrument contained a further stipulation in these words: "In consideration of the premises, we and each of us agree and bargain with said J. J. Linn that he may, at any time within twelve months from the date hereof, purchase said sixty acres of land, ochre, and other minerals, for the sum of \$7,000, in addition to the said sum of \$1,000 paid by said Linn on the delivery of these presents; and, on such payment being made, we bind ourselves, our heirs, executors, and administrators, to make and deliver to the said J. J. Linn a warranty deed in fee-simple to the said lands." Before the time limited by the contract had expired, Charles P. Jones, "as attorney for J. J. Linn," addressed to the complainant a letter in these words. "I desire to inform you that, under the contract between yourself and Dr. J. J. Linn, on the 13th day of February, 1884, he takes the option of purchase, and is ready to comply whenever you give him a good title to the land, as your contract binds you to do. Your contract binds you to deliver to Dr. Linn a warranty deed in fee-simple, and he looks to you for performance of your contract, and expects compliance on your part." The chancellor held that this election to buy did not come under the influence of the statute of frauds, and that the complainant was entitled to the relief prayed.

*Jones & Falkner*, for appellant. *Brickell, Semple & Gunter*, for appellee.

STONE, C. J. When this case returned to the chancery court, the answer was amended by leave of the court, for the purpose of interposing the defense of the statute of frauds against the relief prayed by the bill. Our statute is different from its English prototype, (29 Car. II.) It is also different from

many if not most of the statutes of other states on the same subject. Its language is: "In the following cases every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized in writing: \* \* \* Every contract for the sale of lands, tenements, or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller." Code 1886, § 1732, (2121.)

It is contended for appellee that appellant's plea or defense of the statute of frauds is insufficient in its averments. The contention is that it fails to deny that Jones, who is alleged to have made the election to purchase as the agent of Linn, was "thereunto lawfully authorized in writing." Such authority is expressly denied. The plea goes further, and denies that Jones had any authority from Linn, either written or verbal. Another objection is that the plea does not deny the payment of the purchase money, or a portion of it, and does not deny that McLean put Linn in possession. Possibly it would be a sufficient answer to this objection that the bill itself avers that no part of the purchase money had been paid, and that Linn took possession under the lease, and still retained possession when the bill was filed. We need not, however, place the decision on this question. The amended answer avers in terms, as part of the defense of the statute of frauds, that Linn has made no payment on the land as purchase money, and that he has had no possession, save that he acquired and continued to hold as lessee.

It is further contended for appellee that this case is brought within the exception to the operation of our statute of frauds; that Linn took possession of the land under his purchase; and that the thousand dollars he paid on first entering into the contract became part payment of the purchase money when he elected to make the contract a purchase. There can be no question that Linn, through Nash, was in possession, as lessee, on February 13, 1885. It is not pretended he went out of possession, and was again put in. His possession, until he was superseded by the receiver, was continuous. Taking possession as a lessee, that *status* is presumed to continue until a change of title or changed relations are affirmatively shown. We do not say that, if there be proof that the lease was converted into a purchase, that would not change the character of Linn's holding. The possession is referred to the title under which it is held. *McCarthy v. Nicrossi*, 72 Ala. 332. What we do affirm is that a possession taken as lessee, and continued without visible change, does not tend to prove that such occupant was put in possession of the land as purchaser by the seller, so as to meet that provision of the statute of frauds. No act was done calculated or tending to give notice of a change of holding. *McCarthy v. Nicrossi*, 72 Ala. 332; *Watt v. Parsons*, 73 Ala. 202. So of the thousand dollars paid. There can be no question that up to and on February 13, 1885, this thousand dollars was the purchase price of the lease, and only of the lease. It was no part of the purchase money of the land; for up to that time there had been no contract of purchase. Was its *status* then changed, and, if changed, by what means? We submit if the argument does not at last resolve itself into this: that the possession and payment of the thousand dollars make the oral election sufficient; and the oral election transfers that payment from the lease to the purchase, and thus takes the case without the influence of the statute of frauds. Which is the major and which is the minor factor it is not so easy to determine. It is manifest that the legal validity of the contract must depend on the sufficiency of Jones' letter.

When this case was before us at a former term (80 Ala. 360) most of the questions presented by this record were decided. We then said: "The stipulation of the contract of February 13, 1884, giving appellant the right to purchase within twelve months, may be regarded as an offer to sell; continuing

and extending through the stipulated time; and, being supported by a sufficient consideration, it is not subject to revocation." So that the agreement of February 13, 1884, while resting on a single consideration, embraced two subject-matters: First, a lease, for a specified term, of certain mineral and mining interests in the lands described. To this extent it was an executed contract. It contained another stipulation, which, being on a valuable consideration, in writing, and signed by McLean, was binding on him for the time stipulated, and was irrevocable. It was not a sale, and did not bind Linn. It was an option sold, and therefore, for a term, beyond the power of revocation; and not a mere gratuitous offer, which, until accepted, may be withdrawn without incurring liability to any one. It was a fixed offer of sale for a given time, with no one bound to purchase. If the offer had been accepted within the specified time, there would then have been the concurring assent of two minds,—an agreement, a contract. Till then there could be no sale, nor agreement of sale. It is a mistake to suppose that the acceptance of an offer thus made, the election to purchase, is not an agreement,—is not a contract. There can be no sale without an agreement to sell,—without a contract of sale; and until the election is made, the offer accepted, there is no concurring assent of the two minds,—there is no contract, there is no sale.

It has been much debated on both sides of the Atlantic whether, to take a case without the influence of the statute of frauds, it is essential that each contracting party shall be equally bound, and shall have become so at the same time. Much can be and has been said on both sides of this question. The words, "subscribed [or signed] by the party to be charged therewith," have been given a controlling influence in settling the interpretation. And it has been long settled by a great preponderance of authority that if the contract be so executed as to bind the party who is sought to be charged—the party against whom relief is prayed—it is not material that the party who seeks redress should have so executed the contract as to give a right of action against himself. This does not imply that the party, not originally bound, can hold his adversary to the observance of his part of the stipulations, and then repudiate his own. It rests on the doctrine, deemed equitable, that by holding his adversary to a contract, duly executed by him, he adopts and ratifies the contract as duly made by himself, and estops himself from denying its due execution. By voluntarily invoking judicial assistance, he shows that the policy of the statute "to prevent frauds and perjuries" does not apply to his case. And, inasmuch as this ratification and estoppel on his part are the immediate results of the suit by which he seeks to charge his adversary, the available, efficient obligations of the contract may, in the most important sense, be said to attach to each at the same time. The authorities which maintain the doctrine of this paragraph are too numerous for citation. Many of them are collected in a note to *Seton v. Slade*, 2 Lead. Cas. Eq. (4th Amer. Ed.) 1044; *Heflin v. Milton*, 69 Ala. 354; *Knox v. King*, 36 Ala. 367; *Hutton v. Williams*, 35 Ala. 503; *Smith's Appeal*, 69 Pa. St. 474. The subjoined cases are relied on in maintenance of the decree of the chancellor. None of them are against parties who had not subscribed the contract, and none of them, in the principles actually decided, granted relief against parties who had not signed, either by themselves or agent. Some statutes, unlike ours, do not require that the agent shall be authorized in writing. *Corson v. Mulvany*, 49 Pa. St. 88, 88 Amer. Dec. 485; *Reuss v. Picklesley*, L. R. 1 Exch. 342; *Richards v. Green*, 23 N. J. Eq. 536. *Frick's Appeal*, 101 Pa. St. 485, is not opposed to our views, but it contains some utterances which are not adapted to our system. We hold that the election and acceptance by Jones, not being authorized in writing, did not bind him.

The decree of the chancellor is reversed, and we would dismiss the bill if there was not a receiver, who must make his settlement. Reversed and remanded.

(84 Ala. 478)

## CITY OF MONTGOMERY v. TOWNSEND.

(Supreme Court of Alabama. July 20, 1888.)

## 1. MUNICIPAL CORPORATIONS—CONTROL OF STREET—EMINENT DOMAIN.

Under Const. Ala. 1875. art. 14, § 7, requiring corporations invested with the right of eminent domain to "make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements," a city is liable for damages to real estate caused by cutting down the adjacent sidewalks, which produces such a material change as could not have been reasonably foreseen at the time of the original dedication of the street, or if done merely to increase the public convenience above the ordinary standard of "useful, convenient, and safe," or for ornamentation.

## 2. SAME—DAMAGES BY GRADING STREETS—QUESTION FOR JURY.

Whether cutting down the side-walks was such an injury to plaintiff's property is a mixed question of law and fact for the jury, under proper instructions, and with particular regard to the local situation of the property.

## 3. SAME—DAMAGES—ELEMENTS OF.

The damages awarded in such cases must be confined to such as result directly from cutting down the street, and not include such as are consequential.

## 4. SAME—ACTIONS—PLEADING.

A complaint alleging that defendant wantonly, wrongfully, and illegally cut down the sidewalks adjoining plaintiff's lot, so as to injure and destroy its value, is not demurrable for a failure to state that such alterations were not required to render the street ordinarily safe and convenient, where defendant has general power to alter its streets with that view, without incurring liability for injuries to abutting property.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

George W. Townsend brought this action against the city council of Montgomery, claiming damages for the injury done his property by reason of the grading and cutting down of the sidewalks adjacent thereto, whereby his premises were left about 20 feet above the contiguous street. The sidewalks, before the grading in question, were from 18 to 4 feet above the street, and had been so for many years. The street had been dedicated for public use to the city, and had been so used for 50 years continuously. There was verdict and judgment for plaintiff for \$1,000. Defendant appeals. Defendant requested the following charges, which were refused: (1) "Under the evidence in this case, the jury must find for the defendant." (2) "The evidence in this case does not show any such construction or enlargement of the works, highways, or improvements of defendant that makes defendant liable in this case, even if plaintiff was injured thereby, if there was no invasion or trespass upon plaintiff's property." (3) "Under the evidence in this case, the streets adjacent to plaintiff's property were dedicated as streets, and used as such by the public, for more than fifty years before the cutting down of the sidewalks. By this dedication there was no restriction to their use in their natural state, but was a surrender of their use as a thoroughfare as a safe and convenient way for travel and transportation, extending the entire width of the street; and, although the landowner retains the ultimate fee, his right of property is subservient to the use and enjoyment by the public, and to the reasonable exercise of the authority of the city council to prepare and adapt it, and to make necessary improvements to continue its adaptation to the public convenience and safety; and if the jury believe, from the evidence, that in cutting down the sidewalks adjacent to the plaintiff's property the defendant did nothing more than was necessary to continue the adaptation of said streets and sidewalks to the public safety and convenience, then they must find for the defendant."

*Jones & Falkner and W. S. Thorington*, for appellant. *Watts & Son*, for appellee.

STONE, C. J. When this was before us at a former term, (80 Ala. 489, 2 South. Rep. 155,) we considered very fully the import and extent of section 7,

art. 14, of the constitution of 1875, which reads as follows: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements," etc. We defined the extent and operation of the new provisions said amendment had brought into our constitution, and we do not question the correctness of the interpretation we then agreed on and announced. We held that the cutting down of the sidewalk in the manner shown by all the testimony in the case might come within the purview of the word "construction," as employed in our constitution; and that the removal of the lateral support with the facility of access to plaintiff's lot, which the embankment had furnished, though not an interference with the plaintiff's land proper, might yet work such a present "injury" to his freehold as to entitle him to damages therefor. We fortified our ruling by many adjudged cases on similar constitutional provisions, to which we may add *Railroad Co. v. Marshant*, 13 Atl. Rep. 690,—a decision rendered since our former ruling in this case, reviewing and reaffirming former adjudications. We did not affirm that the principles stated were mere legal conclusions. We held the contrary, and reversed the city court's ruling, which stated them as matters of law. We held it was a mixed question of law and fact,—in other words, a question for the jury to determine, under certain rules of law to be given them in charge. Public streets are acquired by grant or dedication, or by condemnation; and the rules governing their improvement and use are substantially the same, no matter how acquired. The municipality is not restricted in its use to the soil in its natural state. Its surrender is to the public as a thoroughfare,—a safe and convenient way for travel and transportation. And this is co-extensive with the width of the street, including the sidewalks. In opening streets change of surface is usually necessary to adapt them to the uses for which they are laid out. It is rarely, if ever, the case that the surface of the soil, in its natural state, meets the requirements of street service. And the size and prospective growth of the town must be taken into the account; while, even in the same town, proximity to or remoteness from commercial centers and business wants must not be overlooked. In the grant, dedication, or condemnation of parts of the ground plat for the use of streets, all these wants and consequences are presumed to be in contemplation, and the necessary power to carry them into effect follows the dedication or condemnation. It is a power to change or improve the grade and natural surface of the street, as to make it useful, convenient, and safe for the amount and nature of travel and commerce, of which the street is likely to become the highway or thoroughfare. And this right to change and improve is not exhausted with one act of improvement. It extends through all time. And, as we have said, this power is as effectually conferred on the municipality as if it were expressed in the grant or dedication, or expressly prayed for and granted in the condemnation proceedings. Persons who obtain title to such lots abutting on such streets, whether original or subsequent purchasers, are charged with notice of such power, and cannot complain of its exercise. "Authority to make all needed excavations or embankments or alterations, to render the street safe and convenient, is implied in the dedication which follows the coterminous soil, into whosoever hands it may pass." But this power is not without limit. "A material change, operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury, in the enlarged sense of the constitution, which casts on the property owner an additional burden, entitling him to compensation." It is not every change operating an increase of convenience which falls within this rule. Changes

generally have for their object increase of convenience. This power may be exercised completely at one time, or on several occasions, as circumstances may suggest; and it authorizes the municipality to so alter the grade or surface of the streets as to make them useful, convenient, and safe for travel and transportation, as the same may be likely to be in request generally or on the particular street. To come within the clause of the constitution we are discussing, the change, alteration, or improvement must go beyond this. It must be the result of a contingency not likely to be foreseen or anticipated, or must be an increase of convenience above the ordinary standard of "useful, convenient, and safe," or must be made for ornamentation, or for the purpose of improving the general appearance of the street.

We have thus attempted to define, as well as we can, the two classes of street alteration or improvement. The power to make such as fall within the one class is conclusively presumed to have been conferred by the act of dedication or by the judgment of condemnation. In fact, it is so generally conferred that it may almost be said to be inherent in municipal organization. For the proper exercise of this power, the contingent property holder, though injured, is without redress. For injury suffered from the other, he is entitled to compensation under the new provision of our constitution of 1875. But whether the case falls within the one class or the other must depend on so many phases and shadings of fact that it can rarely, if ever, become a question of law. Larger license must be allowed in a city than in a village; in a commercial center and crowded thoroughfare than in an obscure off-street. Hence it is a mixed question of law and fact, to be pronounced on by a jury under proper instructions.

Another question may become important in cases of this kind. Are the damages recoverable in a suit like this confined to the injury which results directly from the construction itself, or can later injuries or annoyances which result consequentially be the subject of a recovery? We hold that the first of these propositions is the true one. We adopt as sound the following language of the supreme court of Pennsylvania in *Railroad Co. v. Marchant*, *supra*: "It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor or security to be given in advance. This is only possible where the injury is the result of the construction or improvement." No question can arise in this case on the power and duty of the city government to keep the streets in proper repair for the uses to which they were dedicated. In the act incorporating the city, approved December 23, 1837, it was enacted that "the mayor and aldermen, in council assembled, shall have power and authority to pass by-laws and ordinances necessary and proper \* \* \* to make, alter, and ascertain new streets and alleys; to clean and keep in repair the streets and alleys." The amendatory act, approved February 13, 1879, (Sess. Acts, 370,) retained this power in the city council, almost without change of language. Since the doing of the act which is complained of as a grievance in this case, the act to amend the charter of the city of Montgomery was passed. It was approved February 26, 1887, (Sess. Acts, 483.) That act cannot affect this case. The older statutes, however, conferred on the city government power to do all the acts in reference to the streets and sidewalks we have enumerated above. To them was confided the discretion and final arbitrament of determining the grades, embankments, and excavations necessary to make the streets safe and convenient, with the single limitation that, since the constitution of 1875 went into effect, they cannot go beyond what may reasonably be supposed to have been had in contemplation, or what was necessary to make the streets safe and convenient, without making compensation to the abutting landed proprietor for the injury done to his property. And this

judgment and discretion in reference to the streets and sidewalks, their change of grade and improvement, with a view to their usefulness, safety, and convenience, was and is restricted to no narrow boundaries. Purchasers of property fronting on streets are conclusively presumed to know and give their assent that necessary changes in grade and surface may be made, and may be changed from time to time, as probable growth of the city or town may reasonably be supposed to have been anticipated. We subjoin the authorities sustaining the views we have expressed, without collating or commenting on them: 2 Dill. Mun. Corp. (3d Ed.) § 686; *Hovey v. Mayo*, 43 Me. 322; *Calender v. Marsh*, 1 Pick. 418; *Brown v. City of Lowell*, 8 Metc. 172; *In re Furman Street*, 17 Wend. 649; *Plum v. Canal Co.*, 10 N. J. Eq. 256; *Gall v. City of Cincinnati*, 18 Ohio St. 563; *City of Lafayette v. Bush*, 19 Ind. 326; *Dunham v. Hyde Park*, 75 Ill. 871; *City of St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. City of St. Louis*, 14 Mo. 20; *Schattner v. Kansas City*, 53 Mo. 162; *McCormack v. Patchin*, 14 Amer. Rep. 440, and note; *Creal v. City of Keokuk*, G. Greene, 47; *Karst v. Railroad Co.*, 22 Minn. 118; *De Witt v. Duncan*, 46 Cal. 842; *Humes v. Mayor, etc.*, 1 Humph. 403; *Markham v. Mayor, etc.*, 23 Ga. 402. There are cases which hold that municipal corporations may subject themselves to damages, at the suit of adjacent property holders, for injury inflicted in grading and improving streets; but the cause of action is not the act done, but the unskillful, careless, or reckless manner in which it is done. *Hooker v. Northampton Co.*, 14 Conn. 146; *State v. Jersey City*, 34 N. J. Law, 277; *Louisville v. Mill Co.*, 3 Bush. 416; *City of Delphi v. Evans*, 36 Ind. 90, 10 Amer. Rep. 12; and note; *City of Aurora v. Reed*, 57 Ill. 29; *Goodall v. Milwaukee*, 5 Wis. 32, and note; *Mayor v. Nichol*, 3 Baxt. 838; *Oakley v. Trustees*, 6 Paige, 262. The general rule, however, is that, in the absence of constitutional and statutory provision on the subject, cities are not liable for incidental or consequential injuries done to property by the change of grade, or other alteration of a street, made by the direction of the city authorities. *New Haven v. Sargent*, 38 Conn. 50, 9 Amer. Rep. 360; *Green v. Reading*, 9 Watts, 332; *Mayor v. Randolph*, 4 Watts & S. 514; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Hoffman v. St. Louis*, 15 Mo. 651; *Imler v. Springfield*, 55 Mo. 119; *Macy v. City of Indianapolis*, 17 Ind. 267; *Nebraska City v. Lampkin*, 6 Neb. 27.

We have shown above that under the laws of its incorporation the city of Montgomery, through its authorized agents, has the management and control, construction, and repair of its streets and sidewalks. That authority was conferred by a general law, of which the courts take judicial notice. We have shown, further, that under such general authority, and the implications which attend the dedication or condemnation of ways for public streets, very large discretion is confided to the city government in the matter of grading, lowering, or elevating the surface, so as to render the streets safe, suitable, and convenient for the public. We have shown that the changes of surface and grade necessary to bring about this result must be supposed to have been had in contemplation when the dedication was made, and hence this right of change was conferred as part of the dedication. The amendment of the constitution, however, introduces a new restraint, before unknown, that any change or improvement not necessary for public safety and convenience, but introduced for purposes of ornamentation, or for an object foreign to the original purpose of the dedication, must be regarded as not within the contemplation when the dedication was made; and hence that no power exists to make such change or improvement without a new dedication or condemnation, or without incurring a liability for the injury done. It is not the elevation or depression of grade which necessarily *per se* does the wrong. It is only such elevation or depression as is not necessary to the safety and convenience of the street as a highway; only such elevation or depression as extends beyond the requirements of public safety and public con-

venience, and embraces the ornamental, the fanciful, the novel; such change of grade as is not supposed to have been had in contemplation when the right was acquired. In *Smith v. Corporation of Washington*, 20 How. 135, is this language: "It has been contended that this power, 'to open and keep in repair,' does not include the power to alter the grade or change the level of the land on which the streets, by the plan of the city, are laid out. But we think such a construction of this clause of the charter is entirely too narrow, and cannot be supported as consonant either with the letter or spirit of the statute. It is the evident intention and policy of this statute to commit to this corporation, as a municipal organ of government, whose members are chosen by the citizens, the care, supervision, and general regulation of the streets, as in other cities and boroughs. \* \* \* Streets cannot be open and kept in repair, or made safe and convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down, hollows filled up, or, in other words, the road must be 'graded' or 'reduced to a certain degree of ascent or descent;' which is the proper definition of the verb 'to grade.' If the duty imposed on the corporation requires this to be done, the power must be co-extensive with the duty. If charged with neglect of their duty, as public officers bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and therefore the street is 'opened,' or that it has been kept in good repair, as it was found. \* \* \* Nor could the allegation be admitted that, having once fixed a grade, which is now found improper and insufficient, the corporation has exhausted its power, and has no authority to change the level or grade in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it."

When the case was before us at a former term, the record disclosed that separate demurrers had been interposed to the three several counts of the complaint. Each of these demurrers assigned causes. The demurrers had been overruled in the trial court, and, not being insisted on in the aspects here considered, they were not ruled on. We will not now consider them. After the reversal and remandment, a supplemental demurrer was filed to the three counts collectively, which was also overruled. No authorities have been cited in support of this supplemental demurrer. The second count of the complaint avers that the "defendant, by its agents and employes, disregarding the rights of the plaintiff, wantonly, wrongfully, and illegally cut down the sidewalks adjoining said lot, so as to injure and destroy the value of said property," etc. The first count charges the same acts as a trespass on the property itself. A plausible argument can be made in support of this demurrer, based on the admitted power of the city over street improvements. It will be remembered that it was both the privilege and duty of the city government to so grade the streets or change their grade as to make them safe and convenient, and that this power is conclusively presumed to have been conferred when the dedication was made. The city violates the law only when it makes embankments, excavations, or other alterations in excess of the rule and purpose of safety and convenience. The argument is that, to put the city in fault, the excess should be averred. An examination of the reported cases will not support this view, while our own liberal rules of pleading do not exact so great strictness. *Railroad Co. v. Jones*, 83 Ala. 376, 3 South. Rep. 902. The city court did not err in overruling the supplemental demurrer. Charges 1 and 2, asked by defendant, are in palpable conflict with our rulings when the case was formerly before us, which rulings are reaffirmed above. There was no error in refusing them. Charge 3 is an argument liable to confuse, and rightly refused on that account, if no other. Affirmed.

(55 Miss. 519)

STATE v. BIAS *et al.**(Supreme Court of Mississippi. May 31, 1883.)*

## TAXATION—COLLECTION—FORMER RECOVERY BY REVENUE AGENT.

Act Miss. March 6, 1880, substantially re-enacting act April 15, 1876, which provided for the appointment of a state revenue agent for the term of four years, with authority to collect all amounts due the state, county, or levee boards, except those shown by open account to be due, and providing, in case of his death, resignation, or removal, for the appointment of a successor for his unexpired term, re-creates the office of state revenue agent for the term of four years only; and a suit brought by such agent, in the name of the state, on a tax collector's bond, after the expiration of such four years, is unauthorized, and not a bar to a subsequent suit by the state on the same bond.

Appeal from circuit court, Union county; W. S. FEATHERSTON, Judge.  
*T. M. Miller*, Atty. Gen., for the State. *Z. M. Stephens, Strickland & Bates*, and *Calhoon & Green*, for appellees.

COOPER, J. This is a suit brought by the state against J. M. Thompson, late sheriff and tax collector of Union county, and the sureties on his bond as such collector, to recover certain sums received by said Thompson, as tax collector, which have not been paid over by him to the proper officers, as required by law. The defendant pleaded a former recovery on the same cause of action, in a suit instituted on the ——— day of March, 1886. To this plea the state interposed a replication, setting up in an obscure, prolix, and indefinite manner various matters. Whether it was intended by the pleader to traverse the facts of the plea, or to confess and avoid them, we cannot determine. The replication seems to challenge the conclusiveness of the former judgment by averring that the suit in which it was recovered was brought by one Wirt Adams, revenue agent for the state, who sued for a different default than that named in the present action; and who had no authority to sue for the sums here sought to be recovered; and who sued only some of the parties defendant in this action; and (possibly) that the bond here sued on was not the one involved in the former suit. A demurrer to this replication was interposed by the defendants, and, it having been sustained, the plaintiff declined to plead further, whereupon judgment final was rendered in favor of the defendants, and from that judgment this appeal is taken.

The pleadings disclose the fact that the breaches of the condition of the bond set out in the declaration existed at the time of the institution of the suit by Adams, revenue agent, and it is manifest that the court below sustained the demurrer upon the ground that the state could have but one recovery upon the bond, and that the judgment recovered by Adams was a recovery by the state. *State v. Morrison*, 60 Miss. 74. We deal with the case as it was dealt with in the court below, as presenting the single question whether the state is precluded of her present action because, in a suit brought in March, 1886, on the same bond here sued on, by Adams, revenue agent, a judgment was recovered for a portion of the delinquency then existing in the accounts of the tax collector. We think the state is not affected by the first suit, for the reason that at the time named, March, 1886, there was no such office as that of revenue agent of the state, and therefore that the suit by Adams was not a suit by the state, and the judgment recovered by him was not a judgment by the state. The circumstances and conditions that gave rise to the act of April 15, 1876, entitled "An act to appoint an agent to investigate frauds, and collect the revenue due the state, counties, and levee boards of the state," is somewhat disclosed by the title of the act itself, and is matter of public history. The act declared by its first section that there "shall be appointed by the governor a revenue agent of the state of Mississippi, who shall continue in office for the term of four years, and shall have authority to collect and receipt for all amounts due the state, county, or levee boards of the state in the follow-

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ing class of cases," enumerating many cases. By section 11 it was declared that the agent so appointed should not be "authorized to collect money due the state or county or levee boards, which are shown by open account to be due;" thus indicating that it was against concealed and furtive frauds that the act was aimed. By the tenth section of the act it was provided "that in case of the death, resignation, or removal of said agent herein appointed it shall be the duty of the governor, by and with the advice and consent of the senate, to appoint a successor to fill the unexpired term of the aforesaid agent." It is thus seen that the circumstances under which the act was passed were of a character not likely again to exist. The duties to be performed had reference principally to concealed frauds, and he was excluded from the right of collecting any sums where the same appeared to be due according to the fiscal system of accounting between the permanent officers charged with the collection and disbursement of the public revenue. The term of the officer was to be for four years, (within which time it was supposed the work he was appointed to perform would be concluded,) and in event a vacancy should occur "by death, resignation, or removal," a successor was to be appointed, to hold office only for the unexpired term, and not for a new term of four years. All these considerations strongly suggest that it was not within the legislative purpose to create a permanent office, but to appoint a fiscal agent for the state, to perform the duties therein prescribed for a definite time, and then that the employment, and with it the office, should terminate. We should feel strongly impelled to this conclusion if no other action had been taken by the legislature indicating its construction of the scheme; but the act of March 6, 1880, unmistakably indicates the legislative purpose and understanding. On that day an act was passed, called an "amendatory act," but with the exception of a few changes and modifications of the original it is the original itself. It begins by providing, as did the act of 1876, that a revenue agent for the state should be appointed, and the first section is a literal transcript of the first section of the first act. If a permanent office had been created by the act of 1876, it would have been a work of supererogation to re-create it by a new act of legislation, and the act of 1880 would have been in the form of a simple amendment to that of 1876, modifying and changing it according to the legislative will; but if the former act would expire by its own limitation within a short time, it was but natural that the form of the act should assume the form of a new direction to the governor to appoint a new agent for a new term of service. We are not considering what construction the legislature in 1880 put upon the act of 1876, with a view of following its construction of that act, but we look at it for determining what the legislature of 1880 meant by its own act. By re-enacting that of 1876 it indicated its construction that otherwise the act would have expired by limitation, and we must assume that it intended the same construction to be put upon its own act. The conclusion, therefore, is that the act of 1880 had expired by limitation before the institution of the suit by Adams; that there was not at that time any such office as that of revenue agent, and per consequence there could not be either a *de jure* or *de facto* incumbent; that assuming to act as such did not invest Mr. Adams with the official authority to represent the state; and that a recovery by him was not a recovery by the state; wherefore, the present suit is maintainable. It is but justice to Mr. Adams, by whom the former suit was prosecuted, to say that his right to sue as agent of the state has not been controverted. We doubt not that he has acted in the utmost good faith in continuing in the performance of what he thought was official duty. The judgment must be reversed, and the demurrer to the replication overruled.

## SMOKEY v. JOHNSON.

(Supreme Court of Mississippi. March 19, 1883.)

## 1. CONTINUANCE—WHEN GRANTED—ABSENT WITNESS.

In an action on a note given by a wife to procure the release of her husband and son, arrested for embezzling the price of land sold by them as agents, defendant was properly refused a continuance because of the absence of a witness by whom it was expected to prove, as tending to show a public and *bona fide* sale of the land by the husband and son, that the witness endeavored to buy the property, but his offer was refused on account of the previous sale, such evidence being immaterial.

## 2. APPEAL—REVIEW—FINDINGS OF FACT.

A finding by the jury in such case that the note was not procured by duress or fraud, and was for a valid consideration, will not be disturbed on appeal.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

This was an action brought by Anna F. Johnson against Mary E. Smokey. Mrs. Johnson owned a house and lot in Natchez. Mr. Smokey, the husband of defendant, effected a sale of the house and lot for the sum of \$1,194, and Mrs. Johnson wrote to Smokey to deposit the purchase money in bank. Instead of so doing, Smokey, conspiring with his son, concluded to borrow the money. So he sent to Mrs. Johnson his individual note for \$1,100, and \$94 in cash. Mrs. Johnson immediately returned the note, insisting on receiving the cash, doing this through the medium of an attorney. Smokey failed or refused to give up the money, whereupon affidavit was made against Smokey and his son for embezzlement. A warrant was issued for their arrest, which was executed, and they were brought before a justice of the peace, and then Mrs. Smokey appears, arranges for the bail of her husband and son, and at the same time executes a note for \$1,100, in favor of Mrs. Johnson, and also a deed of trust to secure the same. The note was lost, and this is a suit by Mrs. Johnson for the \$1,100. On the trial, the defendant moved for a continuance on the ground of an absent witness, which motion was overruled, and Mrs. Smokey defended on the ground that she had been forced to give the deed of trust and note by fraud and duress, and her testimony was to the effect that the arrest of her husband and son was simply a scheme to collect the money, and that the note was without valid consideration. The testimony for Mrs. Johnson negatived the defense of fraud and duress. There was a verdict and judgment in favor of Mrs. Johnson, from which Mrs. Smokey appealed.

The statement of facts expected to be proved by the absent witness is contained in the following affidavit: "Affiant, Mary E. Smokey, expects to prove by absent witness, J. N. Carpenter, that in March, 1884, he, the said Carpenter, learning that the residence of Mrs. Johnson, plaintiff in this action, was about to be sold, went to Mr. J. J. Smokey, in Natchez, to see him about it; that said J. J. Smokey, husband of the defendant, told witness Carpenter that his son Fred. Smokey was attending to the matter; that after a little while Fred. Smokey came in and said that the property had been sold, and showed a deed from Mrs. Johnson to David McClure, and said that he had held the deed for some time, but McClure had failed to bring up the money to pay for the residence; that witness Carpenter then offered to pay \$100 more than McClure had bargained to pay for the place, provided McClure failed to complete the purchase; that afterwards, on the same or the next day, said absent witness Carpenter offered to give \$300 more, provided McClure did not take the property, provided the purchase could be closed within a reasonable time; that it was understood between Carpenter and Fred. Smokey, acting as agent for Mrs. Johnson, that McClure should have a chance to complete their contract, provided it was closed within a reasonable time; that Fred. Smokey said to Carpenter that he would see McClure, and give him until 2 or 3 o'clock on that day or the next to raise the money and complete the contract; that Fred. Smokey did not tell Carpenter that he would close with him at his office, but would see McClure, as above stated; that this evidence is material and imper-

tant, to show that this was an open and public sale in good faith to McClure of the property of Mrs. Johnson by J. J. Smokey and his son, Fred. Smokey, as agents of Mrs. Johnson."

*Proby & Clinton, Reed & Reed, and Hooker & Hooker, for appellants. J. S. Morris, for appellee.*

**PER CURIAM.** The application for continuance was properly overruled. The facts proposed to be proved by the absent witness, Carpenter, were not material to the issue, and if they were, they were shown by other evidence. We discover no error in the action of the court in regard to the admission and rejection of testimony. There are no instructions given for appellee in the record, and none refused that were asked by appellant. All the instructions in the record, asked by appellant, were given, and whether the note sued on was obtained by fraud or duress, and was without valid consideration, were questions of fact for the jury, and there is nothing in the record to require or justify us in setting aside the verdict. The judgment is affirmed.

#### JOHNSON v. SMOKEY.

(*Supreme Court of Mississippi. March 19, 1883.*)

##### **INJUNCTION—TO RESTRAIN JUDGMENT.**

An injunction restraining the enforcement of a judgment at law which has been affirmed on appeal will be dissolved, when nothing is alleged in the injunction suit which was not litigated in the legal action.

Appeal from chancery court, Adams county; WARREN COWAN, Chancellor.

This is a bill filed by Mrs. Smokey to enjoin the judgment at law in the preceding case of *Smokey v. Johnson, ante, 787*, and on the same state of facts. The chancellor granted the injunction, from which Mrs. Johnson appealed.

*J. S. Morris, for appellant. Proby & Clinton, Reed & Reed, and Hooker & Hooker, for appellee.*

**PER CURIAM.** This cause, involving the note and the deed of trust executed to secure it, was practically disposed of by the judgment at law on the note; which judgment we have just affirmed, (*ante, 787*,) both cases having been submitted and argued together. Nothing is alleged against the deed of trust which was not litigated in the suit on the note. If the note was valid, the deed of trust was also. On the facts of record, the decree should have been for appellant. The decree is reversed, the injunction dissolved, and the bill dismissed.

#### SMOKEY v. JOHNSON.

(*Supreme Court of Mississippi. March 19, 1883.*)

##### **1. EXECUTION—CLAIMS BY THIRD PERSONS—EVIDENCE.**

Where one claims certain property levied on as the property of his wife, it is proper for the other party to show that nothing is assessed to him.

##### **2. SAME—APPEAL.**

When the claim of a husband to a horse, levied on as the property of his wife, is supported by evidence that he employed certain persons to attend to the horse, and contradicted by evidence that he had nothing assessed to him, a verdict against said claimant will not be disturbed on appeal, except for error of law.

##### **3. APPEAL—REVIEW—OBJECTIONS WAIVED.**

When no exception is taken to instructions when given, or in the motion for a new trial, they cannot be complained of in the appellate court.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

This is a claimant's issue growing out of the suit in the case of *Smokey v. Johnson, ante, 787*, above reported. After Mrs. Johnson had recovered judgment against Mrs. Smokey in the circuit court an execution was issued and

levied on certain property, among which was a horse. The appellant, Frank Smokey, interposed a claim to the horse as his property, and supported his claim by testimony to the effect that he had employed certain parties to attend to the horse, and some hearsay evidence about his purchase of the horse, which was excluded. The plaintiff in execution, Mrs. Johnson, over the objection of the claimant, proved that the claimant had no property; that nothing was assessed to him. There was a verdict and judgment in favor of Mrs. Johnson, from which Frank Smokey appealed.

*Proby & Clinton, Reed & Reed, and Hooker & Hooker, for appellant. J. S. Morris and A. H. Gelsenberger, for appellee.*

**PER CURIAM.** The objections made to the admission and exclusion of evidence are without merit. On the facts of the record it cannot be said that there is not testimony sufficient to support the verdict, or that it is manifestly wrong, and in such state of case, and where there is no error of law, we cannot disturb the verdict. *Bank v. Moss*, 63 Miss. 74. And as to the law we are precluded from considering the instructions for the reason that no exception was taken to them in the court below, either when given, or in the motion for a new trial, and they cannot be complained of here for the first time. *Scott v. State*, 31 Miss. 473; *Temple v. Hammock*, 52 Miss. 360. Therefore the judgment is affirmed.

(24 Fla. 281)

**O'DONOVAN v. WILKINS, Sheriff.**

(*Supreme Court of Florida. July 9, 1883.*)

**1. HEALTH—COUNTY BOARDS—CONSTRUCTION OF STATUTES.**

The act of 1885, (chapter 3603,) providing for the appointment of county boards of health, and defining their powers, does not repeal the act of 1879, (chapter 3162,) providing a uniform system of quarantine in this state. These statutes are *in pari materia*, and to be construed together.

**2. SAME—PORT INSPECTOR.**

In authorizing a county board of health to establish quarantines, and to appoint a port inspector, the act of 1885 means quarantine, as defined and authorized by the act of 1879, and a port inspector, with the powers and duties prescribed by the latter act.

**3. SAME—QUARANTINE—HOW ESTABLISHED.**

Neither of the above acts establishes of itself a quarantine at any place or in any county, but they leave it to the board of health to establish the same, when, in its judgment, it is expedient for the public welfare to do so.

**4. SAME.**

The quarantine regulations, which the act of 1885 authorizes a board of health to make, are not operative, nor to be obeyed as such, except during the existence of a quarantine duly established by a board of health, in accordance with the above statutes; and wherever either statute has regulated any matter of quarantine, any regulation inconsistent therewith, made by a board of health, is of no effect.

**5. SAME.**

The regulation of the board of health of Escambia county, involved in this case, held to be invalid for the reason that, as presented by the record, it purports to be operative, notwithstanding the absence of the establishment of quarantine by such board, and also because it assumes to regulate, in a different manner from the act of 1879, the detention of vessels in the matter of their examination as to whether they are subject to quarantine.

(*Syllabus by the Court.*)

Error to circuit court, Escambia county; JAMES F. MCOWELLAN, Judge.

On the 18th day of December last R. C. White made affidavit before the county judge of Escambia county that on the 5th day of the same month the plaintiff in error violated the following rule and regulation of the board of health of that county, viz.: That the port inspector shall visit and inspect every vessel entering the bay of Pensacola, and ascertain and report her sanitary condition; and until such inspection and report, and the release of such

vessel by such officer; no person shall visit her, and no person from her shall visit any other vessel, or the shore, after such rule has been printed 10 days in a newspaper printed in said county,—by visiting and going on board the vessel called the "Clyde," lately entering the bay and port of Pensacola, before the inspection and release of said vessel by the port inspector appointed by the board of health of said county.

The plaintiff in error was arrested under a warrant issued on such affidavit, and, the county judge having examined the witnesses, and inquired into the charge, and determined that there was just reason to believe that the plaintiff in error was guilty of the offense, and having decided that the latter should enter into a recognizance in the sum of \$200, with sufficient surety, for his appearance at the next term of the criminal court of record of Escambia county, and the plaintiff in error having failed to enter into such recognizance, the county judge committed him to jail until he should give such recognizance or be therein discharged by due course of law.

The plaintiff in error then presented his petition to the judge of the First circuit for a writ of *habeas corpus*. To this petition is annexed, as part thereof, a copy of the affidavit, warrant, and commitment spoken of. It also states the evidence on which the commitment was based to be as follows: That on the same 5th day of December plaintiff in error was an inspector of customs of the United States for the district of Pensacola, and that on that day, about 4:30 P. M., he was ordered by his superior officer, the chief inspector at Pensacola, to board the vessel mentioned for the purpose of seeing her manifest, she then being known by plaintiff in error to be direct from Port Eads, and then being at anchor in the anchorage off the city of Pensacola. That petitioner, on his way to said vessel, followed in the rear of the boat of the inspector of the board of health of Escambia county, the said White, but that before arriving at said vessel the said inspector, White, caused his boat to return to the wharf, and did not visit the vessel that afternoon. That plaintiff in error, in the performance of his duty as an inspector of customs, in pursuance of the act of congress prescribing his duties, continued out to said vessel, and boarded her before White had done so. The said rule and regulation of the Escambia county board of health had been printed 10 days before said 5th day of December, in a newspaper printed in said county. That such rule was never enacted as a law by the legislature of Florida, but was adopted and promulgated under and by virtue of said section 10, c. 3603, or board of health statute. The statements of the petition are admitted to be substantially correct.

The writ of *habeas corpus* having issued, the sheriff made return thereto that he held plaintiff in error in custody by virtue of the said commitment issued by the county judge. This return the plaintiff in error moved to quash.

The motion was denied, and the plaintiff in error remanded to the custody of the sheriff.

*Mallory & Maxwell*, for plaintiff in error.

BANEY, J., (after stating the facts as above.) On the 11th day of March, 1879, a statute (chapter 3162) entitled "An act to provide a uniform system of quarantine in this state" received the approval of the governor. In view of its provisions, and the express repeal by it of the statute formerly controlling the same subject, we need not refer to prior legislation in considering the case now before us. The first section of this act constituted the mayor and aldermen and city physician, if there was one, of every incorporated city or town in the state a board of health for such city or town, and when there was no incorporated town or city, the county commissioners were to be the board of health for the county. The county commissioners were not to be the board of health for the county if there was an incorporated city or town in the county.

The act (section 3) authorizes any board of health to establish, at any time during each year, a quarantine, forbidding the approach to the city, town, or district covered by the board's jurisdiction of any vessel upon which any contagious, infectious, or pestilential disease has occurred or existed during the voyage thereto, or within 30 days preceding the arrival thereat, and forbidding the landing of any person or goods from such boat or vessel until it has performed quarantine in accordance with the provisions of this act, and with the rules and regulations of the board of health. It (section 4) also provides that "any board of health" may establish quarantine against any country or locality of which it has information as being infected with plague, or other malignant contagious or infectious disease, forbidding the approach to the town, city, or district of any vessel or person from such infected country, and the landing of any such vessel, or of any person or goods therefrom, until such vessel, person, or goods shall have performed quarantine as aforesaid. The establishment of the above quarantine is required to be publicly posted, or published in some newspaper for the space of two weeks. Sections 4, 5.

"The board of health of any incorporated city or town" (section 6) may appoint one or more port inspectors, whose duty it makes to board any vessel approaching such city or town, and ascertain if it is subject to perform proper quarantine under the third or fourth sections, and to order the same, if found to be so subject, and the persons and goods on it, into quarantine, and immediately notify the board of the fact. Each board has power to appoint a quarantine physician, to reside at and have control of the quarantine grounds. Section 7. And by section 8 the board of any incorporated city or town may order into quarantine any boat or vessel in the vicinity of the city or town whenever the presence of such boat or vessel, or the cargo thereof, in said vicinity will, in the opinion of the city physician, endanger the health of the inhabitants of the city or town.

If, after proclamation under such third and fourth sections by the board of health of any city or town, any person, coming in any boat or vessel approaching the city or town from the high seas, shall (section 11) himself land, or shall land any goods from the vessel, or if any person shall go on board of such vessel previous to her inspection by a port inspector, such person, should the vessel be ordered to quarantine, shall be required to perform the same quarantine, or be fined not less than \$100, nor more than \$500, and be imprisoned not less than 20, nor more than 60, days in the county jail.

The board of health of any city or town may make such rules for the regulation of quarantine not inconsistent with this act as they may deem necessary. Section 18.

The board of any city or town may establish (section 15) a land quarantine when in their judgment necessary, and are empowered to make rules or regulations to prevent or restrain any or all persons or goods coming from any city or place where any infectious or contagious disease prevails or exists from entering into such city or town during the existence of such quarantine; and, for the purpose of such quarantine, the jurisdiction of such city or town extends to the boundaries of the county, and in case there shall be two or more cities in any county, the jurisdiction of each on the side towards another shall extend to a line midway between them.

By act of March 7, 1881, entitled "An act to provide for the appointment of boards of health for incorporated cities and towns containing three hundred or more registered voters," (chapter 3812,) it was enacted that the governor shall appoint in any incorporated city or town having 800 or more registered voters a board of health, consisting of five discreet persons, not less than two of them to be medical men of acknowledged ability and skill, and the mayor of the city and the town and the chairman of the board of county commissioners are made *ex officio* members of the board. Such boards were given (section 4) full power to act in regard to all matters pertaining to the

public health and vital statistics, and empowered to make such rules and regulations as they might deem necessary "for its government and the protection of the public health, abatement of nuisances, etc.; and the jurisdiction of each board of health shall extend to the boundaries of the county in which it is located, and in case there be more than one such board in any county, the jurisdiction of each shall extend to a line midway between them;" and it is provided that in all matters of quarantine such boards shall have the same powers as are conferred upon boards of health by the preceding act of 1879, it being expressly declared that the act of 1881 shall not be construed as repealing section 1 of said act of 1879, so far as it relates to cities and towns of less than 300 registered voters.

In 1883 the seventeenth section of the act of 1879 was amended by chapter 3443 of our laws, so as to permit the boards of health to fix the inspectors' and fumigation fees, and also to authorize suit as well as detention of the vessel for the same.

In 1885 an act (chapter 3608) entitled "An act to provide for the appointment of boards of health in and for the several counties of the state of Florida, and define their powers," was passed. It provides that the governor of the state shall appoint for every county in this state a board of health, consisting of five discreet persons, not less than two of whom shall be physicians of skill and experience, to serve without pay, with a term of office of four years, and with power to elect annually a president and a secretary, who is to be treasurer. Every such board is made a corporation, with power to sue and be sued, and to contract, and to acquire and dispose of real and personal property. The county commissioners of each county are empowered to assess and levy, at the request of the board, a tax not exceeding in any year two mills on the dollar, to enable the board to meet its expenses. The boards of health of counties separated by any lake, river, bay, or estuary shall have concurrent jurisdiction over such bodies of water, and when any board of health shall locate a quarantine station beyond the limits of the county for which it has been appointed it shall have complete jurisdiction over such station, exclusive of the board in which the station is located, provided 10 days' previous notice of the metes and bounds of the station be given by proclamation prior to the time that the jurisdiction is to attach.

Section 8 provides that every board of health thus created shall have "full power to act in regard to all matters pertaining to quarantine, public health, vital statistics, and the abatement of nuisances, to appoint and suitably compensate a port inspector and such other officers or agents as they may find necessary, who shall be subject to removal at the pleasure of the board." It also provides a punishment, by fine not exceeding \$1,000, of any person who shall interfere with, hinder, or oppose any such agent or officer or member of the board in the discharge of his duty. Section 9 authorizes the board to establish at any time "such quarantines as in their judgment are expedient for the public welfare, and provide such rules and regulations for the same as may be needful for the proper enforcement of such quarantine; and after the establishment of any quarantine against any port or place, any person violating the same shall be deemed guilty of a felony, and upon conviction punished by a fine of not more than \$500, or by imprisonment in the state penitentiary not more than one year." Section 10 is that every board "may adopt such rules and regulations as they may deem needful in the exercise of the powers and the discharge of the duties created and imposed by the provisions of this act; and any person who shall violate any such rule or regulation, after the same has been printed for ten days in some newspaper printed in the county, shall be punished by a fine not exceeding one thousand dollars, or imprisonment in the penitentiary not exceeding two years;" and section 11 gives the board a remedy by injunction, and without bond, to restrain the violation of any rule or regulation for the protection of public health.

The twelfth section of this act amends the first section of the above act of 1879, so as to make it read as follows: "The mayor, aldermen, and city physician, if there be one, of any incorporated city or town in this state of less than three hundred registered voters, shall be, and are hereby, constituted a board of health for said incorporated city or town."

It is plain that the act of 1885 does not do away with boards of health for incorporated towns,—municipalities having less than three hundred registered voters,—and it is also clear that there is in the act of 1885 nothing that repeals the act of 1879, except in so far as it made a board of health for such an incorporated town the board for the county. As indicated above, there was, under the act of 1879, no county board as such unless there was no incorporated city or town in the county; and as to "a land quarantine," under the fifteenth section of that act, the jurisdiction of an incorporated city or town extended to the boundaries of the county in which it was situated, and in case there should be two or more towns in any county, the jurisdiction of each on the side towards the other extended to a line midway between them.

There are two views to be taken of the effect of the act of 1885 upon that of 1881. One is that it was intended to take the place of it, and do away with the boards of health provided by it, and the other is that it was merely to create a new or county board as an additional or third board in the quarantine or health system in this state. Had the act of 1885 not contained the twelfth section, it might have been urged with force that the intention of the legislature was to have the county boards take the place of those of both towns and cities; but, in view of the provisions of such section, it is indisputable that such was not their intention as to town boards, and we are not clear that it was their purpose as to city boards. It is, however, not material to settle the latter question; for, whichever view is to prevail, it is plain that the general provisions of the general quarantine law of 1879 have not been repealed, but are still in force. It and the act of 1885 are *in pari materia*, and to be construed together. *State v. Palmes*, 23 Fla. 620, 3 South. Rep. 171.

When the act of 1885, in its ninth section, says that a board of health created under it may at any time establish such quarantines as in their judgment are expedient, it means quarantines as authorized by the act of 1879. If, in its judgment, it is well to establish a quarantine forbidding the approach to the county of any vessel or boat upon which any contagious, infectious, or pestilential disease has occurred, or existed during the voyage to said county, or within 30 days next preceding the arrival of such vessel or boat at such county, it may do so, forbidding the landing of any persons or goods from such vessel or boat until it has performed quarantine in accordance with said act and the rules and regulations of the board at the quarantine ground established by it. This county board may also, upon information that any county is infected with plague, or other malignant, contagious, or infectious disease, establish quarantine against such county or locality, forbidding the approach to the county of any vessel or boat or persons from such infected county or locality, and forbidding the landing of such boats or vessels, or of any persons, or goods therefrom, until such boat, vessel, persons, or goods shall have performed quarantine. Section 4.

The sixth section of the act of 1879 informs us what is meant by the act of 1885, when, by its eighth section, it gives power to appoint and suitably compensate a port inspector. It means an officer whose duty it shall be to board every boat or vessel approaching the county, and ascertain if it is subject to perform quarantine, and, if she is, order her and all persons and goods on her thrown into quarantine, and notify the board of health that she has been ordered into quarantine.

We thus see that the legislature has regulated the matter of quarantining vessels to a certain extent. There has been no repeal of these provisions, and

we are satisfied that in the grant of powers alluded to, made by the act of 1885 to county boards, it was meant that they should exercise similar powers as to counties, or, rather, should conform to these regulations. In the matter of land quarantines it will be perceived that the legislature has not gone into such detailed regulations. There was good reason for the course pursued as to the former feature of the subject. Its purpose was not only to secure the communities against the arrival in their midst of a vessel herself infected, or coming from an infected country, but also, by making it a feature of the system that an officer should thus board her, and ascertain whether or not she was liable to quarantine, avoid subjecting her and the customs revenue system or other officials of the United States to the interruption or delay not necessary to an efficient quarantine system. The purpose and meaning of this statute is that if the vessel is not subject to quarantine, she is not to be detained after it is so ascertained by the port inspector. The law does not contemplate that he shall detain her after finding she is not a subject of quarantine; nor did it contemplate that the business of the United States officials as to customs revenue and commerce should be further delayed than this. The fact that the statutes of the United States have enjoined an observance of state quarantine, and health statutes and regulations on customs, revenue, and other officers, (*Morgan v. Louisiana*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114, and statutes cited,) makes it none the less the duty of the states to see that such statutes and regulations are productive of no unreasonable delay. In view of our statute, we do not think it was ever intended that any board of health should make a regulation authorizing a longer detention, as it has done in this case.

Under the regulation before us the vessel is to be detained and the United States officers delayed until not only the inspection has been made, but also until the report and release of the vessel. If she is not liable to quarantine any such detention of the vessel or the United States officials is contrary to the policy of our statute, and in view of it, as well as in itself, unreasonable.

There is another feature in which we think the regulation is unauthorized. As it appears before us it is one that is intended to be in operation and effect, although no quarantine may have been established by the board of health. Both the act of 1879 and of 1885 show it to have been the intention of the law-makers that boards of health should take affirmative action establishing quarantine. These statutes do not of themselves establish quarantine for all time, and authorize rules and regulations which are to be of force and effect, and obeyed as such, whether the boards may or may not deem that there is any necessity for a quarantine, but, in the language of the act of 1885, and the evident meaning of that of 1879, the boards "may at any time establish such quarantine as in their judgment is expedient for the public welfare." The authority implies the duty, and the duty to establish when it is expedient for the public welfare implies the corresponding one not to establish, and to abrogate one already established, when the public welfare does not require any. The rules and regulations authorized as to quarantine are to be in force and to be obeyed as such only in and of an existing and lawfully established quarantine.

If there is any other regulation of the board of health of Escambia county that operates as a limitation upon the one before us it does not appear in the record, nor can we take judicial notice of its existence. *Freeman v. State*, 19 Fla. 552. The proceedings taken against the plaintiff in error do not allege the establishment and existence of any quarantine; and, in the absence of both an explanatory rule and the allegation mentioned, we think they are insufficient.

The result is that the judgment must be reversed, and the cause remanded, with directions to discharge the plaintiff in error; and it will be so ordered.

(24 Fla. 263)

**COUNTY COM'RS v. STATE *ex rel***  
*(Supreme Court of Florida. July 9, 1888.)*

**1. COUNTIES—COUNTY SEAT—CONSTITUTIONAL LAW.**

The general provision of section 4, art. 8, Const., declaring that "the legislature shall have no power to remove the county-seat of any county, but shall provide by general law for such removal," is a limitation upon the power of the legislature, and the effect of the proviso thereto: "Provided, that in the formation of new counties the county-seat may be temporarily established by law," is to qualify such limitation, and reserve to the legislature, when forming a new county, the power to establish for the same a temporary county-seat, which shall not be subject to such limitation, but shall be the county-seat only until the permanent county-seat shall be established, in the manner provided by the special act organizing the county.

**2. SAME—LOCATION OF COUNTY SEAT.**

The removal of a county-site is matter properly connected with the establishment of a county within the meaning of section 16, art. 8, Const., and the provisions of the above act, as to the permanent location of the county-site, are covered by its title, within the meaning of such constitutional provision.

**3. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—COMMISSIONERS TO LOCATE COUNTY SEAT.**

The grant of power to a board of county commissioners, or a majority of them, to locate the temporary county-seat of a new county, is not a delegation of the law-making power, nor is it prohibited by the constitution of this state in legislation organizing a new county.

**4. SAME.**

The act approved May 27, 1887, entitled "An act to create and establish the county of Lake from portions of Sumter and Orange counties," and providing for a location of a temporary county-seat by the county commissioners, or a majority of them, and also providing for an election for the location of a "permanent county-seat," and that the place obtaining a majority of all the votes cast shall be the county-seat of said county, as provided by the general laws of this state, is not a delegation of the law-making power, nor a violation of the constitution, in so far as the act authorizes the temporary location of the county-seat; nor is the provision of the act for the location of the permanent county-seat, within the limitation of section 4, art. 8, Const., upon special legislation, but is excepted from such limitation by the proviso thereto.

**5. MANDAMUS—WHEN LIES—NON-PERFORMANCE OF OFFICIAL DUTY.**

A *mandamus* will not lie to compel the performance of an official duty until there has been an actual default in the performance thereof by the officer upon whom it is imposed.

*(Syllabus by the Court.)*

Error to circuit court, Lake county; JOHN D. BROWNE, Judge.

Application by the state of Florida, on the petition of relators, for *mandamus* to compel county commissioners of Lake county to call an election for the choice of a county-seat. A preliminary writ was issued against the defendants, and they bring error.

J. B. Gaines and A. W. Cockrell & Son, for plaintiffs in error. Alex. St. Clair Abrams, for the State.

RANNEY, J. 1. The statute creating and establishing the county of Lake, approved May 27, 1887, (page 154, Pamph. Laws,) is entitled "An act to create and establish the county of Lake from portions of Sumter and Orange counties." The first three sections define the boundaries of the new county, name it, declare what congressional and what judicial district it shall form a part of, and provide for the appointment of the several county officers by the governor.

The fourth section enacts "that the board of county commissioners of Lake county shall, within thirty days after this act goes into effect, meet at such place in said county as they or a majority of them shall designate and appoint, which place shall be the temporary county-seat of said Lake county until the permanent county-seat is established by the votes of the people of said county." The fifth section is as follows: "That it shall be the duty of the board of county commissioners of said county at their first meeting to provide for an election to be held within ninety days thereafter for the loca-

tion of a permanent county-seat for said Lake county, and the place obtaining a majority of all the votes cast shall be the county-seat of said county, as provided by the general laws of this state. If at said election no place voted for shall obtain a majority of all the votes cast, it shall be the duty of the board of county commissioners to order another election within ninety days thereafter, and if at such second election, no place shall obtain a majority of all the votes cast, to hold succeeding elections until a permanent county-seat is established according to law."

Section 4, art. 8, Const. 1885, is in the following language: "The legislature shall have no power to remove the county-seat of any county, but shall provide by general law for such removal; provided, that in the formation of new counties the county-seat may be temporarily established by law."

The preceding section of the same article declares the power of the legislature to establish new counties, and to change county lines.

The pleadings show that Bloomfield was designated and appointed by the county commissioners as their place of meeting under and according to the fourth section of the statute, and that they have held their meetings and taken official action there as to elections for the permanent county-seat.

It is contended on behalf of the plaintiffs in error that the statute in question is unconstitutional in so far as it provides for the establishment of the permanent county-seat. They argue that the proposed selection and establishment of such "permanent county-seat" is in effect a "removal" of a county-seat, within the meaning of the constitutional provision set out above, and that it cannot be provided for or affected by special legislation, as is attempted in this case. They assent to the power of the legislature to temporarily locate a county-site through the instrumentality of commissioners, as provided by the fourth section of the statute, though not altogether satisfied with the reasoning by which the authorities reach this conclusion.

The position of counsel for defendant in error is that the statute has failed utterly to lawfully establish a temporary county-seat, as it has attempted to delegate this power to a majority of the board of county commissioners; but that, even if the statute did so, and Bloomfield was selected as the temporary county-seat, it was and is by the terms of section 4 only intended to be the meeting place of the county commissioners. No court, he says, can be held there, or at any but a permanent county-seat; nor has this act, he argues, prescribed any place for holding the courts in accordance with section 8, art. 5, Const., which provides that the circuit judge shall hold at least two terms of his court in each county, "at such times and places as shall be prescribed by law, and may hold special terms." He further contends that, until a permanent county-seat has been established, there can be no "removal" within the meaning of the constitution.

In view of the language of the fourth section of the statute, we find it impossible to avoid the conclusion that the legislature intended that the place adopted by the commissioners for their meetings should "be the temporary county-seat" of said Lake county until the permanent county-seat is established" in the manner provided by the fifth section of the act. It is equally difficult to withhold from the law-making power the intent and purpose that for the same period of time, and at the place so designated by the county commissioners, all offices should be kept, and all official acts done, that the general laws of our state provide for being done at a county-seat. If it be that the legislature has failed to prescribe the place for holding the terms of the circuit court in this county under section 8, art. 5, Const., this omission does not of itself make Bloomfield any the less the temporary county-site for all other purposes.

The purpose of section 4, art. 8, Const., considered independently of the proviso, was to prohibit the legislature from removing the county-site of any county otherwise than by a general law applicable to all cases of removal.

The idea of the removal of a county-site necessarily involves the previous establishment of one. This section, considered either with or without the proviso, does not have the effect to prohibit the legislature from establishing a county-site when making a new county; for the power to make a county, declared by section 3 of article 8, necessarily includes the power to create, and do everything necessary and proper to its perfect organization, that is not prohibited by other portions of the constitution; and a county-site is, to say the least, a proper, if not a necessary, element of county organization.

It is equally clear that, but for the proviso, the terms of the section would prohibit the removal in any other way than according to the mode prescribed by a general law,—a removal of the county-seat established in the formation of a new county. The purpose of a proviso is to except something from, or restrain the generality of, what precedes it. *Minis v. U. S.*, 15 Pet. 423; *Wayman v. Southard*, 10 Wheat. 1; *Huidekoper v. Burrus*, 1 Wash. C. C. 119. As, then, the general provision of the section would not have prohibited the legislature, when forming a new county by special act, from establishing a county-site that could be changed or removed only under the provisions of the general law governing removals of county-sites, yet would have deprived the legislature of the power to establish even a temporary county-site that would not be subject to the indicated restraint upon removals, the only purpose the proviso can or does serve is to authorize the legislature, when organizing a county, to establish by special act a county-site freed from the limitation of removal by general law alone. Of course, a proviso is to be strictly construed, and nothing not fairly within its terms is taken by it out of the general provisions of the section to which it is attached; but it is to be given some effect, and not to be held to merely declare an effect which the section of which it is a part would have without it. If we say that it merely authorizes the legislature to make a location subject to change only pursuant to general law, we practically eliminate the proviso by declaring it of no effect to except anything from the general restriction imposed by the section; for without such proviso the section permits such a location of a county-site of a new county by special act. The purpose of this proviso was to enable the legislature to provide county-seats for new counties until permanent county-seats should be established in such manner as in its wisdom it should deem proper; or, in other words, to provide a provisional or temporary county-seat until the permanent organization of the county, in so far as a county-seat is concerned, should be perfected as directed by the act creating the county. In view of the mode adopted in the case before us for establishing the county-seat permanently,—a mode most responsive to the sentiment of the people, and doubtless the one deemed by the framers of the constitution and by the people when adopting it, as most likely to be followed by the legislature,—the power secured to the law-makers by the proviso was indispensable.

The purpose of the constitution, as indicated by the proviso in question, to permit the legislature to provide a provisional or temporary county-seat until the permanent one should be located, has been acted upon by the law-makers in this case, and the clear purpose of the legislature was that the place selected by the county commissioners should be the county-seat until the electors of the county should by a majority vote select a place for a permanent seat. It is manifestly not the purpose or intent that the place selected by the commissioners should remain the county-site until proceedings for a change of location should be taken in accordance with the general law regulating the change of location of county-sites. The special provisions of the Lake county act, and the absence from it of the provision of the general law as to a petition to the county commissioners for a change, which petition is jurisdictional to the power of the commissioners to call an election under the general law, fully show this.

When the county-site of Lake, or of any new county, is once permanently located in the manner prescribed by the statute organizing it, then the legis-

lature will have exhausted its power of special legislation as to providing the county-site of such county, reserved to it by the proviso; and as to the subject of any further removal of the county-site the legislature will be under the limitation of the general provision of the section.

The expression "permanent county-seat," as used in the Lake county statute, is the antithesis of the other expression, "temporary county-seat," the plan of the legislature as to organizing the county being that it would leave to the voters of the county the selection of that county-seat, which should be subject to removal only under the provisions of the general law, and make provision for a "temporary" seat to answer the immediate exigency until such "permanent" seat should be located. The temporary seat was but one step in the organization of the county in so far as its county-seat was concerned. The place chosen by the majority of the votes is to be "the county-seat of said county, as provided by the general laws of this state." Section 5 of the statute.

There is nothing in the case of *Bagot v. Board*, 48 Mich. 577, (cited by counsel for plaintiffs in error from 5 N. W. Rep. 1018,) inconsistent with our conclusion. The constitutional provision of Michigan was: "No county-seat once established shall be removed until the place to which it is proposed to be removed shall be designated by two-thirds of the board of supervisors of the county, and a majority of the electors voting therein shall have voted in favor of the proposed location, in such manner as shall be prescribed by law." There was a general law enforcing the section. The difference between this section and the section of our constitution is obvious. There is no provision or exception upon the general limitation. Though the place to which a removal can be made must be designated by two-thirds of the supervisors, and a majority of the electors voting, nothing is said as to the enactment of a special law subject to these provisions, in the case of any county. The decision of the court, as embodied in the head-note, is that "the proposition for the removal of a county-seat may originate with the board of supervisors. No previous action of the legislature is necessary to give the board authority to act. It is immaterial that in the particular case the county-seat was permanently located by the legislature when the county was organized. The permanent location is only until a removal takes place in accordance with law." There was no question of power as to special legislation. Though the constitutional provision was necessarily regarded as a limitation upon the power of the legislature, the court and counsel agreed that it left the legislature all power over the general subject that could be exercised consistently with it. This principle is applicable to the general provision of the section in our case, and it is evident that the purpose of the proviso was a reservation of power to the legislature.

2. Both upon authority and principle we are satisfied that there is nothing in the position of the counsel for the defendant in error as to there being any improper delegation of legislative authority in authorizing the county commissioners, or a majority of them, to select a place for their meetings, and providing that the place so designated shall be the temporary county-seat until the permanent one is established in the manner provided by the act. In the case of *Bagot v. Board*; *supra*, Judge COOLEY says: "Unquestionably, if the legislature may propose the removal, it may also delegate the authority to propose it." The authority of the legislature to provide for the location of county-sites by means of commissioners, or through the instrumentality of an election by the legal voters of the county, is fully established. *Bagot v. Board*, *supra*; *Rice v. Shay*, 43 Mich. 880, 5 N. W. Rep. 435; 1 Dill. Mun. Corp. § 140, (92), note 4; *Alexander v. People*, 7 Colo. 155, 2 Pac. Rep. 894; *Territory v. Board*, 12 Pac. Rep. 780, (Sup. Ct. Arizona, 1887); *Barnes v. Board*, 51 Miss. 305; *Com. v. Painter*, 10 Pa. St. 214; *Etwell v. Tucker*, 1 Blackf. 285; *Armstrong v. Board*, 4 Blackf. 293. There are cases in which it has been done

through the instrumentality of commissioners, and in which the validity of the legislation or establishment under it has been contested on other grounds, though the question raised here has not been made. It is not a delegation of the law-making power, but is simply the adoption of one of the several admissible modes which it in its discretion may use, or the use of an instrumentality it may clearly use, for doing what it has the power to do. Independent of the section in question of the constitution, (section 4, art. 8,) it would doubtless not be contended for a moment that the selection could not be made through the instrumentality of commissioners, and there is clearly nothing in the section from which it can be inferred or argued that when the constitution, by the proviso, reserved to the legislature the right of temporarily establishing a county-seat by law, it did not mean that it could pass the same kind of a law, and call into use the same instrumentalities under it, as it could have done in establishing such a temporary county-seat had there been no such section in the constitution. Where the legislature has the power to do a thing by law, and the constitution has not prescribed the manner of doing it, or the nature of the thing is not such as to require that it be done directly by the legislature, it may, through the provisions of its law, use any proper instrumentality for effecting the result to be accomplished. Any other rule would render the doing of many things by law impracticable. A county-site established by commissioners designated by law is one established by law.

3. It is contended on behalf of plaintiffs in error that the fifth and sixth sections of the statute in question are not within the title of the act. The title and the fifth section are set out above. The sixth section relates to the qualification of electors and their registration for the purposes of the courthouse election.

The argument concedes that an original establishment of a county-site by the legislature, whether done directly by it, or indirectly through commissioners, is constitutionally within such a title as this act has, but contends that the legislature exhausted its powers of special legislation in the temporary location of the county-seat, and that the provisions of the sections mentioned, whether they have regard to a temporary or a permanent site, presupposed such exhaustion, and the full creation and habilitation of the county of Lake in the sisterhood of counties, and provide a method for the voters of the county, as one fully organized, to change their county-seat, whereas the title of the act looks merely to the investiture of the county with such habiliments, and cannot be made to look beyond it, or to embrace legislative matter not pertaining to the organization of the county; that the original designation of a county-site does pertain to the creation of a county, but the method provided in those sections whereby the people of an organized county may change or permanently establish their county-site is not matter properly or otherwise connected with the creation or establishment of a county.

Section 16 of article 3 of our constitution provides that each law enacted in the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title.

The title "An act to create and establish the county of Lake from portions of Sumter and Orange counties," is, in our opinion, broad enough to cover any provision as to the location of the county-site, or a change of the same at any period or stage of the existence of the county. Provisions for such change, whether from a temporary or a permanent, an original or a subsequent, location, are a part of the county government established. Any provision relating to its organization or government, though for use in the future, is as much matter properly connected with the establishment of the county as are those relating to the earliest stages of its existence. The subject of the establishment of a county, within the meaning of the constitutional provision in question, includes not merely what is necessary to put it on its feet as a county, but anything that may concern its future existence or operation.

Nothing is more properly connected with the subject of establishing a county than making provision for a change of the county-site in the future. *Cooley*, Const. Lim. marg. p. 144; *Morford v. Unger*, 8 Iowa, 82; *Whitting v. City of Mt. Pleasant*, 11 Iowa, 482; *Bright v. McCullough*, 27 Ind. 223; *Mayor, etc., v. State*, 30 Md. 112; *State v. Union*, 33 N. J. Law, 350; *Humboldt Co. v. Commissioners*, 6 Nev. 30.

The objections urged to the constitutionality of the statute are untenable.

4. The alternative writ issued April 11, 1888, recites that the relators have filed their petition against the defendants, county commissioners, "charging that the defendants, as such board of county commissioners, have failed and refused to order another election since the recent election for county-seat of Lake county held on the 10th day of March, 1888, although requested so to do by the citizens of said county; and further averring and charging that the defendants do not intend and will not order said election as they are required by law to do; and further averring and charging that there is no county-seat in said county designated by law, and that great injury will be done to said county and to the people thereof if said election is not held and ordered without delay;" and commands the commissioners to assemble at their usual place of meeting, on Monday, April 16th, and order an election for county-seat of the county to take place within the period prescribed by law or to show cause why they should not do so.

A demurrer was interposed to this alternative writ, but was overruled.

By referring to the fifth section of the act, the duties of the county commissioners, so far as they are involved in this proceeding, will be found. They were at their first meeting to provide for a county-seat election to be held in 90 days thereafter; and if at such election no place voted for obtained a majority of all the votes cast, it was made their duty to order another election within 90 days thereafter; and if at this second election no place obtained such majority, they are to hold succeeding elections until a permanent county-seat is established according to law.

In the absence of any allegation to the contrary, it is to be assumed that the county commissioners held their first meeting within the time prescribed by the fourth section of the act, and that at such first meeting they called an election to take place within 90 days thereof. The act having been approved May 27, 1887, the election alleged by the alternative writ to have been held on March 10, 1888, must be assumed to have been at least the second one held under the act. Any other assumption would imply an omission of duty. The only complaint of the alternative writ is that the commissioners have failed and refused to order another election since the one of March 10th, although requested so to do by the citizens of the county; and to this is added the charge that they do not intend to and will not order an election as they are required to do by law.

This writ shows no failure or omission of duty on the part of the commissioners. Even if it be that the statute contemplates that a third or subsequent election should take place within 90 days of its predecessor, the lapse of 30 days from the March election without calling another does not constitute an omission of duty in the premises and authorize a *mandamus*. Assuming even that 30 days' notice of election should be given,—and certainly no longer notice can be assumed as necessary,—there was still no default. If the 90-day limit was applicable, it was still the province of the commissioners to fix the day on which the election should be held, and the circumstances of this case show that when the writ was issued an abundance of time still existed for doing it, and giving full notice to the people of the same. There must be an actual omission of duty, and it must be clearly shown by the alternative writ before relief by *mandamus* will be granted. If, in any case the people's right to an election will be lost by the omission of officers to call it on a day fixed by law, and the duty omitted will not be enforced, (*McConihe*

v. *State*, 17 Fla. 238, 271,) there is yet nothing in the provisions of this statute that sustains such an idea as applicable to it, or that would justify a *mandamus* before there had been an actual and clear default of duty in calling one. Allegations that officers do not intend or will not perform their duty, do not authorize the issuance of the writ. *State v. Board*, 17 Fla. 706; High, Extr. Rem. § 12. The statements of the writ as to the request of the people, and that there is no county-seat, like the allegations of injury to the county, do not change the duty nor lessen the discretion of the commissioners.

The demurrer to the alternative writ should have been sustained. It, and not the petition, is what the defendant is to plead to, and should state the facts constituting the duty to be performed, and show the default of the defendants therein. High, Extr. Rem. §§ 536-539.

As is evident from a preceding portion of this opinion, we do not think that any petition by a third of the registered voters of the county praying a change of the location of the county-site was necessary. The petition provision of the general act as to removal of county-sites has no application to the commissioners of Lake county in calling an election under the fifth section of the Lake county act, which requires no such petition.

The judgment is reversed, and the case remanded, for proceedings not inconsistent with this opinion.

(24 Fla. 238)

SAUNDERS v. PROVISIONAL MUNICIPALITY OF PENSACOLA.

(*Supreme Court of Florida*. July 17, 1883.)

1. STATUTES—CONSTRUCTION—GRANT OF POWERS.

When the language of an act granting powers is sufficient to give a particular power, and there is nothing in the other express provisions, or in the purpose of the act, clearly inconsistent with the exercise of such particular power, it will be held to have passed under the grant.

2. SAME—AMENDMENT—CONSTITUTIONAL PROVISION.

Where there is an express amendment of a section of a statute within the meaning of section 14, art. 4, Const. 1868, the amendatory section takes the place of the section amended, as a part of the original act.

3. SAME—ERRONEOUS DATE.

An error in an amendatory act, in stating the day of the month on which a former amendatory act was approved, does not necessarily render inoperative the amendment made by the act in which such error has occurred.

4. SAME.

Where the title of an act is "to amend" a former act, (giving its title and date of approval,) and "the act amendatory thereof, and to further provide" as to the subject of the original act, and one of its sections enacts that the twenty-ninth section of the act mentioned in the title "as amended by the act approved March 8, 1877, shall read as follows," there being in fact no act approved on said day in March amending such section, but one amending other sections of the same act having been approved on said day, and an act amending such section having been approved on the second day of the same month, the mistake in the date will not invalidate the amendment, but should be held to be merely clerical.

5. MUNICIPAL CORPORATIONS—CHARTER AND FRANCHISES—POWER TO EXTEND CORPORATE LIMITS.

The grant to a provisional municipality, under the legislation of 1885, (chapters 2608, 2607,) of all the powers and authority, rights and privileges, conferred upon cities and towns by the general municipal incorporation act of 1869, (chapter 1688,) and the amendments thereto, includes the power to extend corporate limits as provided by the latter act.

6. SAME.

The power mentioned is not excluded from the grant by the previous provisions of the same section that the boundaries of the provisional municipalities shall be co-extensive with those of the dissolved city or town, nor by any other express provision of the acts of 1885, nor is it inconsistent with the purpose of the same.

7. CONSTITUTIONAL LAW—TITLE OF LAWS—EXPRESSION OF SUBJECT.

Where the title of a statute is one to "amend" a former act, giving the title and date of approval of the latter, and the title of such amended act is sufficiently expressed.

pressive of its "subject," the title of the amendatory act is sufficient to cover an express amendment made by one of its sections of an intermediate act expressly amending a section or sections of the original act.

2. **SAME.**

The additional expression in the title of the third act of a purpose to amend acts amendatory of the original act, and to make further provisions as to its general subject, is not a violation of such constitutional provision, and does not impair the third act.

3. **SAME.**

The incorporation in one section of an amendatory act of provisions relating to matters within the general subject of the act amended, but as to which no provision is made by the section of which such amendatory section takes the place, is not a violation of such constitutional provision.

(*Syllabus by the Court.*)

Appeal from circuit court, Escambia county; JAMES F. MCCLELLAN, Judge. *Mallory & Maxwell*, for appellant, *W. A. Blount*, for appellee.

RANEY, J. 1. The first point involved in this case is whether or not a provisional municipality, instituted and existing under the provisions of chapters 8606 and 3607 of the Laws of 1885, can extend its territorial limits in the manner provided by section 2, c. 3163, Laws 1879, amending the general municipal incorporation act of February 4, 1869, (section 44, p. 255, McClell. Dig.) The cities and towns to which the provisions of the above acts of 1885 are applicable, repealing their charters, are those incorporated under the act of 1869, and having an indebtedness to the amount of \$200,000, and defaulting in the payment of interest on the same. Section 5 of chapter 3606 makes it the duty of the governor to appoint a board of seven commissioners, residents of such city or town, who shall elect one of their number as president, and also a president *pro tem.*, who shall act as president in the absence of the president, and shall exercise the powers and functions herein-after provided, and hold their office for four years. This section gives the governor power to fill vacancies in the board, and vests the president with all the powers and charges him with all the duties of a mayor under the act of 1869, and the amendments thereto. Section 6 provides "that all such cities and towns for which commissioners shall be appointed, as provided for in section 5, are hereby declared to be provisional municipalities, *the boundaries of which shall be coextensive with the boundaries of such defunct cities and towns*; and the said commissioners, and such officers as may be appointed, and the inhabitants within the limits of such cities and towns, shall be vested with all the powers and authority, rights, and privileges, and charged with all the duties, which are conferred on the aldermen and other officers and the inhabitants, under and by virtue of said act, to provide for the incorporation of cities and towns, approved February 4, 1869, and the amendments thereto, and other acts conferring power upon municipal corporations, except as herein-after provided, and as may be inconsistent with this act; and all ordinances in force in such defunct corporations shall remain in force until altered or repealed by such commissioners." The language of the act of 1885, which we have italicized, is in itself nothing more than a declaration of the territorial boundaries of the new municipality. There is in it, whether considered alone or in connection with the other words or parts of the statute, nothing indicating a further or other legislative intent than a designation of the territory over which a new government might be instituted under the act; nothing that shows an intent to make these boundaries permanent. They are not used for the purpose of granting or limiting the powers of the government after it should be instituted, but are only a part of the language employed in defining the territory and people over which and in whom the new government was to be instituted and vested. No express declaration of boundaries could be in language less indicative of an intention to make them permanent or to negative the power to change them. A declaration that the boundaries

"shall be" followed by a detailed statement of the boundaries of the old city or town, would be no less expressive of the idea of permanency. To say that these words are a limitation upon the power of the new government is to give to them a meaning stronger than they naturally convey, and to apply them to a feature of the legislation which, as is evident from reading the statute, the legislative mind had not yet reached in the work of perfecting this new system of municipal governments. It was designating that to which power should be granted, and not defining the powers to be granted. The legislature must be regarded as familiar with the above statute of 1879 as to alteration of municipal boundaries. Having defined the locality over which the new government might be instituted, it proceeds to declare the powers of the new municipality, saying that the said commissioners, and such officers as may be appointed, and the inhabitants within the limit of such cities and towns, shall be vested with all the powers and authority, rights and privileges, and charged with all the duties which are conferred on the aldermen and other officers and the inhabitants under the act to provide for the incorporation of cities and towns, approved February 4, 1869, and the amendments thereto and other acts conferring powers upon municipal corporations, except as hereinafter provided, and as may be inconsistent with this act. Here we see a clear and positive purpose to give to the municipality, as constituted under the new act, all the powers which its predecessor had, except where otherwise expressly provided in the new act, or as might be inconsistent with the provisions of the new. The cardinal change made by the act was from an elective to an appointive system of municipal officials, a board of commissioners appointed by the governor, and the president of this board taking the place of the former board of aldermen and the mayor. It is not necessary to detail all the changes as to constituting officials, but there is in the act no provision upon the subject of alteration of boundaries. Knowing as it did the provisions of law as to alteration of boundaries, the legislature, if it had intended to limit the new government's power in this respect, would, in making its grant of power, have so indicated; but, instead of doing so, we see that it has expressly given to the new municipality all the powers given to other municipal corporations by the parent act and its amendments, and all other acts conferring power on municipal corporations. Looking at the language of the act, we see no provision interdicting the use of the power contended for by appellee in this case.

It is further contended that the object of the act was the dissolution of municipal corporations when found to be in a certain stage of insolvency, and the providing of a temporary government for them when dissolved, and that it was the purpose of the law makers to secure, as well as could be done, *bona fide* creditors of such municipal corporations, by holding them in a condition of quiescence, compelling them to conserve their resources, and to thus enable them to meet their just obligations. Nothing, it is argued, was further from the intent of the legislature than to destroy municipalities with elective governments merely for the purpose of substituting for them municipalities with officials to be appointed by the governor, with full power and authority to conduct their municipal governments as those which they had replaced had been conducted. It is not to be denied that the statute of 1885 makes express provision, and shows a clear intent, as to the payment of municipal indebtedness. It distinctly declares (section 12) that it shall be the duty of the commissioners to proceed immediately to levy a sufficient tax, in addition to the other taxes provided by law, to discharge and pay the maturing coupons of bonds and other matured indebtedness, and to levy a special annual tax to meet the accruing annual interest of the bonds; it being, however, provided that no claim against such city, in existence at the time of the approval of the act, shall be paid until reduced to judgment, unless the board is satisfied of the justice and legality of the claim. It is also undeniable that financial delinquency is

the test of the applicability of the act to any city or town, and the system it establishes is provisional. But we may say that it does not seem to us that it is provisional in the sense that, when instituted over any city or town, it was to last for only four years, or for one term of appointment of commissioners. There is nothing in the statute so indicating, unless it be that the commissioners shall hold their offices for four years. The new government does not come in to supply a place during a mere suspension of the old. The old is abolished and done away with, and the new is instituted, and no limitation is put upon its existence. We think it is provisional in the sense that it was provided to meet the occasions and exigencies presented by cities and towns so financially delinquent, and that the legislature did not intend to sanction it as a permanent system, but as one that should exist over any city or town only so long as the law-making power should find that the condition of such city or town required it. As a mere means of securing the recognition and discharge of indebtedness, or, in other words, as a remedial agency for creditors, such a construction as is contended for does not commend it. The question of the continuation of the system over any city or town after the expiration of four years from its institution is, we are aware, settled in the affirmative by the act of 1887, (chapter 3709;) but, even admitting that the view of the original act taken by counsel for appellee on this point is correct, we still do not see anything in the statute inconsistent with the exercise of the power to alter the boundaries. The remedy applied by the legislature to cities and towns so financially delinquent was one of a government with appointive offices, instead of an elective or popular government. Whether the financial delinquency was attended by other corporate or official omission or neglect of duty, it is clear that a change in the mode of selecting officers, who were to perform the functions of officials of the preceding government, was the means of relief adopted. The change in the titles of office is nothing. The power to alter boundaries, whether by increase or reduction, is not necessarily one of detriment to the creditor. This power, in so far as the commissioners or the people or voters are to take any part in its exercise, has not been withheld. The language of the grant of power covers it as fully as it covers any other. The power is no more dangerous to creditors in the hands of a provisional municipality than in the hands of one under the act of 1869, and its amendments. Finding nothing in the language or nature of the act of 1885 that excepts the power in question from the general grant of powers made to these new governments, we cannot conclude otherwise than that the legislature intended that they should possess these powers, and were satisfied that it would not be used but for purposes and instances beneficial to all concerned. It will not be denied that where the language of an act granting powers is sufficient to give a particular power, and there is nothing in the other parts or the purpose of the act clearly inconsistent with the exercise of such power, it will be held to have passed under the grant.

2. The remaining point is that of the constitutionality of the act of March 4, 1879, (chapter 3163,) under which the proceedings in question annexing territory were taken. The twenty-ninth section of the general municipal incorporation act of February 4, 1869, (chapter 1688,) regulated the matter of changing corporate limits. In 1877 the legislature passed a statute (chapter 3025) entitled "An act to amend an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved February 4, 1868." It was approved March 2, 1877, has two sections, and after the enacting clause the first section reads: "Section 1. That section 29 of said act be amended so as to read as follows." The first section prescribes the mode for the reduction of boundaries, and the second section the mode of enlarging the same. The title of the act approved March 4, 1879, (chapter 3163,) is as follows, "An act to amend an act entitled 'An act to provide for the incorporation of cities and towns, and to es-

establish a uniform system of municipal government in the state, approved February 4, 1869, and the acts amendatory thereof,' and to further provide for the organization and government of cities." The second section of this act commences thus: "Sec. 2. That section 29 of said act, approved February 4, 1869, as aforesaid, as amended by the act approved March 8, 1877, be, and the same is hereby, amended to read as follows." The substance of the section is divided in form into three separate paragraphs, the first of which regulates the contraction of territorial limits, the second the extension of them, and the third the annexation of one city or town to another. The second and third paragraphs are numbered 2 and 3, respectively. In 1877, the legislature passed also an act, (chapter 3024,) which was approved March 8th, and is entitled "An act to amend sections 11, 12, 13, 16, 17, 18, 19, 23, and 29 of the general municipal incorporation act of 1869." Its first eight sections, taken in their order, are severally a repeal of and substitute for the eleventh, twelfth, thirteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twenty-third sections of the act of 1869. There is in it no section repealing or standing in the place of the twenty-ninth section, nor does it in any way affect such section. Referring to the enrolled acts in the office of the secretary of state, we find that the act of March 2d passed the assembly February 28, 1877, and the senate the next day, whereas the act approved March 8th did not pass the assembly or senate until March 1st. Doubtless the pending or passage of the former of these two acts occasioned the omission from the act of March 8th of any substitute for the twenty-ninth section. The act of March 2, 1877, (chapter 3025,) upon its approval, became for all purposes in the future the twenty-ninth section of the general municipal incorporation act of 1869. *Basnett v. City of Jacksonville*, 19 Fla. 664. It was not necessary to state in the title of the act of 1879 (chapter 3163) the sections intended to be amended. *State v. Commissioners*, 23 Fla. —, 3 South. Rep. 193. Where the title of the amending act sets out the title of the act to be amended, as does this, and the title sufficiently states the subject of the act to be amended, and the body of the amendatory act states, as does this, for what section of the act amended any of its own section may be the amendment and substitute, there is a sufficient compliance with section 14, art. 4, Const. 1868, providing that the "subject" of each law "shall be briefly expressed in the title, and no law shall be amended or revised by reference to its title only; but in such case the act as revised, or section as amended, shall be re-enacted and published at length." In so far as affecting the twenty-ninth section of the original act of 1869, as amended by the act of March 2, 1877, (chapter 3025,) the title of the act of 1879 (chapter 3163) would have been sufficient had it been merely entitled 'An act to amend the statute of 1869,' referring to it by its title and date of approval, as it does. The words "and the acts amendatory thereof" had naturally the effect to suggest to the legislative mind that the act of 1869, as originally passed, had been subsequently amended, and that the legislation proposed would effect it as amended. This was beneficially and specifically calling the law-makers' attention to the fact of such amendments. The other language of the title of the act of 1879, viz., "and to further provide for the organization and government of cities," would naturally suggest that the legislation proposed was to contain provisions relating to other subjects connected with the organization and government of cities than a mere amendment as to the subjects to which the sections to be amended related. *Gibson v. State*, 16 Fla. 291. There is nothing in the title that offends the constitutional provision in question. If we regard as surplusage all of it after the date of the act of 1869, it is sufficient, and such subsequent part was of itself calculated to call the legislators' attention more fully to the existing legislation to be affected. The error in the body of section 2 of act of 1879, as to the date of approval of the act of 1877, amending the twenty-ninth section, is, we think, entirely immaterial. It can be regarded as only

a clerical mistake or an error as to the real date of the approval of chapter 3025, and not as an indication that the legislature was ignorant as to what amendment had been made in 1879. The only amendment of the twenty-ninth section that had been made was one in 1877. Is it to be thought for a moment that the legislature understood that the amendment which had been made in 1877 was other than that to be found in the act of March 2d, or that they did not know that the twenty-ninth section as amended, or as it stood in 1879, when the legislation of that year was pending, was as set out in the act of March 2d. The only legitimate conclusion is that they understood the section to be what the act of March 2d made it, and with it, as such, they were dealing, and not that they thought the act of March 8th (chapter 3024) contained an amendment of it. They may have mistakenly thought that chapter 3025 was approved March 8th, but they never thought that any other act of 1877 amended the section in question. The third section of the act of 1879 provides that after its passage no city or town shall issue bonds to secure any indebtedness unsecured, if the amount of such bonds, added to any bonds outstanding, and its floating debt shall exceed 8 per cent. on the assessed value of such city or town, it being declared to be the intention of the section "to limit the bonded debt of all cities and towns to 8 per cent. of their assessed value, real and personal." The incorporation into an amendatory act of provisions as to matters properly connected with the subject affected by the act amended, but outside of the matters to which the expressly amendatory sections relate, is not prohibited by the constitution. *Gibson v. State, supra*. But even if this section 3 should be void, we do not see how it affects the second section. The order appealed from is affirmed.

FINLEY, J., Fifth judicial circuit, sitting in place of MAXWELL, C. J., disqualified.

(24 Fla. 230)

MERRITT v. DAFFIN *et al.*

(Supreme Court of Florida. July 17, 1898.)

1. EXECUTORS AND ADMINISTRATORS—MORTGAGE—FORECLOSURE—PARTIES.

An administrator holding the real estate of his intestate as assets is, under the laws of Florida, the only necessary party to a suit for the foreclosure of a mortgage made by the intestate.<sup>1</sup>

2. SAME.

The heir of the intestate is not a necessary party, and, though not a party to such a suit, is concluded by a decree of foreclosure and sale therein against such administrator.<sup>1</sup>

3. MORTGAGES—FORECLOSURE—INJUNCTION TO RESTRAIN DECREE.

Where a bill is filed by heirs to enjoin the enforcement of a decree of foreclosure and sale rendered against an administrator on a mortgage made by their ancestor, and such bill does not show that the bill of foreclosure did not state facts justifying a decree against the administrator, it is error to enjoin the enforcement of the decree.<sup>1</sup>

4. SAME.

Where there is a decree of foreclosure and sale against an administrator, the appointment, without notice to the administrator, of a second master, in place of the one originally named in the decree, who had died, is not a ground for enjoining a sale by the second master under such decree.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; JOHN C. AVERY, Judge.

Mrs. Daffin and Mrs. Perry file a bill, to which the husband of each is a party complainant, against the appellant, making the following allegations: That their mother, Mrs. Ann A. Clarke, in 1866, and up to the time of her death, owned and was possessed of certain described lands in Jackson county;

<sup>1</sup> See note at end of case.

and that on March 22, 1867, Mrs. Clarke and her husband, John Clarke, gave to one E. J. Merritt a paper purporting to be a mortgage on said lands, to secure the payment of a promissory note for the sum of \$3,600, made by them, and payable to the order of said E. J. Merritt, one year after date, with interest. That the execution of the alleged mortgage was never acknowledged by Mrs. Clarke on an examination separate and apart from her husband, as required by the statute, and that, therefore, it is null and void. That the sum of \$3,600, attempted to be secured, was lent by the testator, E. J. Merritt, to John Clarke, and was used by him in the conduct of his own business, and not in the interest nor for the benefit of his wife. That Mrs. Clarke died on the 22d day of March, 1867, leaving as her sole heirs Mrs. Daffin and Mrs. Perry, and John Clarke; and that after her death the appellant, as executor of E. J. Merritt, who had in the mean time departed this life, instituted a suit in the circuit court of said county against said John Clarke in his own right and as administrator of Mrs. Clarke, to foreclose said mortgage, and that, no defense being made, a decree foreclosing said mortgage and directing a sale of the lands described therein was rendered on December 12, 1877, and that afterwards, the master originally appointed by such decree having died, the circuit judge, on application of the complainant therein, and without notice to the defendant, appointed another master to make the sale thereby decreed, and that the new master has advertised and threatens to sell the lands under and pursuant to such decree. The prayer of the bill is for an injunction against a sale or other further proceedings under such decree, and for general relief.

To this bill the appellant demurred, and the cause was referred to Mr. John C. Avery, of the Pensacola bar, for trial; and, it having been submitted to him for final disposition on the pleadings, he decreed that the appellant be enjoined from making sale of any part of said lands under said decree of December 12, 1877, except the one-third interest of said John Clarke therein.

From this decree an appeal has been taken.

*Liddon & Carter*, for appellant. *Mallory & Maxwell*, for appellees.

RANEY, J., (*after stating the facts as above.*) The leading question to be decided in this cause is whether or not the decree of foreclosure and sale rendered against John Clarke as administrator of the estate of his wife, Mrs. Ann Clarke, concludes her daughters, Mrs. Daffin and Mrs. Perry, as her heirs. There is no doubt that, if the property covered by the alleged mortgage deed were personal, instead of real estate, they would be concluded, though not parties to the decree, for, both at common law and under our statute, the administrator of an estate is the only necessary representative of the personality of a decedent, in such a suit. Whether or not this is also true of a suit of foreclosure and sale, under our system of laws, when the property involved is real estate, is to be ascertained by a consideration of our statutes, and their effect upon the common law as it existed independent of them. Independent of the statutes, the heirs would be necessary parties; and a decree against the administrator, and to which they were not parties, would not conclude them.

Though this precise question has never been before this court, yet there are a number of decisions as to the effect of our legislation upon the *status* of lands with reference to the administration of the estates of deceased persons.

In *Gilchrist v. Flyau*, 2 Fla. 94, it was held that an action of debt could not be sustained in this state against an heir upon the bond of his ancestor, although the heir was expressly named in the bond; and in *Bank v. Heirs of Powell*, 3 Fla. 175, that, lands being assets in the hands of the personal representatives, it was necessary that such representatives should be parties to a *scire facias* brought to revive a judgment rendered against a testator or intestate, and that, under the statute (Thomp. Dig. 444) providing a limitation

for an action of debt or *scire facias* against any executor or administrator, or other person having charge of the estate of the testator or intestate, upon any judgment obtained against his testator or intestate, to revive such judgment, it was questionable whether it was necessary to make the heirs and tenants parties to such a *scire facias* brought to subject the land of the decedent to the judgment; and that unless they could be regarded as persons having charge of the estate of the testator or intestate, within the meaning of the statute, and the lands in their hands assets, they were not properly parties. The failure to institute the *scire facias* against the personal representative within the statutory limitation was held to be a good defense in behalf of the heirs to the *scire facias*.

In *Sanchez v. Hart*, 17 Fla. 507, the conclusion reached is that in this state an administrator has the right of entry into, and the right of possession of, the real estate of his intestate, and can maintain ejectment. That his right to recover follows his right to rents and profits, and because lands are assets in his hands with a power to cultivate the same. That the basis of his action is the title of the intestate; his estate, interest, and power after recovery being limited by the incidents and duties which the law attaches to him, and with which his possession is surrounded.

In *Wade v. Doyle*, 23 Fla. 90, 1 South. Rep. 516, it was held that when administration has been granted on the estate of a decedent, and the estate is unsettled, and the administrator not discharged, the heirs at law of the decedent cannot maintain a suit in ejectment for the recovery of real estate of such decedent, but the administrator is the proper party plaintiff. In *Eppinger v. Canepa*, 20 Fla. 264, we have a decision to the effect that an executor in possession of real estate of the testator is, when the rents thereof are necessary to the satisfaction of the debts, personally accountable to the creditors for the rental value thereof when the circumstances of the case disclose a failure to realize rents, and a neglect to exercise the diligence and business activity required at his hands in the management of the property.

It is unnecessary to review all the statutes upon which these decisions are founded. The conclusions reached flow naturally and logically from the fact that our statutes have made lands "assets," and that as such they are answerable in the hands of the executor or administrator for the payment of the decedent's debts; and as assets the administrator is the one in whose possession the law, by making them such, places them, and to whose care it intrusts them.

It is contended by the counsel for appellees, citing the authorities mentioned in this paragraph, that the title in fee of real estate vests, upon the death of the ancestor, in the heir, (*Bank v. Heirs of Powell*, *supra*; *Whitlock v. Willard*, 18 Fla. 156, 168; *Scott v. Lloyd*, 16 Fla. 151,) subject only to the "right of possession for temporary purposes, and subject to defined statutory powers of sale," (*Whitlock v. Willard*, *supra*, 168;) and that, in order that the rights of any party in interest shall be barred by a foreclosure of mortgage, it is necessary that he be a party to such foreclosure, and that therefore, as the rights of Mrs. Daffin and Mrs. Perry vested upon the death of Mrs. Clarke, and before the institution of the foreclosure suit, these ladies should have been made parties, and the decree did not affect their rights, but bound only John Clarke as an heir and as administrator.

The title to real estate descends upon the death of an intestate to the heirs, but this title is cast subject to the effect the existing provisions of law may have upon it.

Not only did the statutes in force at the death of Mrs. Clarke make real estate assets in the hands of executors or administrators, (section 2, Act Nov. 20, 1828; pp. 202, 203, Thomp. Dig.) but they also declared that real estate in the hands of one or the other may and shall be equally liable with personal property to an execution existing upon any judgment against such executor

or administrator: provided, however, that no real estate of any deceased person shall be taken in execution unless first directed by the administrator, so long as there remains personal property sufficient on which such execution may be levied; but the executor or administrator in every case may designate the property or kind or part of property which shall first be taken in execution, and whether it shall be real or personal property: provided, always, that the officers levying said execution shall judge of the sufficiency, and shall take sufficient property, if it be found, to satisfy the execution. Section 24, Act Nov. 20, 1828; section 5, p. 200, Thomp. Dig. The act of 1870 is equally strong in its provisions making lands assets, and as to the sale of the same under execution. McClel. Dig. pp. 85, 86.

The first and second sections of the same act of 1828 (sections 57, 58, pp. 93, 94, McClel. Dig.) are to the effect that in all cases where written agreements on contracts shall have been made for the conveyance of real estate in this state, and the person agreeing or contracting to make such conveyance has died, or shall hereafter die, before the execution of such conveyance, the executors or administrators of such person shall be authorized and empowered to execute such conveyance according to the rules and forms prescribed by law for the conveyance of real estate, and such conveyances are given the same force and effect as other conveyances of real estate made under and in pursuance of the laws of the state.

By the act of February 10, 1834, (section 5, p. 112, McClel. Dig.,) it is provided that, when one executor or administrator resides or has removed beyond the limits of the state, and there are "assets" of the testator or intestate in the state, it shall be lawful for any person having a debt or demand against the estate to take out an attachment against such assets in the manner provided therein.

Though it be true that upon the death of the ancestor the fee of real estate descends to, or the title thereof is cast, through the instrumentality of the statute of descents, upon the heir, it cannot be denied at this day that the administrator is entitled to the possession of it as assets; nor do we think it can be said that an execution sale of it, and a conveyance by the sheriff pursuant thereto, under a common-law judgment *de bonis intestatoris* rendered against the administrator on a claim originating against the intestate in his life-time, would not cut off the heir, and vest the ancestor's title and interest in the purchaser, and thus, too, though the heir has not been named upon the record of the proceedings resulting in such judgment, sale, and conveyance. It is clear, though we admit the administrator is not the owner of the land, or of the title thereto, that the effect of the proceeding, to which he alone, as the representative of such property, is a party, is to pass to the purchaser the title which descended to the heir at the death of the ancestor. It will be observed, moreover, that not only do the above provisions as to such judgments and the execution sales thereunder have the effect stated, but that the administrator is given the discretion to have real estate subjected to such levy and sale in preference to personalty. The right to exercise this discretion is an unquestionable power over the inheritance, and one to which the heirs' rights and title are subject.

When the ancestor has made a written contract to convey, the person entitled to the conveyance does not have to ascertain, and apply to the heirs upon whom the technical title may have fallen for a conveyance, but the administrator may convey the title; and, finding nothing to justify a suspicion that real estate is not included in the "assets" of the attachment statute referred to, the conclusion that a sale under a judgment in such an attachment proceeding, to which the administrator was the only party representing the intestate and the land of his estate levied upon under the attachment, would carry the entire interest and title of the intestate, and be binding upon the heirs, is, we think, unquestionable.

In view of these several provisions, it cannot be denied that to a great extent the administrator is, under our statutory policy, the representative of the entire title and interest of the intestate's real estate, and that this representative capacity either extends to the interest of the heirs, or is superior to their interests.

If it be, as clearly is the case, that upon the adjudication by a common-law court of an indebtedness of the intestate against the administrator, as such, an execution sale may be had of the real estate held as assets by the administrator, with the effect stated upon the heirs, unless, the estate being insolvent, he stop such sale by insolvent proceedings, and that he has the representative authority as to the lands otherwise indicated above, how can it be logically said that he has not such a representative capacity as to lands as assets where his intestate has not only contracted during his life-time the indebtedness, but also given an express lien on the land entitling the creditor to a decree of foreclosure and sale to satisfy such indebtedness in a court of equity? A mortgage in the ordinary form is, when duly executed, as much an agreement that the mortgagee shall have such a decree, as it would be were there an express contract to this effect embodied in it. *Hart v. Sanderson's Adm'r*, 18 Fla. 103, 114; *Patterson v. Taylor*, 15 Fla. 337. There is no more reason, on the score of protection of their interests in fee in lands, why the heirs should be before the court in the case of a foreclosure suit than in a common-law action, or than that they should execute the deed of conveyance where there has been a written contract of sale. To hold that it is necessary that they should be parties in order to be bound by the decree, would be antagonistic to the clearly-defined policy of the statutes as to the extent of the administrator's representative power in all adversary proceedings instituted by creditors to reach the land as assets of the intestate.

There is nothing in any of the authorities cited that conflicts with the conclusion we have reached, nor is it necessary to notice all of them. *Scott v. Lloyd*, 16 Fla. 151, decides that heirs at law are not proper plaintiffs in an action for unlawful detainer, where the defendant is in possession under a lease made by the ancestor in her life-time, but that, as the right of possession passes to the administrator or executor, the right of action passes as an incident of the asset. *Whitlock v. Willard*, 18 Fla. 156, holds that, while an administrator may, under the statutes of this state, maintain an action of ejectment upon the title of the intestate to recover possession, yet, not being an owner, joint tenant, tenant in common, or coparcener within the meaning of the statute giving such persons a right to partition, he cannot have partition. If there is any remark in the opinion in that case which would seem to militate against our conclusion in this, it is only necessary to say of it that there was nothing in that case requiring an expression upon, or a consideration of, the point before us; nor does the opinion indicate that the several statutory provisions more expressly evidencing the legislative intent as to the question before us were considered by the justice delivering it.

The Michigan statute, as to which the remarks of the supreme court of that state in *Campau v. Campau*, 25 Mich. 127, quoted, were made, is not so broad as ours, but merely gave the administrator right to the possession of real estate, and to receive the rents, issues, and profits of the same until the estate was settled or delivered over by order of the probate court to the heirs or devisees.

As to *Steele v. Steele's Adm'r*, 64 Ala. 438, it is only necessary to say that, while we do not feel called upon to say whether or not a judgment *de bonis intestatoris* recovered by a creditor concludes an heir as to the validity of the claim in a proceeding by the administrator under the statute to sell land to pay it as a debt of the estate, we see nothing in the opinion that, in view of our statutes, precludes the conclusion we have reached.

Though the administrator is not the owner nor invested with the title to

the real estate of his intestate, he holds it in trust to pay debts and lawful charges, and to manage for the benefit of all concerned; and his representative capacities as to it, as assets, are such, under our statute, as to make him the sole necessary party in a proceeding by a creditor to subject it to foreclosure and sale under a mortgage. The fact that our statute of 1841, in providing a special proceeding to be instituted by the administrator for the sale of real estate where the personal estate was not sufficient to pay the debts, may have required that the heirs shall have notice, or be made parties, does not overcome the general effect of other laws making them assets, or as to proceedings instituted by creditors. The act of 1828, and that of 1870, have no such requirement. Though he could not himself procure under the act of 1841 a sale on his own application, except upon notice to the heirs, this does not take away the power given him to represent the assets, and all interested in them, in proceedings instituted by creditors; nor does it otherwise qualify the general effect of the legislation to make lands assets in the hands of administrators, and liable to the debts of the intestate. It is subject to those liabilities and conditions that they descend.

2. As the administrator of Mrs. Clarke was a proper and the only necessary party to the foreclosure proceeding, the defenses, if there were any, to the bill resulting in the decree of foreclosure and sale should have been made by him. What the allegations of that bill were is not made known to us. They may have been such as to constitute a binding charge upon the land notwithstanding the defect in the instrument as a statutory mortgage. If the decree rendered upon it was erroneous, it should have been appealed from in the time allowed for taking appeals. It is *res adjudicata* as to the appellees.

3. The record does not show that the administrator, John Clarke, is not still living, and such administrator. If he is, he is the proper party to correct any error there may have been in the manner of appointing a second master after the death of the first one. The bill does not suggest that the administrator is not still living, and the defendant's demurrer to the bill is not the pleading by which such a fact can be suggested, either directly or inferentially.

The decree is reversed, and the injunction dissolved, and it will be so ordered.

FINLEY, J., Fifth judicial district, sitting in place of MAXWELL, C. J., disqualified.

#### NOTE.

**MORTGAGES—FORECLOSURE—NECESSARY PARTIES.** In a suit to foreclose a mortgage it is necessary to make parties defendant of all persons who have succeeded to the rights of the mortgagor in the premises, or who claim an interest in the controversy adverse to the plaintiff. *Hefner v. Urton*, (Cal.) 12 Pac. Rep. 486. Where a woman mortgages real property held in her own name, and there is between her and her son a secret trust, the deed of which is not recorded until after the mortgagor's death, her estate has no interest in the property after the record of the deed, and her personal representative is not a necessary party defendant in a suit to foreclose the mortgage. *Richards v. Hutchinson*, (Nev.) 3 Pac. Rep. 53, affirmed on rehearing, 4 Pac. Rep. 702. In *California*, the heirs of a deceased mortgagor are not necessary parties defendant in a foreclosure suit against the personal representative. *Bayly v. Muehe*, 3 Pac. Rep. 467.

In *Illinois*, under a statute giving the personal representative of a deceased mortgagee power to release the mortgage, and a mortgage being regarded as personal assets passing to the representative, the latter may maintain a suit to foreclose without joining the heirs as parties complainant. *Bank v. Dayton*, 4 N. E. Rep. 492. So in *Maine*, *Plummer v. Doughty*, 5 Atl. Rep. 526.

In *Wisconsin*, the heirs of a deceased mortgagor are necessary parties defendant to a foreclosure suit, the right of redemption vesting in them on the death of the ancestor. *Zaegel v. Kuster*, 7 N. W. Rep. 781. And in *North Carolina* it is held that the action to foreclose should properly be brought against the heirs, and that it is unnecessary to join the personal representative. *Fraser v. Bean*, 2 S. E. Rep. 159. So in *South Carolina*, where, in the case of *Butler v. Williams*, 3 S. E. Rep. 311, the court (McLym, J.) says: "The authorities clearly show that when the mortgagee will be satisfied with only the partial relief afforded by a foreclosure and sale of the mortgaged premises, and

does not claim a judgment for any deficiency that may remain unpaid after the application of the proceeds of the sale of the mortgaged premises, the personal representative is not a necessary party."

In *Iowa*, it is held that, although the heirs of a deceased mortgagor are necessary parties to a suit to foreclose, yet a failure to join them does not entirely invalidate the proceedings; but a purchaser at the foreclosure sale takes the premises subject only to the right of the heirs to redeem, and they cannot maintain a suit to partition the mortgaged property, ignoring the sale. *Harsh v. Griffin*, 84 N. W. Rep. 441. In *Michigan* it was decided by a divided court, *CHAMPLIN and MORSE, JJ.*, dissenting, that where a decree is entered in mortgage foreclosure proceedings, and a sale made thereunder in the mortgagor's life-time, a confirmation of the sale after his death, without making his legal representatives parties, is not such an irregularity as will expose the proceedings to attack by an action of ejectment. *Hochgraf v. Hendrie*, Id. 18.

(24 Fla. 287)

**ROBINSON v. EFFING et al.**

(Supreme Court of Florida. July 17, 1888.)

**1. BONDS—ACTIONS ON—RELEASE OF SURETY.**

Where, in a chancery suit, a decree is made for an accounting between the complainant and the defendants therein, and for the dismissal of an action at law, instituted by the latter against the former, and a bond is given by such complainant, conditioned that he shall pay to the defendants such sum as may be found to be due them upon the final determination and decree in the chancery cause, the omission to actually dismiss the action at law is not a defense in behalf of a surety on the bond to an action brought thereon to recover of him the sum decreed in the chancery cause to be due by the complainant therein.

**2. SAME.**

The bond does not make the actual dismissal of the action at law a condition to the surety's liability for the sum decreed to be due by the principal in the bond.

**3. PRINCIPAL AND SURETY—LIABILITY OF SURETY—EXTENT.**

A surety's liability is limited by the terms of his undertaking, and it is not to be extended by implication. A bond, conditioned for the payment of such sum as may be found to be due by the principal to the obligees therein, upon the final determination and decree in a chancery suit, does not extend the liability of the surety to the costs which the obligees may recover in such suit, but limits his liability to the indebtedness of the latter to the former, as fixed by such decree.<sup>1</sup>

**4. EXECUTORS AND ADMINISTRATORS—APPOINTMENT—JURISDICTION OF COUNTY COURT.**

The doctrine of the former decision in this case, (21 Fla. 86,) as to the applicability of the act of 1868, (chapter 1637, p. 826, McClel. Dig.,) in so far as it provides a method of bringing matter before the county court as a court of probate, by petition or complaint, held not to mean that such a petition or complaint is necessary and jurisdictional to the appointment of an administrator, but only that it is the regular method of applying for such an appointment; and further, that if the meaning of the decision is that the petition is jurisdictional, a sufficient compliance therewith, as against a collateral attack, is shown by the records of the county court in this case.

**5. SAME—FAILURE TO APPLY—CITATION—PUBLICATION.**

The requirement of section 5, p. 78, McClel. Dig., in case neither the husband nor wife of the intestate, nor "other person entitled to distribution," apply for administration, is that citation shall be published both in a newspaper and by posting for the period of six weeks, and in the manner stated in the section; but the citation need not state the name of any person as contemplated for appointment as administrator.

**6. SAME.**

A statement or recital in the order of the county court granting administration of "citation having been published for six weeks, as required by law," is an adjudication by that court of the fact that a publication had been made of the citation for the period stated and in the modes—*i. e.*, in a newspaper and by posting—prescribed by law.

**7. SAME—FINDING OF COUNTY COURT—COLLATERAL ATTACK.**

Whether or not the testimony before the county court was sufficient to justify the conclusion adjudicated, cannot be inquired into in a collateral proceeding.

<sup>1</sup>Sureties have a right to stand on the strict terms of their obligation. *Plow Co. v. Walsley*, (Ind.) 11 N. E. Rep. 339, and note; *Bowers v. Cobb*, 81 Fed. Rep. 678; *Graeter v. De Wolf*, (Ind.) 18 N. E. Rep. 111; *Bank v. Gerke*, (Md.) 18 Atl. Rep. 568; *Spurgeon v. Smitha*, (Ind.) 17 N. E. Rep. 106; *Evans v. Daughtry*, (Ala.) 4 South. Rep. 562.

**8. SAME—VALIDITY OF APPOINTMENT.**

Upon the issues of this case, as presented by the first and second pleas, and a feature of another plea, and under the law of the case as settled in a former decision of this court, (21 Fla. 37,) if it appears from the record of the county court of Escambia county that the intestate was not at the time of his death possessed of any goods, chattels, or lands in any county in this state, or, if it be that at the time of his death, the intestate did not have any such property in Escambia county, and the fact or averment that he did have such property was not presented to and adjudicated upon affirmatively by such court in granting the letters of administration, and the absence of such presentation and adjudication appears by the record of such court, the grant of administration was void, and the pleas are sustained.

**9. SAME.**

The record of the order adjudicating the publication of the citation, as indicated above, such order bearing date April 15, 1882, states "that letters of administration have this day been issued to Walter Tate, he having given bond under oath, and otherwise qualified according to law," and the letters of administration of same date as recorded in said court, in compliance with section 13, p. 988, McClel. Dig., recite that the administrator has "*duly qualified according to law.*" These records are evidence of the affirmative determination of such court upon the question of granting administration upon the estate of the intestate.

**10. SAME—OATH OF ADMINISTRATOR—PRESUMPTION FROM AFFIDAVIT.**

The statute of this state (section 7, p. 78, McClel. Dig.) provides that previous to granting letters of administration the court shall require the person applying for the same to state upon oath or affirmation, to the best of his knowledge and belief, whether there be any heirs or legal representatives of the intestate in being or not, and whether, according to the best of his knowledge and belief, the deceased died without a will. Upon the files of the county court is an affidavit appearing to be connected with the administration of the intestate's estate, and purporting to have been made and subscribed by the person who was appointed administrator, and to have been sworn to before the county judge, who made the order and issued the letters of administration. It bears date the 18th day of —, 1882. This affidavit states that there are no heirs of the intestate in this state or out of it, and that he left no will, and includes the usual administration oath. The legal conclusion from this whole record is that the affidavit was on file at the time the order of April 15, 1882, was made, and the letters issued, and that it is to such affidavit that the language of the order and of letters of administration, italicized in the preceding head note, refers.

**11. SAME.**

Such affidavit also states that the intestate "died, leaving an estate" in Escambia county, Fla., "consisting of an unliquidated claim, the amount whereof deponent cannot state." Considering this averment in connection with the order, and the letters of administration, it affirmatively appears by the records of the county court that the question of the intestate's having at his death property in said county was presented to and adjudicated upon affirmatively by such court, and the grant of administration by it is valid as against any collateral attack, and the pleas are not sustained.

**12. SAME.**

Though the statute requiring the oaths in question does not require that they shall contain the statement as to the intestate's leaving property in said county, yet, as the only practical purpose that it could have been put in the affidavit for was to present for the adjudication of the court the fact of the existence of such property, and thereby show the jurisdiction of the county court to grant administration, it must be held to have been made for this purpose, and not without a purpose, to serve a substantial end.

**13. SAME—GRANT OF ADMINISTRATION—COLLATERAL ATTACK.**

The grant of administration was an adjudication by the county court of the sufficiency of the presentation of the fact of assets, and of its presentation in the form of a petition, and such adjudication cannot be questioned in a collateral proceeding.

**14. SAME.**

The fact that the record of the county court does not affirmatively show that the question of assets had been presented or considered before the issue or publication of the citation is immaterial. It is sufficient if the record of the court shows upon its face, even at as late a stage of the proceedings as the order for letters to issue, or the final adjudication of administration, that the question was presented to the court, and adjudicated affirmatively.

**15. SAME—GRANT OF ADMINISTRATION—COUNTY.**

In the former decision in this case (21 Fla. 52) it was held, in construing section 8, p. 77, McClel. Dig., that the term "goods," embraces choses in action, and that the county, in this state, where the debtor of an intestate dying out of the state, resides, is the one in which letters of administration should be granted. Assuming, as contended by appellant, that the "unliquidated claim" mentioned in the record of the

county court, is the claim asserted by the intestate in his above-mentioned chancery suit, such claim is within the above definition of the term "goods." The fact that the suit in chancery resulted, after the death of the intestate, against his administrator, does not affect the previous adjudication of the county court of its existence as a chose in action, or defeat the jurisdiction of such court as adjudicated by itself.

(Syllabus by the Court.)

Appeal from circuit court, Escambia county; JAMES F. McCLELLAN, Judge.

This case was before this court on an appeal taken by Epping, Bellas & Co., and an opinion was rendered at the June term, 1884, holding the first plea to be good and the second to be insufficient, and reversing the judgment of the circuit court. See 21 Fla. 36. Upon the remanding of the cause, the circuit court made an order giving leave to the parties to amend their pleadings. The first plea, which, as stated, was held to be good, is as follows: "As to the appointment of Walter Tate, administrator of the estate of said Y. S. Hirschfelder, alleged in said declaration, that the said Y. S. Hirschfelder was never a resident of Florida, but for many years prior thereto, and at the time of his death, mentioned in said declaration, had been, and was, a resident of Alabama, and died at a place out of the state of Florida, and at the time of his death was not possessed of any goods, chattels, or lands in any county in this state; by reason whereof the appointment of said Walter Tate (which defendant avers was procured by the plaintiffs in this action, and not by the production of legal authority from the representatives of the deceased Hirschfelder, qualified by law in the state of Alabama) was without any authority of law or jurisdiction in said county court of Escambia county, as appears upon the face of and by the records of said county court, and was and is altogether void and of no effect." See 21 Fla. 38. The defendant, under the order allowing amendments, and just mentioned, amended his second plea to read as follows: "*Second.* There was no final determination of the case between the plaintiff in this suit and the said Y. S. Hirschfelder, as, pending said suit, Hirschfelder died, as stated in the declaration, and no legal representative of said deceased party revived said suit, nor was any legal representative of said deceased party made party to said suit, for defendant says that said Y. S. Hirschfelder died at a place out of the state of Florida, and at the time of his death was not possessed of any goods, chattels, or lands in this county; nor were there any debts due to said deceased Hirschfelder from persons or a person living in this county, for the collection of which the said Walter Tate or any other person produced or had legal authority from the representatives of the deceased Hirschfelder to be appointed administrator. And the defendant avers that the facts necessary to confer jurisdiction, that is to say, the contrary of the allegations in this plea made, were not presented to and adjudicated by the county court in granting letters of administration to said Tate, as appears by the records of its proceedings." The defendant also filed four other pleas. The third plea has been abandoned, and will not be noticed. The fourth, fifth, and sixth pleas are as follows: "*Fourth Plea.* That the bond in the declaration mentioned was made, as appears on its face, in view of an alleged consent decree for an account, and for dismissal of a suit at law in this court by plaintiffs herein against Hirschfelder, the principal in such bond; but said suit at law had not been, and was not dismissed at the commencement of this action. *Fifth Plea.* That the appointment of Walter Tate as administrator of Hirschfelder was without authority of law, and void in this: That the said county court of Escambia county had no jurisdiction to grant letters of administration on the estate of said Hirschfelder, because he, the said Hirschfelder, was a citizen and resident of the state of Alabama, and died in said state, and it does not legally appear by the records of said county court that the citation required by law was duly published and posted, or that said Hirschfelder had assets in said county on which the said county court could grant letters of administration;

wherefore defendant says the letters of administration are void, and did not give legal authority for any proceeding against said Tate, as the representative of the estate of Hirschfelder. *Sixth Plea.* That the appointment of Tate as administrator of Hirschfelder was made upon citation issued without any petition or complaint in writing upon which to base such citation, and that the county court, in the absence of such a petition, had no authority or jurisdiction to issue the citation or grant letters of administration on such citation, whereupon the letters are void, and did not authorize any proceeding by plaintiff against Tate, as such administrator, in the suit in which the decree was never given against him as such administrator." To the first plea, the plaintiff replied that the county court did have and possess authority and jurisdiction to grant the letters of administration, inasmuch as Hirschfelder died leaving assets in said county of Escambia, to be administered as appears from the records of said county court, and no administrator of the estate of said Hirschfelder having been previously appointed by said county court. To this replication the defendant rejoined that the county court did not have and possess such authority and jurisdiction by reason of anything that appears in the record of said county court as to assets left by said Hirschfelder in said county. The plaintiffs demurred to the second, fourth, and sixth pleas as bad in substance, and joined issue on the fifth plea. The demurrer to the fourth and sixth pleas was sustained by the circuit court, but that to the second plea, as amended, was overruled. After this the plaintiff filed replications to the first plea and the amended second plea, as follows: To the first and second pleas, that it is not true that it appears by the record of the probate court that it did not have jurisdiction, as alleged in such plea, to grant letters of administration to Walter Tate upon the estate of Y. S. Hirschfelder. He also at the same time replied to the fifth plea that it is not true that it did not appear from the record of the probate court that it had jurisdiction, as alleged in said plea, to grant letters of administration upon the estate of said Hirschfelder. The issues were tried by the court without a jury. The plaintiff offered in evidence a certain transcript of record of the county court of Escambia county, as follows: "Notice. In the Matter of the Estate of Y. S. Hirschfelder, Deceased. Notice: The next of kin of Y. S. Hirschfelder, deceased, late of Conecuh county, Alabama, and all others whom it may concern, are hereby notified that six weeks after the first publication hereof, and their failure to apply for administration on his estate, I will appoint some creditor of Hirschfelder or other fit person to administer on the same as may be authorized by law. [Signed] N. C. SHACKLEFORD, County Judge. January 8, 1882."

"In the Matter of the Estate of Y. S. Hirschfelder, Deceased. Citation having been published for six weeks, as required by law, and no person entitled to administration having applied, therefore letters of administration have this day been issued to Walter Tate, he having given bond under oath, and otherwise qualified according to law. Dated this 18th day of April, A. D. 1882. N. C. SHACKLEFORD, County Judge."

"State of Florida, Escambia county: Before me this day came Walter Tate, who, being duly sworn, says that to the best of his knowledge and belief there are no heirs of Y. S. Hirschfelder, dec'd, residing in this state or out of it; that the deceased died leaving an estate in this county, consisting of an unliquidated claim, the amount whereof deponent cannot state; that the said deceased left no will. And the said deponent further says that he will well and truly administer all and singular the goods and chattels, assets and credits of said deceased, and make a true and just inventory of the same, pay his debts as far as the assets of the estate shall extend and the law direct, and make a fair distribution according to law, and render a true account of the administration of the estate when thereto required. [Signed] WALTER TATE. Sworn to and subscribed before me this 18th day of ———,

A. D. 1882. N. C. SHACKLEFORD, County Judge. Indorsed: Estate of Y. S. Hirschfelder, deceased. Affidavit of administrator."

Then follows an administration bond by Tate, with George W. Wright and M. H. Sullivan as sureties, bearing date the 13th day of —, A. D. 1882, with the usual conditions, and approved by N. C. Shackleford, county judge, and indorsed "Estate of Y. S. Hirschfelder, deceased. Administrator's bond. Filed April 15, 1882."

"State of Florida, Escambia County. Escambia County Court. In the Matter of the Estate of Y. S. Hirschfelder, Deceased. To All Whom it May Concern. Whereas, Walter Tate has this day filed his bond, with two good and sufficient sureties thereon, as administrator upon the estate of Y. S. Hirschfelder, deceased, and having duly qualified according to law, therefore know ye that letters of administration are hereby granted unto the said Walter Tate upon all and singular the goods and chattels, rights and credits, of Y. S. Hirschfelder, deceased, and he is hereby duly authorized and empowered to take charge of and manage and control the same in whomsoever hands or possession the same may be, and to do such other acts as may be prescribed by law in such cases made and provided. Given under my hand and seal this the 15th day of April, A. D. 1882. N. C. SHACKLEFORD, County Judge."

"State of Florida, Escambia County. In the Matter of Y. S. Hirschfelder, Deceased. Inventory. One suit in the circuit court of Escambia county, Fla., (bill in chancery,) instituted by deceased on the 22d of February, 1877, against late firm of Epping, Bellas & Co. This suit is still pending, and comprises the only interests of said estate that have come to the knowledge of the undersigned. This 24th day of May, A. D. 1882. WALTER TATE, Administrator of Y. S. Hirschfelder, dec'd. Sworn to and subscribed before me this 24th day of May, A. D. 1882. N. C. SHACKLEFORD, County Judge." Indorsed by Y. S. Hirschfelder, deceased. Inventory filed May 24, 1882. The certificate to the above transcript is as follows:

"State of Florida, Escambia County. County Court. I, Walter Tate, judge of said court, do hereby certify that the foregoing seven (7) pages contain a correct copy of all the papers and records in my office relating to the estate of Y. S. Hirschfelder, deceased; that of said papers all are indorsed as shown in the foregoing pages by N. C. Shackleford, the then county judge; and that, except those marked 'Application' and 'Inventory,' they are all recorded in a volume labelled 'Journal of Proceedings in Estates of Deceased Persons, from April 12, 1882.' Witness my hand and official seal this 16th day of January, A. D. 1886. [Seal office.] WALTER TATE, County Judge."

And the said plaintiffs, further to prove the issues in their behalf, produced as a witness one N. C. Shackleford, and offered to prove by him that the affidavit of Walter Tate offered in evidence as a part of said record of the county court of Escambia county, but without file mark, was while he was judge of said court, filed with him before he granted letters of administration to Walter Tate on the estate of Y. S. Hirschfelder, and was before him when he granted said letters. To the admission of Shackleford as a witness the attorneys for defendant objected that it was not competent to prove by parol testimony any fact relating to said record, which must speak for itself. Shackleford testified as follows: "I was county judge in and for Escambia county at the time of the granting of letters of administration on the estate of Y. S. Hirschfelder to Walter Tate. The affidavit of said Tate was filed with me prior to my granting said letters of administration, and was before me in granting said letters." Plaintiffs produced as a witness one Walter Tate, who, under similar objections, testified as follows: "I am the same Walter Tate to whom letters of administration on the estate of Y. S. Hirschfelder were granted. The affidavit was filed by me with N. C. Shackleford, then county judge in and for Escambia county, before his granting letters of administration on the estate of Y. S. Hirschfelder to me." The plaintiffs offered S. R. Mallory and F. E.

de la Rua as witnesses to prove the amount of costs against the plaintiff in the case of Y. S. Hirschfelder against Epping, Bellas & Co., which were paid by the said Epping, Bellas & Co., to which defendant objected, because the bond sued on does not cover such costs, which objection was overruled, and defendant excepted by his attorneys. Said witnesses then testified that \$211 were paid for costs in said case. The court gave judgment for the plaintiffs for the sum of \$5,367.05. The said defendant moved for a new trial on the following grounds, to-wit: (1) The court erred in permitting the testimony of Shackleford and Tate in relation to the record of the county court. (2) The finding of the court is against evidence. (3) The finding of the court is not supported by the evidence. (4) The finding of the court is contrary to law. (5) The court erred in permitting testimony as to costs, and in allowing in its finding that the costs paid by the plaintiffs should be included in the judgment. (6) The defendant was taken by surprise in the action of the court in hearing on evidence explanatory of the record; and if the record was so open to explanation, the defendant has discovered new evidence since the trial, material to the defense, on the evidence of the witness Shackleford, to explain that the words "published as required by law," appearing in the record, did not intend to assert publication of the citation in any newspaper in the state of Alabama, wherein Hirschfelder died, as the only publication in a newspaper was in the state of Florida, which defendant expects to prove by said Shackleford if a new trial be granted.

*Maxwell & Mallory*, for appellant. *R. L. Campbell and W. A. Blount*, for appellees.

RANEY, J. 1. Pursuing the order of argument adopted by the counsel for appellant we consider first the ruling sustaining the demurrer to the fourth plea. This case is an action of debt by appellees upon a bond made September 22, 1877, by Hirschfelder as principal, and appellant and another as sureties. The condition of the bond is set out *in totidem verbis* in the declaration, and is that "whereas in an action brought in the circuit court of Escambia county, Fla., sitting in chancery, by the above-bounden Y. S. Hirschfelder against the said Epping, Bellas, and Barrs, late copartners as aforesaid, to enjoin a suit at law brought by the said Epping, Bellas, and Barrs, as late copartners, in the said circuit court, and for an account and general relief, wherein a decree by consent is entered of date —, A. D. 1877, for an account, and for a dismissal of said suit at law; and said decree is to take effect upon the filing of this bond, conditioned that the said Hirschfelder shall pay to the said Epping, Bellas, and Barrs, as late copartners, such sum as may be found to be due to said respondents from said Hirschfelder upon the final determination and decree in the case. Now, if the said Hirschfelder shall well and truly pay to the said Epping, Bellas, and Barrs such sum as may be found to be due them upon the final decree and determination of said case, then this obligation to be void; else to remain in full force and virtue." The declaration sets up the execution of this bond, the subsequent death of Hirschfelder pending the chancery suit, and the appointment of Tate on or about April 15, 1882, by the county court of Escambia county, as the administrator of his estate, and the revival of the suit in chancery by making such administrator a party, and the rendition of a decree on the 16th day of December, of the same year, to the effect that, according to the report of the master therein, Hirschfelder was in his life-time, on the 1st day of July, 1876, indebted to respondents in a sum which, with interest thereon to the filing of the report, amounted to \$4,045.58, and that the administrator pay the same out of the assets of the estate, if any, now or hereafter in the hands of said administrator to be administered. The substance of fourth plea is accurately given in the statement. It is true that by the terms of the bond, as appears upon its face, the decree for an account, and for the dismissal of the suit at law, was to take effect upon

the filing of the bond, and therefore it may be said that the bond was made "in view" of an alleged consent decree for a dismissal of the suit at law; but it is clear that there is nothing in the bond that makes the actual dismissal of the action at law a condition to the liability of the appellant for any decree that should be obtained against Hirschfelder in the chancery proceeding. Admitting, as contended by counsel for appellant, that the object of the agreement as to dismissal was to give the claim on which the law proceeding of appellees was founded a *status* and protection in the chancery cause, we are, nevertheless, satisfied that if the standing upon the docket, or the omission to actually dismiss the former action, was ever available as a reason why appellees should not have relief for their claim in the chancery proceeding, it, like any other defense of Hirschfelder, or his legal representative, to such claim, should have been asserted in the chancery cause. If ever a good plea, it was one in abatement, and of the nature of a plea of the pendency of a former suit, and cannot be availed of as against this action on the decree rendered in the second or chancery cause. The surety is concluded by the decree as to any matter of defense of which Hirschfelder or his lawful representative might have availed himself in such suit. He cannot, in the action now before us, question the correctness of the decree. *Slovall v. Banks*, 10 Wall. 583.

2. The sixth plea is in substance, as shown by the statement, that Tate's appointment as administrator of Hirschfelder was made upon citation issued without any petition or complaint in writing as a basis therefor, and that such a petition was jurisdictional to the issue of the citation, and to a grant of letters of administration thereon. This plea is based upon the statute of August 4, 1868, (chapter 1627; §§ 9, 10, 11, p. 826, McClell. Dig.) and what is said of it in the former opinion in this case, 21 Fla. 36. "This act," says the opinion referred to, "provides the method of bringing matters before the court for its action, to-wit, by petition in writing, and the facts stated in the petition are the grounds of its judgment. *Pettit's Adm'r v. Pettit*, 32 Ala. 305; *Hays' Adm'r v. McNealy*, 16 Fla. 409. When the county court acts upon the petition, and grants the letters, the facts alleged are adjudicated upon, and its judgment upon these facts is conclusive except in a direct proceeding to reverse, set aside, or annul the order or judgment of the court; and when the record makes an averment with reference to a jurisdictional fact it will be understood to speak the truth on that point, and it will not be presumed that there was no other or different evidence respecting the fact. *Galpin v. Page*, 18 Wall. 366." It is contended by appellants that the law of this case, as established by the former opinion, is that a petition is necessary and jurisdictional to the action of the county court in the appointment of an administrator. Though, under the view we take of this case, as shown by a subsequent paragraph, this record of the county court shows a sufficient compliance with the requirement of the statute mentioned as to a petition, to meet a collateral attack, still we are not satisfied that the opinion supports the contention advanced. There is nothing in the extract quoted above that so declares, or that goes further than to say that the procedure prescribed by that statute is the proper and regular one. Of course, where there is a petition, and it fails to show jurisdiction, and the record does not otherwise show it, the want of jurisdiction is apparent upon the record. Where, however, the record, considered as a whole, does show jurisdiction, a failure to comply with the provisions of the statute of 1868 would be only an irregularity of procedure, and the subject of correction by direct proceeding. The doctrine of the above extract, that the statements of the petition are the grounds of the court's judgment, is advanced upon the assumption that the record of the probate court, when seen, would disclose a case in which the procedure deemed proper by the court had been followed; but there is nothing in it that discusses the effect of the absence of a petition in case the record should otherwise show jurisdiction, or that declares a petition indispensable. The gen-

eral doctrine of the opinion is that it is sufficient if the jurisdiction appears somewhere upon the record. We must say, however, that we do not wish to be understood as concurring in the view that the procedure provisions of the act of 1868 apply to the matter of the appointment of an administrator, although it be that as to the case before us we are constrained to state that the opinion does declare that such act furnishes the measure of proper, though not indispensable, procedure.

3. The third plea having been abandoned, we are brought to a consideration of the trial upon the issues joined upon the first, second, and fifth pleas. The *gravamen* of the controversy under the first plea is that Hirschfelder, who was a resident of Alabama, and died out of the limits of the state of Florida, was not, at the time of his death, possessed of any goods, chattels, or lands in any county in this state, and that this fact appears upon the face of and by the record of the county court of Escambia, and that, consequently, the appointment of Tate as administrator (which appointment is averred to have been procured by plaintiffs without authority from the representatives of Hirschfelder, qualified under the laws of Alabama) was an act without authority of law, or without jurisdiction in said county court. The *gravamen* of the second plea is that Hirschfelder died out of the state, pending the chancery suit, and not only was at the time of his death not possessed of any goods, chattels, or lands in Escambia county, but also there were not any debts due to him from any person or persons living in such county, for the collection of which neither Tate nor any other person produced or had legal authority from the representatives of Hirschfelder to be appointed administrator, and that it appears by the record of the county court that facts necessary to confer jurisdiction upon it to appoint an administrator—that is to say, the contrary of these allegations—were not presented to and adjudicated by such county court in granting administration to Tate. The parts of the above pleas that aver the want of authority from representatives of Hirschfelder, qualified by law in the state of Alabama, to procure administration here, have been disposed of, for the purposes of this case, adversely to appellant, by the former opinion, and are beyond our consideration. The substance of the fifth plea is that the county court had no jurisdiction to grant the letters, because Hirschfelder was a citizen and resident of Alabama, and died there; and it does not appear by the records of such court that the citation required by law was duly published and posted, or that Hirschfelder had assets in said county of Escambia upon which the county court could grant letters of administration. We will dispose of the question of the publication of the citation, and then consider the other features of the pleas together. The statute (section 5, p. 78, McClell. Dig.) provides that if neither the husband nor wife, nor other person entitled to distribution, apply for administration, or if one applying cannot comply with the provisions of the act, then, "after citation duly published for the term of six weeks, once a week, in some newspaper printed in the district or jurisdiction where the intestate died, if any be printed there, if not in some newspaper printed in the adjoining district or state, and also by writing posted at three public places in the county, the said judge may grant administration to a creditor of the intestate or some fit person." The requirement of this clause is that the publication of the citation shall be made in two ways, viz., in a newspaper and by posting. The order of the county court, granting letters of administration to Tate, appearing in the transcript of the record of the proceedings of that court, as read in evidence, recites that "citation having been published for six weeks as required by law." This is a distinct adjudication by the county court that the publication was made for the period of six weeks, in the manner required by law. It is not simply an adjudication of a publication for six weeks, but of a publication for such period, according to law, or in the two modes of publication prescribed. We cannot, on this proceeding, inquire as

to whether the evidence of such publication justified the conclusions reached, but it is unquestionable that it was the duty and within the jurisdiction of that tribunal to ascertain whether the citation was duly published, and that the question was presented to it and decided by it in the affirmative, and that the fact of such presentation and decision is shown by its records. It is not necessary that its records should recite the modes of publication as detailed in the statute. The language used must be held to judicially ascertain and declare a compliance with them, which is sufficient to show jurisdiction. *Gunn v. Howell*, 27 Ala. 676. The statute does not require that the citation shall mention the name of a particular individual as the "creditor" or other "fit person," whom it is intended to appoint administrator. We fail to see anything in its provisions indicating an intention upon the part of the legislature that the terms of the citation, or the publication of the same, shall limit the power or discretion of the court when it comes to the appointment, to the consideration of only one individual as fit for the trust. The purpose of the citation and its publication is to lay the foundation for going outside the favored class of husband, wife, or other persons entitled to distribution, for an administrator, and not to fix the right as between persons not belonging to the favored class. The latter construction would, in case of the failure of the particular party named in the citation to qualify, not only render a new citation, and the publication thereof necessary, but introduces into the statute a requirement not sustained by its terms. The defense made by this feature of the plea is not sustained, and we pass to the other features of the three pleas. If it appears from the record of the county court that Hirschfelder was not at the time of his death possessed of any goods, chattels, or lands in any county in this state, the first plea is sustained; and if it be that at the time of his death Hirschfelder did not have such property in Escambia county, and the fact that he did have such property was not presented to and adjudicated upon by the county court in granting the letters of administration to Tate, and this absence of presentation and adjudication appears upon such court's record, the second plea is made out. Such seems to be the accepted law of this case. The record entry or order of April 15, 1882, made by County Judge SHACKLEFORD, and mentioned above as adjudging the publication of the citation, states that "letters of administration have this day been issued to Walter Tate, he having given bond under oath, and otherwise qualified according to law." The letters of administration also bear date of April 15, 1882, as appears by the copy of the same in such transcript, and they recite the fact of Tate's having given the administration bond, "and having duly qualified according to law." The affidavit appears to have been sworn to "this 18th day of ———, A. D. 1882," before Shackelford as county judge.

The statute (McClel. Dig. § 7, p. 78) provides that previous to granting letters of administration the court shall require the person applying for the same to state upon oath or affirmation, to the best of his knowledge and belief, whether there be any heirs or legal representatives of the intestate in being or not, and whether, according to the best of his knowledge and belief, the deceased died without a will, and to make the usual administrator's oath (or affirmation) as prescribed. It is also provided by law, (section 13, p. 988,) all letters of administration shall be recorded in the office of the county court. The record entry or order of April 15th, and the record of the letters of administration, are the record evidence in this case of the affirmative determination of the court upon the question of granting administration to Tate. The only qualification other than giving the bond that he was required by law to make before the actual grant of letters was the oaths or affirmation referred to, and these are what is meant by the words "having otherwise qualified according to law," and having "duly qualified according to law," in the order and record of the letters. As there is an affidavit on file making the averments

required by law, it must be held that it was there when such entry or order was made, and when such letters of administration were signed and issued, and an affidavit in which these oaths are embodied, and which on its face appears to have been made in connection with the administration in question, appearing on the files of the court, such affidavit and order and letters naturally connect themselves with each other. No other conclusion than that the affidavit was on file when the order was made and the letters signed, recorded, and issued, is, in this case, where there is nothing to suggest the contrary, tenable. The record of the county court showing, then, as it does, that the affidavit in question was on file when the county judge granted letters of administration, and this affidavit containing, as it does, the averment that the deceased died, leaving an estate in Escambia county, consisting of an unliquidated claim, the amount of which the deponent and applicant for administration, Tate, deposed he was unable to state, the jurisdiction of the court is thereby made apparent upon its record. This averment was, it is true, not required by the statute (section 7, p. 78, McClel. Dig.) as a feature of the oaths referred to above; yet it cannot on that account be presumed to have not been put in for a practical purpose. The only practical purpose it could have been put in for was to make the jurisdiction apparent upon the record. This it does, and for this purpose it must be presumed it was intended. The fact that a court is not one of general jurisdiction, according to the course of the common law, does not deprive it of the benefit of the presumption that acts which subserve but one particular purpose were done for such purpose. Assuming that the meaning of the former opinion in this case is that a "petition" or "complaint by petition," under the act of 1868, (sections 10, 11, p. 326, McClel. Dig.) is a jurisdictional paper, we think this affidavit, containing the several averments that it does, is a sufficient petition as against an attack by a collateral proceeding. Its purpose was to present to the court the facts it alleges. It was presented to the court to induce its action, and the court, having acted affirmatively upon it, has thereby adjudged it to be sufficient both in form and substance, and being sufficient in substance to make the court's jurisdiction to or right to decide upon the case, appear upon its records, the correctness of its ruling upon the question of form cannot be raised here any more than can that of the sufficiency of the proof of the averments. Admitting that the usual administrator's oath need not be made, nor the bond given before the entry of an order that letters of administration shall issue, still neither such an order nor the law contemplates the actual issue of the letters before such oath and bond have been filed; but the law does contemplate that the oaths as to heirs and the absence of a will shall be made before such an order for letters to issue is entered, and the fact clearly is that in this case the oaths last referred to, and the administrator's oath and the bond, were all made and filed before there was any order for letters to issue or final adjudication of administration. The fact that the record does not affirmatively show that the question of assets had been presented or considered before the issue or publication of the citation is immaterial. Such publication, wherever it is proper, is a preliminary to the adjudication of a grant of administration, and the question of assets is an essential to such an adjudication, but it is sufficient if the record shows upon its face, and even at such a late stage of the proceedings as the order for letters to issue or final adjudication of administration, that the question was presented and adjudicated affirmatively. Though the question of assets should naturally be inquired into, to a certain extent at least, before the issuance of the citation, yet it is not actually adjudicated until the determination to grant the letters becomes final; and if the record shows that it was considered at any time before such final adjudication, or in even making the same, it is in a proceeding of the kind before us sufficient, even though it should be a fact that the consideration of such question had been expressly omitted at the time of issuing the citation.

Our conclusion is that it does not appear from the record of the county court that Hirschfelder was not at the time of his death possessed of goods, chattels, or lands in any county in this state, but that it does appear from such record that the fact that he did have such property in Escambia county was presented to and adjudicated upon affirmatively by such county court in granting the letters of administration to Tate. In view of the above conclusion it is unnecessary for us to express our opinion as to the admissibility of the parol testimony of Shackelford and Tate, for if there was error in admitting it such error is without injury to appellant in view of the above conclusion as to the effect of the record of the county court. It is urged that the record before us shows that the "unliquidated claim" of the intestate, mentioned in the proceedings of the county court, is the claim involved in the chancery suit instituted by Hirschfelder in his life-time against Epping, Bellas & Co. for injunction and account, the final result of which suit was a decree against Hirschfelder's administrator, for the satisfaction of which the action at bar was brought. This claim, counsel for appellant contends, is not such a chose in action as was held in the former opinion to be in the nature of goods to authorize an administration, and the adverse result of the chancery suit to Hirschfelder's representative is called to our attention in support of their contention. The opinion referred to holds that the term "goods" in the administration statute includes choses in action, notes, bills, and other evidences of debt. 21 Ga. 52. The record of the chancery suit is not before us, nor are we informed as to what is the character of the claim made by the bill filed in it by Hirschfelder further than that it was a bill to enjoin a suit at law instituted by appellees, and to call them to an account. Assuming that such a bill is the unliquidated claim referred to in the administration proceedings, we are clear that it is within the decision. The bill must have claimed a balance to be due to Hirschfelder on an accounting by appellees, and, having been filed by Hirschfelder in his life-time, its *status* as a chose in action has the sanction of the intestate's resort to equity for its recovery. The fact that the suit resulted as it did after his death does not affect the adjudication of the county court as to its existence as a chose in action or defeat the jurisdiction of such court. We do not mean, by anything advanced in the preceding paragraph, to hold that the sufficiency of the proof before the county court of Hirschfelder having died, leaving an estate in Escambia county, consisting of an unliquidated claim, and that this unliquidated claim was of such a character as to support the jurisdictional allegation, can be questioned in this or any collateral proceeding.

4. The only remaining question to be considered is that of appellant's liability upon the bond for the costs in the chancery suit. The appellees had instituted an action at law against Hirschfelder. Hirschfelder filed a bill in equity to enjoin the prosecution of such action, and for an account and general relief against appellees. The condition of the bond in question is for the payment to Epping, Bellas & Co. of such sum as may be found to be due them from Hirschfelder upon the final determination and decree in such chancery suit. A surety does not undertake to do more than is expressed in his obligation, and he has the right to stand upon the strict terms of the same as to his liability thereon. It is not to be implied that he has undertaken more than is within the precise terms of his undertaking. Brandt, Sur. § 79; *Raney v. Baron*, 1 Fla. 327. The meaning of the undertaking in this case we think to be the sum of the indebtedness which might be found to be due by Hirschfelder upon final accounting as ascertained by the decree. To extend the liability of the surety beyond the matter of the indebtedness claimed by Epping, Bellas & Co., to be due them by Hirschfelder upon an accounting, and the amount of such indebtedness as it should be fixed by the final decree, and include in such liability the feature of the costs of the equity suit, is to enlarge the liability by implication to something not covered by the strict terms of the

engagement, and to go beyond the language of the terms and the meaning of the obligation. The amount of these costs is definitely fixed by the testimony of both witnesses at \$211, and the error in allowing their recovery under the bond in no wise affects the balance of the recovery in the judgment appealed from, and, as a consequence, the practice adopted in *McLean v. Spratt*, 20 Fla. 515, 524, is appropriate, and should be adopted here. The judgment of this court is that the judgment of the circuit court be reversed, and a new trial granted, unless the appellees, (plaintiffs below,) or their attorneys, within 30 days after the filing of the mandate of this court in the office of the clerk of the circuit court, shall file with the clerk of said circuit court a *remititur*, as of the date of said judgment, for the said sum of \$211, and upon the filing of the same the said judgment will stand for the balance of said recovery as the judgment of said circuit court, to be enforced according to law. If such *remititur* shall not be entered as aforesaid, the judgment will, upon the expiration of said 30 days, be held to be vacated and set aside, and a new trial awarded. The costs of this appeal will be taxed against the appellees.

FINLEY, J., Fifth judicial circuit, sitting in place of MAXWELL, O. J., disqualified.

(24 Fla. 417)

CARDEN v. STATE.

(*Supreme Court of Alabama. July 26, 1888.*)

1. MURDER—EVIDENCE—FORMER INDICTMENT.

To show motive for the killing, a pending indictment, upon the finding of which deceased was a witness, against the defendant and another for breaking and entering the house of deceased with intent to steal, is admissible, where there is evidence of threats made by defendant against deceased in reference to the charge of stealing contained in the indictment, and because deceased appeared as a witness before the grand jury.

2. SAME—PROOF OF FORMER CRIME.

In such case, it is not competent to introduce facts tending to show defendant's guilt or innocence of the crime charged in the former indictment, as that he was seen with a large amount of money soon after the alleged burglary; money having been stolen from the deceased at that time.

3. SAME—IMPEACHMENT OF WITNESS—EVIDENCE AT PRELIMINARY EXAMINATION.

On a trial for murder, a witness cannot be impeached by reading to him extracts from his testimony taken down by a magistrate, and signed by himself, as required by statute, upon a preliminary trial of one accused of the murder.<sup>1</sup>

4. SAME—FLIGHT OF DEFENDANT.

Testimony of a sheriff as to defendant's flight when approached by him, several days after the killing, and as to his pursuit of the fugitive, is admissible, though the prisoner afterwards made an apparently voluntary surrender.<sup>2</sup>

5. SAME—INSTRUCTIONS—PUNISHMENT OF INNOCENT PERSONS.

It is not error to refuse to charge the jury that "the punishment of an innocent person is regarded as a greater evil than the acquittal of one guilty; and the policy of the law is that in cases of doubt it is safer to err in acquitting than in convicting; and that it is better that many guilty persons shall escape than that one innocent person should be made to suffer."

Appeal from circuit court, Russell county; J. M. CARMICHAEL, Judge.

Indictment for murder. On a preliminary trial of one Elbert Cooper for this same murder, Will Sanders, a witness for the state in this trial, had been examined, and his testimony taken down by the magistrate and signed by the witness, as required by Code Ala. 1886, § 4286. The defendant attempted to discredit this witness by showing discrepancies between his testimony as then taken down and as given on this trial, by reading to him detached portions

<sup>1</sup> On the subject of impeaching a witness by showing former contradictory statements, see *Inhabitants of Milford v. Inhabitants of Veazie*, (Me.) 14 Atl. Rep. 730, and cases cited in note; *Tripp v. Kirmes*, 2 N. Y. Supp. 19.

<sup>2</sup> As to the admissibility of evidence of flight of the accused, and how far it raises a presumption of guilt, see *Stata v. Moncla*, (La.) 2 South. Rep. 814, and note.

of his former testimony, and asking him if he did not so testify. This the court refused to permit, and the defendant excepted. The other facts sufficiently appear in the opinion.

*L. W. Martin* and *John V. Smith*, for appellant. *T. N. McClellan*, Atty. Gen., for the State.

SOMERVILLE, J. The appellant was indicted for the murder of Reuben Sanders, jointly with one Joe Carden, who was acquitted on the trial. The only questions raised for consideration are alleged errors in the rulings of the court, as shown by the bill of exceptions.

1. The evidence tends to show that the appellant entered the house of the deceased, through the aperture in the chimney, and killed him by striking him with an iron crow-bar. To prove motive for the killing, in connection with sundry threats previously made, the state introduced in evidence an indictment found by the grand jury of Russel county, against both of the defendants, for breaking and entering the house of the deceased with intent to steal. The name of the deceased was written on this indictment as one of the only two witnesses for the state, and there was evidence tending to show a threat on the part of the appellant against deceased in reference to the charge of stealing certain money from him involved in this pending indictment, and also a like threat for having appeared as a witness before the grand jury in connection with the finding of this indictment. Under these circumstances, the indictment itself was clearly admissible in evidence to prove a motive on appellant's part for the killing, namely, the removing of a material witness in the burglary prosecution against him. It tended also to show malice against the deceased as the supposed prosecutor. The circuit court did not err in admitting this evidence. *Marler v. State*, 67 Ala. 55, 68 Ala. 580; *Childs v. State*, 55 Ala. 25.

2. It was not competent, however, for the state to enter into an investigation as to the guilt or innocence of the defendant of the charge of burglary or larceny involved in that indictment. The merits of that prosecution could not be entered into on this trial. If it could be, there would virtually be a trial of two separate felonies charged against the same defendant, progressing simultaneously on their merits, and on distinct indictments; for, if the state were permitted to prove the guilt of the defendant under the burglary indictment, it would be competent for the defendant to rebut this evidence by proof of the contrary, showing his innocence. This would, in every essential, be a trial for another felony other than murder, which is alone involved in the indictment under which the defendant is charged in the present case. This would not only multiply issues indefinitely, as any number of similar collateral indictments might be injected into a pending prosecution; but it would operate greatly to prejudice defendants so as to render a perfectly fair trial of them, in many instances, impracticable, if not quite impossible. *Commander v. State*, 60 Ala. 1; *Marler's Case*, *supra*; *Stewart v. State*, 78 Ala. 436; *McAnally v. State*, 74 Ala. 9; *Garrett v. State*, 76 Ala. 18; Whart. Crim. Ev. (8th Ed.) § 784; 1 Greenl. Ev. (14th Ed.) § 53, note b. Under this principle, the circuit court, in our judgment, erred in admitting the statement of the witness Delia Cooper as to the defendant's being seen in possession of a large amount of money soon after the commission of the alleged burglarious entry of the house of the deceased, when the evidence tends to show an amount of money was stolen from deceased, with the larceny of which he had accused the defendant in his hearing. The tendency of this evidence was to prove the fact of the burglary, which was at a different time from that of the alleged murder. It otherwise had no bearing on the present case, and was irrelevant, as an attempt to enter upon the merits of the burglary case.

3. The effort to impeach the witness Sanders, by reading to him garbled extracts from his testimony taken before the magistrate on the trial of Elbert

Cooper, was not permissible. This testimony had been reduced to writing by the magistrate and subscribed by the witness, as required by the statute, and it was not proper to read these detached portions of the writing to him as a basis of impeachment without exhibiting or reading to him his entire testimony. There was no error in the action of the court on this subject. *Wills v. State*, 74 Ala. 21; *Gunter's Case*, 83 Ala. 96, 8 South. Rep. 600.

4. "The flight of a defendant," as said in *Sylvester's Case*, 71 Ala. 18, "may or may not be considered as a circumstance tending to prove guilt; as this depends upon whether the motive of such flight had its origin in the consciousness of guilt, and a pending apprehension of being brought to justice, or whether, on the other hand, it can be explained as attributable to other and more innocent motives." The testimony of the deputy-sheriff was properly admitted as to the defendant's flight on the approach of the witness, several days subsequent to the murderous assault made on the deceased, and of the pursuit of the fugitive by the deputy. The effect of this testimony, as a criminative fact, may have been weakened, but its relevancy was not destroyed, by the prisoner's subsequent, and apparently voluntary, surrender.

5. The third charge requested by the defendant asserted that "the punishment of an innocent person is regarded as a greater evil than the acquittal of one guilty; and the policy of the law is that in cases of doubt it is safer to err in acquitting than in convicting; and that it is better that many guilty persons shall escape than that one innocent person should be made to suffer." The several comparisons instituted in this mere argumentative charge have been several times passed on by this court, and have been repudiated as misleading in their nature when attempted to be formulated as instructions by a court to a jury. There was no error in refusing this instruction. *Ward v. State*, 78 Ala. 442; *Garlick v. State*, 79 Ala. 265; *Farrish v. State*, 63 Ala. 164; *Kidd v. State*, 83 Ala. 58, 8 South. Rep. 443. We discover no error in any of the charges given at the instance of the state.

For the one error above pointed out the judgment of conviction must be reversed, and the cause will be remanded for a new trial. In the mean while the prisoner will be held in custody until discharged by due course of law.

(85 Ala. 128)

#### KING v. PAULK *et al.*

(*Supreme Court of Alabama. July 17, 1883.*)

#### JUDGMENT—LIEN—PRIOR UNRECORDED DEED.

Under Code Ala. 1886, §§ 1810, 1811, providing that an unrecorded conveyance is inoperative against a judgment creditor without notice, the title of a judgment creditor claiming under purchase at execution sale is paramount in ejectment against a purchaser claiming under a prior unrecorded deed, where there was no change of possession to put the judgment creditor on inquiry.<sup>1</sup>

Appeal from circuit court, Bullock county; J. M. CARMICHAEL, Judge.

Statutory real action in the nature of ejectment, brought by the appellant, Charles King, against the appellees, James A. Paulk and Richard Delbridge, for the recovery of certain lands described in the complaint. At the request of the defendants, the court gave the general affirmative charge in favor of the defendants, and the plaintiff excepted. There was verdict and judgment for the defendants, whereupon the plaintiff appealed, and now assigns the ruling of the court in giving the general charge in favor of the defendants as error.

*Norman & Son*, for appellant. *Law & Smith*, for appellees.

<sup>1</sup>As to how far possession of land is notice of the rights of the occupant, and what is sufficient to put a purchaser on inquiry, see *O'Neal v. Seixas*, (Ala.) ante, 745, and cases cited in note; *Phelan v. Brady*, 1 N. Y. Supp. 626. See, also, as to the rights of a bona fide purchaser without notice of a prior unrecorded deed, *Roll v. Rea*, (N. J.) 12 Atl. Rep. 905, and note.

STONE, C. J. Both parties to this suit claim title from Pitts, and it is not disputed that for several years, and until June, 1887, the legal title was in him. Pitts was not in the actual occupancy of the land, but Delbridge, his tenant, went into possession under him, and held the possession continuously for several years, and until this suit was brought. King claims title as follows: On August 13, 1887, he recovered a judgment against Pitts in the circuit court of Bullock county, the county in which the lands in controversy lie. Execution was issued on that judgment, which went into the hands of the sheriff, August 23, 1887. The execution was levied on the lands sued for, and they were sold by the sheriff December 5, 1887. King became the purchaser, and the sheriff conveyed the lands to him. He brought the present action to recover possession, January 11, 1888. Paulk's title and claim are as follows: He testified that in February, 1887, he made a verbal agreement with Pitts for the purchase of the lands, in payment of debts due him from Pitts, and paying him some money; and that he then agreed with Delbridge, who was then in possession, to let the lands to him for the year at an agreed rent, which the latter had paid him. He then proved that on June 10, 1887, Pitts conveyed the lands to him by deed, having two subscribing witnesses. This deed was acknowledged and properly certified November 17, 1887, and was recorded on the next day. Actual knowledge of this sale or conveyance was not pretended to have been traced to King until after his execution was in the hands of the sheriff. It has been settled, as the proper construction of our statute, (Code 1886, §§ 1810, 1811,) that unrecorded conveyances, of the class brought to view in this case, are inoperative against purchasers and judgment creditors without notice, *Wood v. Lake*, 62 Ala. 489; *Watt v. Parsons*, 73 Ala. 202; *Tutwiler v. Montgomery*, Id. 263; *Chadwick v. Carson*, 78 Ala. 116. Taking possession by the vendee, although the deed may not be recorded, and although there may be no actual notice, is enough to put a purchaser or creditor on inquiry, which would lead to a knowledge of the conveyance, and is equivalent to registration or actual notice. And taking possession by a tenant or agent is as effectual as if the possession was taken by the purchaser. *Burt v. Cassey*, 12 Ala. 734; *Brunson v. Brooks*, 68 Ala. 248; *Boyd v. Beck*, 29 Ala. 704; *Sawyers v. Baker*, 66 Ala. 292; *Watt v. Parsons*, 73 Ala. 202. The principle on which these cases rest is that a change of possession from one occupant to another is enough to excite inquiry why the change is made. Such change is obvious to the senses, and any one exercising ordinary diligence will not fail to note the change. Law is a reasonable science, and this furnishes the requisite reason on which the rule is founded. In the present case, however, there was no visible change of occupancy. Delbridge had gone into possession as the tenant of Pitts, and no change had taken place to give warning or put on inquiry. Actual notice or registration was necessary to the protection of Paulk as a purchaser. *McCarthy v. Nicroci*, 72 Ala. 382, 47 Amer. Rep. 418; *Watt v. Parsons*, 73 Ala. 202. King is not shown to have had notice, actual or constructive, that title had passed out of Pitts, and the circuit court erred in ruling to the contrary.

Reversed and remanded.

(85 Ala. 149)

CRUMPLER *et al.* v. DEENS *et al.*

(Supreme Court of Alabama. July 17, 1888.)

GUARDIAN AND WARD—SETTLEMENT BEFORE PROBATE COURT—RES JUDICATA.

A bill in equity to compel a settlement and accounting by a guardian, alleging loss through the guardian's want of diligence in recovering bonds from his predecessor, who had become insolvent, in the absence of averments and proof of special grounds of equitable interposition, is barred by a decree of a court of probate rendered on a final settlement of the guardian's account.

Appeal from chancery court, Crenshaw county; S. K. MCSPADEN, Judge. Bill in equity to compel account taken and settlement by guardian.

*W. D. Roberts*, for appellants. *John Gamble and Stallworth & Barnett*, for appellees.

CLOPTON, J.: The bill was filed by appellants to compel A. W. Deens to an account and settlement as guardian of the estate of the appellant Lorena Crumpler. The bill does not seek to reopen a settlement made by the guardian, on the special ground that injustice was done complainants by accident, surprise, fraud, or by the act of the guardian without fault or neglect on their part; nor is it filed under the statute for the correction of errors of law or fact which intervened in the final settlement. It makes no allusion whatever to any settlement in the probate court. Its general equity rests on the original jurisdiction of chancery, concurrent with that of the court of probate, of the settlement of guardian accounts. Among other defenses, Deens sets up in bar of the bill that on December 30, 1884, he made a final settlement of his guardianship in the probate court, from which he derived his appointment. The complainant married in the fall of 1884, and on December 1, 1884, the guardian filed his accounts, for the hearing of which a day was set, notices were given, and the final settlement made, all the proceedings appearing to be regular and in accordance with the statutes. The marriage of Mrs. Crumpler terminated the relation of guardian and ward and the authority and duty of the guardian, who was required thereupon to make a final settlement of the guardianship. Code 1876, § 2772. The probate court had jurisdiction of the subject-matter and of the parties interested in the settlement. A final decree was rendered in favor of the complainants for Mrs. Crumpler's portion of the assets in the hands of the guardian. The complainants could have compelled the guardian to account, on his final settlement, for the bonds now alleged to have been lost by his negligence. The decree of the court of probate rendered on the final settlement was conclusive on the parties, and a court of equity will not reopen the settlement, except on averments and proof of the special grounds of equitable interposition, which authorize interference with the judgments of other courts of record, or for the correction of error of law or fact. *Waldrom v. Waldrom*, 76 Ala. 285; *Bowden v. Perdue*, 59 Ala. 409; *High v. Snedecor*, 57 Ala. 403. A chancery court will not take jurisdiction of the settlement of a guardian's accounts after proceedings for that purpose have been already commenced in the probate court, and especially after final settlement made, unless special ground of equity is averred and shown. The final settlement of the guardian in the probate court was a complete bar to the bill, as framed.

The *gravamen* of the bill is that on the final settlement of John R. Salter, who was the predecessor of Deens as guardian, the court ordered him to turn over to the latter four state bonds of \$1,000 each, which the former had received as the guardian of Mrs. Crumpler and her brother; that by some arrangement between Deens and Salter, the latter was permitted to retain the bonds until he and his sureties became insolvent, and that Deens by the use of due diligence could have recovered them. If no final settlement had intervened, and Deens was now called for the first time to account and settle, the complainants have failed to establish a liability for the bonds converted by the former guardian. A guardian is bound to bring to the discharge of his duties that degree of skill and diligence which an ordinarily prudent man bestows on his private affairs, and is chargeable with the amount judicially ascertained to be due by his predecessor, and with the value of the property ordered to be turned over by him; if the same could be collected or recovered by reasonable diligence in the use of legal remedies, or by personal effort. *Wilkinson v. Hunter*, 37 Ala. 268. The evidence clearly and satisfactorily shows that the bonds had been disposed of by the former guardian some time prior to his final settlement, and placed beyond the reach of his successor. It further shows that Deens commenced immediately after the

settlement to make efforts to obtain possession of the bonds, and to learn where they were; that he employed counsel for this purpose, and used extraordinary diligence, and that at the time of the final settlement of Salter he and all his sureties were, and have ever since been, insolvent. A succeeding guardian is not a guarantor of the solvency of his predecessor and his sureties. It is difficult to see what Deens could have done more than he did. The evidence fails to show any just ground why Deens should be held responsible for the bonds, even if no final settlement had been made, or that complainant suffered any injustice in the final settlement. Affirmed.

(85 Ala. 232)

**CENTRAL RAILROAD & BANKING CO. *et al.* v. CHEATHAM.**

(*Supreme Court of Alabama.* July 17, 1888.)

1. **RAILROAD COMPANIES—IMPLIED POWERS—REWARD FOR ARREST OF TRAIN-WRECKERS.**  
It is within the implied power of a railroad company, for the protection of its property, to issue a printed circular offering a general standing reward "for the arrest, with proof to convict, any person for the malicious obstructing of" its tracks, and such offer is binding on the company.
2. **SAME—OFFICERS—POWER OF SUPERINTENDENT TO BIND COMPANY.**  
A railroad superintendent may bind the company by issuing such a circular, though no authority to do so has been granted him by the board of directors; such an act being within the scope of his general duties.<sup>1</sup>
3. **SAME—EXECUTION OF CONTRACT—SIGNATURE OF SUPERINTENDENT.**  
Such a circular, when headed with the names of two railroad companies and signed by their superintendent, is the contract of the companies, and not of the superintendent personally.
4. **SAME—REPLY TO LETTER BY SUPERINTENDENT—PRESUMPTION.**  
When, in response to a letter sent to a railroad superintendent, such a circular is received through the mail in an official envelope, addressed in the handwriting of the superintendent's secretary, the presumption is, in the absence of rebutting evidence, that it is an offer made by the superintendent on behalf of the companies.
5. **SAME—OFFER OF REWARD—CONVICTION OF CONTRACT.**  
Such an offer applies to the arrest of those who commit the offense either before or after the date of the circular.
6. **SAME—OFFER OF REWARD—KNOWLEDGE OF OFFICERS—EVIDENCE.**  
The facts that such circulars were posted at various public places on the line of the railroad, by direction of an employe of the company under the control of the superintendent, and that they remained posted for about three months, and until after the arrest of some parties for obstructing the track, tend to show that the officers or agents of the company knew of the offer.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

Action by William D. Cheatham against the Central Railroad & Banking Company of Georgia and the Montgomery & Eufaula Railway Company of Alabama, to recover a reward offered for the arrest and conviction of persons maliciously obstructing defendants' tracks. Plaintiff obtained judgment. Defendants appeal.

*Arrington & Graham*, for appellants. *Rice & Wiley*, for appellee.

CLOPTON, J. In June, 1886, the appellee arrested three individuals for the offense of having maliciously obstructed the railroad of the Montgomery & Eufaula Railway Company. One of them was discharged by the magistrate on the preliminary investigation. The other two were committed, subsequently indicted, and convicted. Thereupon appellee brought the suit to recover a reward claimed to have been offered by the appellants. The offer was by means of a printed circular, of which the following is a substantial copy: "*Central Railroad & Banking Company of Georgia, South-Western Railroad Division. Montgomery & Eufaula Railway Company of Alabama.*"

<sup>1</sup>Concerning the liability of a corporation for acts of its officer within the apparent scope of his authority, and what are such acts, see *Railroad Co. v. Grove*, (Kan.) 18 Pac. Rep. 958, and cases cited in note.

\$300 reward for the arrest, with proof to convict, any person or persons, for the malicious obstructing of the tracks of these companies. THEO. D. KLINE, Supt." The offer, though general, being for the arrest of any persons committing the specified offense, may be regarded a promise conditional on doing the proposed acts, and by performance becomes a binding contract, not having been previously revoked. To entitle the plaintiff to recover, it was incumbent on him to prove, not merely the arrest, but also that he furnished proof to convict. The nature and sufficiency of the proof so furnished need not be circumstantially shown; it is sufficient if shown that he furnished the proof on which the conviction was had.

The material and important questions, on which the liability of the defendants depends, are raised by the objection to the admission in evidence of the circular. The objection involves the power of railroad corporations, and the authority of the superintendent, in the absence of express authority by the managing body, to offer such general rewards, the nature and extent of the offer, and the collateral rulings of the court on the admissibility of the evidence to show that the offer was made by the superintendent, and that it was adopted and ratified by the corporations. Without controverting the power of such corporations to offer rewards in special cases, it is contended that they have no implied power to offer a general standing reward. The argument is that, the state having enacted laws to protect their property, and being presumed capable of enforcing them, such implied power is unnecessary. The general principle will be conceded that a corporation can do no acts and make no contracts except such as are authorized by its charter or by the general law. All the powers, however, need not be conferred in express terms. There are implied powers incident to every private corporation; power to do such acts as are necessary or proper, directly or indirectly, to carry the express powers into effect, and to enable it to answer the purposes of its creation. Among the powers incidental to all private corporations is the authority to institute the established and appropriate legal proceedings for the enforcement of their rights and the protection of their property. It is of the highest importance and necessity that the tracks of railroad companies, employing the powerful agency of steam in the transportation of freight and passengers by day and by night, shall be kept free from obstructions, and that every reasonable precaution to secure safety should be used by the officers or agents to whom this duty is intrusted. For the purpose of affording protection, the statute declares that any person who wantonly or maliciously places any obstruction or impediment on a railroad shall be guilty of a felony. The enforcement of the criminal law is essential to the peace, good order, and security of the community. The institution of prosecutions against those who commit the offense of obstructing the railroad is a legitimate and proper means of protecting the property of such corporations. The power to institute such prosecutions is a necessary implication from the nature of their business and the necessities of their condition. The prosecution of persons accused of crime by citizens, whose rights have been specially offended, is encouraged in aid of the state authorities to bring them to justice, and the offer of rewards for the apprehension of perpetrators of felonies when unknown, and of fugitives from justice when known, is the policy of the state. Code 1886, § 4746. There can be no question of the authority of the corporations to offer rewards and employ agents to detect and arrest violators of the criminal law enacted for their protection. On the ground of such authority is founded their responsibility for the willful and malicious acts of such agents when done in executing the agency. Railroad companies ordinarily operate long lines, which render it impracticable to guard every section. Usually, obstructions are placed on the road-beds under cover of secrecy, and the perpetrators are unknown. Prompt action is necessary to their detection. Delay after the commission of the offense renders the detection more difficult, and frequently defeats it alto-

gether. A general reward tends to promote immediate and prompt vigilance and effort, is more efficient to prevent the commission of such offenses, and is not inconsistent with any law or public policy, nor foreign to the objects of the corporation. A general standing reward may be offered by natural persons, and equally by corporations. *Ricord v. Railroad Co.*, 15 Nev. 167; *Express Co. v. Patterson*, 78 Ind. 490.

But, though the corporation may have such implied power, it is insisted that the superintendent has no authority to offer a general reward unless expressly granted by the board of directors. A corporation necessarily acts by representation, and the appointment of an agent includes power to do anything necessary and usual to execute the authority with effect. The scope and character of the business which he is empowered to transact is the measure of the authority of a general agent. The real authority of a superintendent is not restricted to such powers as may be conferred in terms by the board of directors, or the by-laws, or by the usages of the corporation, but also includes such powers as are incident to his general duties and express authority. To him is intrusted, as the representative of the corporation, the general management and supervision of the running and operation of the road, and it is his general duty to take care that it is kept in safe condition. In the discharge of this duty he may adopt any legitimate mode, and employ any means which are usually deemed effectual and proper to protect the road against obstructions. As we have shown that railroad corporations have the implied power to offer a general reward for the detection, apprehension, and bringing to justice of persons obstructing the road, such authority is incident to the business and duties of the superintendent, and to the purposes of his department; consequently within the scope of his agency. *Railway Co. v. Rodrigues*, 47 Ill. 188.

The objection to the introduction in evidence of the circular is founded on the further ground that the offer of the reward is, on its face, the personal obligation of the superintendent, and on the absence of evidence showing that it was intended to bind the defendants. The general rule undoubtedly is that when a contract is made by an agent, in order to bind the principal, it should be made in his name and purport to be his contract. An exception to the general rule is, when an agent has incidental authority to make contracts in relation to his usual and general employment, both he and the principal may be personally responsible, though the contract may be made in the name of the agent, and that the true character of the transaction may be shown by parol evidence. *McTyer v. Steele*, 26 Ala. 487. It is true, no attempt was made to show, by extrinsic evidence, that the offer was intended to be the personal engagement of the defendants, and the mere affix of the abbreviation of superintendent to his signature does not, *prima facie*, impose a personal liability on them. But the form and manner of the signature are not conclusive. The offer itself furnishes its own interpretation. It purports by the heading to be made in the names of both defendants, and is in relation to and connected with their property and business. In such case, the signature of Kline as superintendent must be regarded as the signature of the corporations by him. In form and terms the offer is the joint and several contract of the defendants. *Collins v. Hammock*, 59 Ala. 448.

For the purpose of showing that the offer was made by Kline as superintendent, the plaintiff was allowed to prove, against the objection of the defendants, that he wrote a letter to Kline, without stating its contents, which was sent by mail, addressed to him at Macon, Ga., his place of residence and business. A few days thereafter he received by mail the printed circular, inclosed in an envelope, post-marked Macon, Ga., on which were printed the words, "Official Business, Office of Superintendent," and the names and description of defendants as they appear in the circular; and also that after the arrests, in an interview with Kline, the plaintiff stated that he wished one

Mulloy, who was in the employ of one of the defendants, as a witness at the trial of the accused persons, who Kline promised should be present, and that he was present at two terms of the court. That Kline was superintendent of the south-western division of the Central Railroad & Banking Company, and of the Montgomery & Eufaula Railway Company, which was part and parcel of the former, were admitted facts. His name, as affixed to the circular, was printed, which rendered the positive proof of his signature impracticable, and resort to circumstantial evidence compulsory. The printed circular having been sent by mail, in response to a letter directed to the superintendent, and in an official envelope addressed in the handwriting of his secretary, the presumption is, in the absence of rebutting evidence, that it was an official transaction. The facts and circumstances above stated were relevant and proper to be considered by the jury in determining the question whether the offer was made by the defendants through Kline as their superintendent.

When an act is done without authority, under an assumed agency, it is the duty of the principal, if he would avoid personal responsibility therefor, to disavow and repudiate it in a reasonable time after information of the transaction. *Railway Co. v. Jay*, 65 Ala. 113. It would be unjust to permit plaintiff to expend his time, labor and skill in detecting, arresting, and procuring proof to convict on the faith of the offer of reward, and then allow defendants, if cognizant of the offer, to disavow the obligation after receiving the benefits, under the pretense of want of authority. On the question of ratification, the facts that the circulars were posted at various public places on the line of the railroad, by direction of an employee of the defendants, who was under the control of the superintendent, and remained posted for about three months, and until after the rendition of the service, were proper to go to the jury, as tending to show that the officers or agents of defendants were cognizant of the offer. *Kelsey v. National Bank*, 69 Pa. St. 426.

It is further insisted that the offer of the reward was prospective, and did not apply to the arrest, with proof to convict, of persons who had committed the offense previously to its date. While the offer may be largely preventive in its nature and purpose, prevention may be rendered as effectual by industrious efforts to bring to justice those who have already committed, as by causing the arrest and punishment of those who may thereafter commit, the offense. The words, "for the malicious obstructing of the track of these companies," were used to designate the special offense, and were not intended to confine the reward to the commission of future, to the exclusion of past, offenses. Its terms are broad enough to embrace both; but, if it should be limited to either, the reasonable construction would be in favor of its application to offenses committed, and not solely anticipative of future commissions. We discover nothing in the terms of the offer which authorizes the construction contended for by appellants. The rulings and charges of the court are in accord with the foregoing principles. Affirmed.

(34 Ala. 487)

**FRAZER et al. v. WESTERN UNION TEL. CO.**

(*Supreme Court of Alabama*. July 18, 1888.)

**TELEGRAPH COMPANIES—NEGLIGENCE—REMOTE DAMAGES.**

In an action against a telegraph company for negligence in transmitting to plaintiffs a telegram announcing a rise in the price of cotton, whereby plaintiffs sold their cotton for less than they could have obtained had they received the telegram promptly, it appeared that the sender was under no legal obligation to inform plaintiffs as to the price of cotton, and that plaintiffs did not rely on receiving information from him. Held, that the damages claimed were too remote to be recovered.<sup>1</sup>

<sup>1</sup> Where commission merchants neglect to sell cotton of their principal within a reasonable time after being instructed to sell, and it is destroyed by fire, the delay in selling is not the proximate cause of the loss; and, in the absence of fraud, such commission merchants are not liable therefor. *Lehman v. Pritchett*. (Ala.) ante, 801.

By "proximate cause" is intended an act which directly produced, or concurred di-

Appeal from circuit court, Bullock county; J. M. CARMICHAEL, Judge.

Action by Frazer & Co., a partnership consisting of Charles and Nathan Frazer, against the Western Union Telegraph Company, for the recovery of damages caused by the delay in delivering a telegram sent to plaintiffs by one S. T. Frazer, in consequence of which, it was alleged, they sold certain cotton at a less price than they would have sold it had said telegram been delivered within a reasonable time. It appeared on the trial that S. T. Frazer, a member of the general assembly of the state, then in session at Montgomery, had promised to keep plaintiffs informed as to changes in the cotton market, for which services he was to receive no compensation. There was conflict of testimony whether the telegram was delivered to the telegraph company at 8½ or 4½ o'clock P. M. It was received at a quarter of an hour after 5 o'clock P. M.,—10 or 15 minutes after plaintiffs had sold their cotton at 8½ cents per pound. Plaintiffs claimed that, had they received the telegram within a reasonable time after its delivery to the defendant, they could have sold the cotton for 8½ cents per pound. The contents of the telegram in question was a notification that cotton had advanced 18 points. There was a verdict and judgment for defendant. Plaintiffs appeal.

*Norman & Son*, for appellants. *Jones & Falkner* and *John G. Winter*, for appellee.

SOMERVILLE, J. The sending of the telegram by S. T. Frazer to the plaintiffs, Frazer & Co., by which was conveyed to them the intelligence as to the rise of cotton in Montgomery and other markets, was the volunteer act of one who was under no obligation to do it as an agent or otherwise. It was done as a mere favor, and seems to have had no proximate connection with the particular sale of cotton made by the plaintiffs on December 6, 1886, in which they sustained the loss now claimed by them as damages. It does not appear that plaintiffs expected or relied on this intelligence in shaping the terms and time of sale, nor that the failure to receive it exerted in fact any influence in inducing them to take the price for which they actually sold the cotton. The sending of the dispatch was, in other words, accidental in its nature, and not the outgrowth or product of any legal obligation assumed by the sender. The possession by the plaintiffs of the 140 bales of cotton on that day was accidental in its relations to the telegram, as was also the sale of the plaintiff's cotton. There was, legally speaking, no causal connection or relation between them. No damage can be recovered, based on the defendant's negligence, unless it be the natural and proximate consequence of the act complained of in the action. If the damage claimed cannot be reasonably supposed to have entered into the legal contemplation of the parties at the time of making the contract for the breach of which such damage is claimed, it is not recoverable. The application of this rule is fatal to the plaintiffs' case. The evidence does not tend to prove that the damages claimed by the plaintiffs could have been within the legal contemplation of the contracting parties at the time of sending the telegram in the delivery of which it is claimed there was negligence on the part of the defendant company. The general charge could well have been given for the defendant without hypothesis. The errors in the rulings of the court, therefore, if any, are errors without injury, and need not be considered. Affirmed.

rectly in producing, the injury. By "remote cause" is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Troy v. Railroad Co.*, (N. C.) 6 S. E. Rep. 77. The question of proximate cause, when the facts are disputed, is for the jury. When they are undisputed, the court may determine it. *Township v. Watson*, (Pa.) 9 Atl. Rep. 490. In general, on the subject of proximate and remote cause, see *Owens v. Railroad Co.*, (Mo.) 8 S. W. Rep. 350, and note; *Woodward v. Railway Co.*, (Wis.) 38 N. W. Rep. 347, and note.

(84 Ala. 451)

## FOSTER v. STATE.

(Supreme Court of Alabama. July 18, 1888.)

## 1. GAMING—PLAYING IN PUBLIC PLACES—WHAT CONSTITUTES AN INN.

A house at which transient guests as well as regular boarders are entertained is an inn, though not licensed, and a room therein, the only entrance to which is through the house, and which is let by the proprietress to a tenant who cooks and eats, as well as sleeps, there, is part of the inn, within the meaning of Code Ala. 1886, § 4052, which prohibits playing cards at a tavern, inn, or public place.

## 2. SAME—TRIAL—EVIDENCE.

Upon trial for playing cards in such a room, it need not be shown, in order to convict, that the playing was done in a public place.

Appeal from city court of Montgomery; THOMAS M. ABBINGTON, Judge.

Indictment of John Foster for playing cards at a tavern, inn, or public place. The defendant requested the following charges, which were refused: "(1) If the jury believe from the evidence that the playing of cards, or betting at cards, occurred in the room occupied at the time of the playing or betting, and for several years previous thereto, by Du Bose Bibb, as a bedroom, in which he lived and slept, and the evidence does not show beyond all reasonable doubt that people resorted there, then the said room would not be a public place, and the jury must acquit the defendant. (2) Unless the jury are satisfied from the evidence that the boarding-house of Mrs. Schoolcraft was a public house, was duly licensed by law, and that the traveling public was allowed at all times to resort thereto, that the room occupied by Du Bose Bibb was a part of that public house, and connected therewith, and that cards were played at such public place, then the jury must find the defendant not guilty." Defendant was found guilty, and appeals.

*Thos. N. McClellan, Atty. Gen., for the State.*

SOMERVILLE, J. The defendant is indicted for playing at a game with cards at a tavern, inn, public house, or outhouse where people resort, the indictment following the requirements of section 4052 of the Code of 1886. Code 1876, § 4207. The evidence, in our judgment, was sufficient to sustain a conviction for playing at a tavern or inn, and authorized the giving of the general affirmative charge, which was given by the court in favor of the state.

An inn is a house of entertainment for travelers, being synonymous in meaning with hotel or tavern. It was formerly defined to mean "a house where a traveler is furnished with everything which he has occasion for while upon his way." *Thompson v. Lacy*, 8 Barn. & Ald. 288; *People v. Jones*, 54 Barb. 811. But this definition has necessarily been modified by the progress of time, and the mutations in the customs of society and modes of travel in modern times. An inn, however, was always, and may now, when unlicensed, be distinguished from a boarding-house, the guest of which is under an express contract, at a certain rate, and for a specified time; the right of selecting the guest or boarder, and fixing full terms, being the chief characteristic of the boarding-house as distinguished from an inn, except as to inns or hotels specially licensed under the statute, where general contracts with guests are expressly authorized. Code, 1886, § 1824 *et seq.*; *Willard v. Reinhardt*, 2 E. D. Smith, 148; *McDaniels v. Robinson*, 62 Amer. Dec. 586, note. There is nothing inconsistent or unusual, however, in a house of public entertainment having a double character, being simultaneously a boarding-house and an inn. In respect to those who occupy rooms, and are entertained under special contract, it may be a boarding-house; and in respect to transient persons, who, without a stipulated contract, remain from day to day, it is an inn, tavern, or hotel. *Cromwell v. Stephens*, 2 Daly, 15, 24; *Chamberlain v. Masterson*, 26 Ala. 371. The house occupied by Mrs. Schoolcraft was clearly both an inn and boarding-house within the above definitions, partaking of a dual character in this particular. The playing was done in a room in the third story of

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this house, which had been rented from the proprietress by one Bibb by the year, and was occupied by him as a bedroom, in which he, having no family, prepared his meals, ate, and slept. There was no connection between said room and inn or boarding-house, except that it was part of the building occupied by Mrs. Schoolcraft, and the entrance to the room was through that to the boarding-house. Was the room a part of the inn so as to be brought within the prohibition of the statute directed against playing cards at an inn? It has been uniformly held in this state, where a house is public, as a store, and a bedroom in the same building is under the control of the proprietor of the building, the room, though used for private purposes, is *prima facie* within the prohibition of the statute as to playing at a public house, "unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the mere convenience or accommodation of the owner, his employes, or his customers, but it is occupied for some justifiable private purpose entirely disconnected from the business of the store, or the convenience of its customers." *Brown v. State*, 27 Ala. 47; *Huffman v. State*, 29 Ala. 40; *Arnold v. State*, Id. 46. Yet, when the playing is at a public house, inn, tavern, or any other of the places specially enumerated in the statute, no matter what secrecy may be observed in the playing, those who participate in the game will be held to be violators of the law, and subject to the penalty. *Windham v. State*, 26 Ala. 69; *Bythwood v. State*, 20 Ala. 47. So, when a case is embraced in the words of a statute, and clearly falls within the mischief intended to be remedied by it, such case will be construed to come within the prohibition of the statute, however penal its terms may be. *Huffman v. State*, 29 Ala. 40. The room in question was in the same building occupied as an inn, and was rented by the occupant from the proprietress of the inn. It must therefore be construed to be appurtenant to it, so as to be a part of it, within the prohibition of the statute. *Russell v. State*, 72 Ala. 222. There can be no difference between the case of a room in a hotel or inn engaged by the year, the month, the week, or the day, so far as the question before us is concerned. In the Elizabethan inns, travelers paid separately for their apartments, and for each meal. In modern times there are hotels kept on what is known as the "European Plan," where rooms may be engaged for a specified price and time, without meals or other accommodations. In fact the modern guest often rents his room from the inn or hotel proprietor, and takes his meals at a restaurant; or obtains his meals there, and his lodging elsewhere,—there being at this day any amount of diversity as to the contracts and relations of the various patrons to the building and business of the proprietor. As observed in a recent case, and as we have substantially said above, "as the customs of society change, and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes." *Carpenter v. Taylor*, 1 Hilt. 195. Any other construction of the statute would easily enable persons to evade its provisions by the most flimsy devices. The first charge requested by the defendant ignored the inquiry as to the room being appurtenant to the inn, and was properly refused. It erroneously assumed that no conviction could be had under the indictment unless the evidence showed the playing was done in a "public place." The house could be a hotel or inn, without being licensed under the statute, a fact which is excluded erroneously from the consideration of the jury by the second charge requested on the part of the defendant. *Lanter v. Youngblood*, 73 Ala. 587; Code 1886, § 1824 *et seq.* There was no error in refusing this instruction. Affirmed.

(35 Ala. 61)

**FRIEDMAN *et al.* v. McADORY.***(Supreme Court of Alabama. July 18, 1888.)***SPECIFIC PERFORMANCE—WHEN MAINTAINABLE.**

A bill for the specific performance of a contract to lease a building when completed cannot be maintained while the building is still in course of construction.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Bill by Friedman & Loveman against C. McAdory for the specific performance of a contract of lease. The contract was entered into August 26, 1886, and the building was to be completed and the lease to begin July 1, 1887. Some disagreement arising between the parties, defendant notified complainants that they could not have the house. Thereupon they began this suit May 30, 1887, while the building in question was still in course of construction. The chancellor dismissed the bill as prematurely brought, and complainants appeal.

*Martin & McEachin* and *R. H. Pearson*, for appellants. *Gillespy & Smyer* and *Ward & Head*, for appellees.

STONE, C. J. It is manifest that the present suit was prematurely brought, and the decree of the chancellor must be affirmed on that account. A bill for specific performance cannot be maintained until the complainant, alike by his averments and proof, shows himself entitled to have the agreement carried into effect. *Bradford v. Marbury*, 12 Ala. 520; *Grimball v. Patton*, 70 Ala. 626, 636; *Thompson v. Gordon*, 72 Ala. 455. We do not regard this as a ruling on the merits; and hence, if it is thought the complainant can compel the performance of the alleged agreement after the completion of the storehouse, the present ruling should not and will not prejudice his right to maintain such suit. Abstaining from any positive expression of opinion on the merits, we refer to *Linn v. McLean*, *ante*, 777. Affirmed.

(35 Ala. 123)

**BALTZELL v. MORITZ.***(Supreme Court of Alabama. July 18, 1888.)***1. SET-OFF AND COUNTER-CLAIM—WHEN ALLOWABLE—MEASURE OF DAMAGES.**

Plaintiff agreed to furnish defendant, a newspaper publisher, with partly printed papers, to be filled up by the latter, the printed matter so furnished to contain not more than three columns of advertisements. There was more than that amount of advertisements in the papers furnished; and defendant, when sued for their price, attempted to recoup damages for such excess of advertisements at the rate per column which he charged for advertising. Held, that the true measure of damage was the diminished value, if any, of the papers, and that, in the absence of proof thereof, defendant could recoup nothing.

**2. SAME—FAILURE TO ESTABLISH—IMPROPER CHARGES.**

When defendant entirely fails to establish by evidence a set-off pleaded by him, any error in the charge on that subject cannot prejudice him.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Action of *assumpsit* by Edward Moritz against Frank Baltzell. Plaintiff obtained judgment. Defendant appeals.

*M. N. Carlisle* and *J. N. Arrington*, for appellant.

STONE, C. J. The record before us shows the following state of facts: No question was raised on the justness of plaintiff's claim, considered by itself, but the same was conceded. The language of the bill of exceptions is that the "defendant in his testimony conceded he had got the goods therein charged, and did not deny its correctness." Neither did he claim that he had made any payments, other than those which had been allowed him. So, we may dismiss the plaintiff's side of the controversy with the statement that it was fully made out, and not controverted; in fact, was admitted. This might have

been charged on without hypothesis. 3 Brick. Dig. p. 109, § 44; *Hall v. Posey*, 79 Ala. 84. Baltzell was the publisher of a newspaper in Troy, Ala., and the indebtedness claimed by plaintiff was for partly printed papers furnished to him on his successive orders, to be filled up and supplied by Baltzell to his customers. One ground of defense was that Baltzell, by the terms of the contract, was to supply to the company from which he obtained the paper certain copies of his finished newspaper, for which he was to be paid an agreed price; that he had furnished the papers, and had not been paid for them. The record discloses no ruling of the court on this question, and hence nothing in relation to this phase of the case is presented for our consideration.

The only other defense relied on is presented as follows: There was testimony tending to show that under the stipulations of the contract to supply papers partly printed, not exceeding three columns of the printed matter so furnished was to be occupied by advertisements; and that in the printed matter actually furnished there was an average of more than three columns devoted to advertisements, inserted by the furnishing company. For this excess over the average of the three columns, the defendant claimed set-off or recoupment at the rate he charged for inserting advertisements, and he testified what that rate was. The bill of exceptions states that "there was no evidence in the case tending to show the difference in the value of the paper with more than three columns of advertisements, and the same paper with only three columns of advertisements;" and it asserts that it contains all the evidence. We may add, there was no testimony that the excess of advertisements injured either the value, the circulation, or the salableness of the newspapers. It is manifest that Baltzell's advertising rate furnished no criterion for estimating the amount of his set-off or recoupment. The advertisements occupied no blank space he had reserved to himself, and he bestowed neither labor nor expense on them. All he could claim for such breach of contract would be the injury he is able to prove he suffered therefrom; and, failing to make such proof, the jury were without rule or guide for allowing him damages, or even for finding that he had sustained any damage. Verdicts can rest only on testimony, aided sometimes by legal presumptions.

The testimony, not only uncontroverted, but admitted to be correct, fully made out plaintiff's case; while there was no testimony authorizing the jury to find anything in defendant's favor, on account of the excess of advertisements. It is thus affirmatively shown that no charge the court could have given on that question could have done him any appreciable injury. All the charges, given or refused, on which exceptions are reserved, relate to that feature of the defense; and, even if erroneous in any particular, which we do not assert, it was error without injury. *Hall v. Posey*, 79 Ala. 84. In what we have said above we have made no allusion to defendant's acquiescence in, and ratification of, the alleged breach of agreement by the furnishing company. The proof of this seems to be very full, and the evidence tending to show it is not controverted by the defendant himself. We need announce no ruling on this question. 1 Brick. Dig. p. 397, § 279. Affirmed.

(88 Ala. 178)

**BLOCK et al. v. GEORGE.**

(*Supreme Court of Alabama. December Term, 1887.*)

**1. EXEMPTION—DECLARATION—CONTESTING CLAIM BEFORE LEVY.**

Under Code Ala. 1876, § 3828, allowing any resident of the state to make a declaration of exemption, verified by oath, describing the land claimed as exempt, with the value thereof, the same to be filed in the office of the probate court, a declaration of exemption as to a debt contracted prior to the constitution of 1868, when land not exceeding \$500 was exempt, filed for record in 1877, which describes the land claimed as exempt as the undivided one-fifth of 860 acres, and the entire interest in 160 acres, and alleges that its value does not exceed \$2,000, is insufficient on

its face, as to debts contracted prior to 1868, because it exceeds in value the exemption then allowed, and, as to debts contracted thereafter, because it exceeds in quantity the exemption allowed; and is not a sufficient declaration to require the creditor to contest the validity of the claim before levying on the land.

2. **SAME—FILING DECLARATION WITH OFFICER—LEVY BEFORE CONTEST.**

Under Code Ala. §§ 2884, 2885, providing that, where no declaration of exemption has been filed in the probate court, the declaration provided for in section 2893 may be lodged with the levying officer, which the plaintiff must successfully contest before the property can be sold, a judgment creditor may levy a subsequent execution without first contesting the claim lodged with the levying officer on the first execution, as the decision of such claim determines the right of exemption only as it existed at the time the lien of execution attached.

Appeal from circuit court, Wilcox county; JOHN MOORE, Judge.

Motion by Robert D. George to set aside a sale of lands on execution against him in favor of D. H. Block. The lands were purchased by Solomon D. Block. From a judgment setting aside the sale the defendants to the motion bring this appeal.

*S. J. Cumming and J. N. Miller*, for appellants. *Howard & Beck*, for appellee.

CLOPTON, J. There are three classes of debts against which homestead exemption is allowed, the character and extent of the exemption being dependent on the time when the debt against which it is claimed was contracted,—whether prior to the constitution of 1868; or after it became operative, and before the act of April 23, 1873; or after the passage of the act. There are also two modes in which the exemption may be claimed; and a defendant in execution will be held to have waived his right if he knowingly permits his property to be levied on and sold without making a claim of exemption in one of the modes provided. *Martin v. Lile*, 63 Ala. 406. As one mode, the statute provides that “any resident of this state, entitled to and claiming such exemption, may at any time make a declaration, in writing, stating the property so selected and claimed as being exempted, and describing each piece or item of such property, with the value thereof, in such manner that the same may be known and identified with reasonable certainty, and verified by the oath of such party. Such declaration and claim must be filed for record in the office of the probate court of the county in which the property is situated.” Code 1876, § 2828. After the filing of such declaration and claim for record, no execution, attachment, or other process for debt shall be levied on such property, unless the plaintiff contest the validity of such claim, in whole or in part, by making affidavit; and, if it be proposed to levy on personal property, by giving bond, as required by section 3830. The appellee insists that he made and filed for record a declaration and claim of exemption in compliance with the statute, and that the sale of the lands should be set aside, inasmuch as the plaintiff in execution procured them to be levied on and sold without contesting the claim. In *Clark v. Spenoer*, 75 Ala. 49, it was held that, when a valid declaration and claim have been made and filed for record, the preliminary step of contestation should be taken; and that a levy and sale without inaugurating a contest are irregular, and the sale will be set aside on timely application by a proper party; and that a valid declaration and record of claim, though only applicable to debts contracted after April 23, 1873, are sufficient to require the preliminary step to contest, before the land can be levied on by execution for a debt contracted prior to the time the constitution of 1868 went into effect. There must, however, be a declaration and record of claim of exemption *prima facie* sufficient, as against one of the classes of debts; for the making and filing for record of the declaration and claim are, as to the creditors of the claimant, *prima facie* evidence of the correctness of such claim, and casts on the creditor the *onus* to show that it is incorrect. Code 1876, § 2831; *Abbott v. Gillespy*, 75 Ala. 180. The lands, the sale of which appellee moved to set aside, were sold under a *pluries* execution, is—

sued on a judgment rendered in April, 1869, for a debt contracted in 1866. On February 27, 1877, the defendant, who is appellee, made and filed for record in the office of the judge of probate a declaration in writing, claiming the lands as being exempted as against debts contracted before the constitution of 1868 became operative. The claim of exemption, having been made against a specific class of debts, distinguishes it from the claims heretofore considered by this court. By the statutes in force at the time the debt was created, "such real property as may be selected by the head of the family, to include the homestead, not to exceed three hundred and twenty acres, and in value not to exceed five hundred dollars," was exempt from levy and sale by any legal process. Rev. Code, § 2880. The mode, method, and remedy for asserting, ascertaining, and determining exemptions, when claimed in relation to debts contracted since April 23, 1873, are made applicable in cases of debts contracted before the constitution of 1868 became operative. Code 1876, § 2844. A claim of exemption, professedly and *eo nomine* against only one of the classes of debts, should be *prima facie* a valid claim against debts of such class. When a claimant of exemptions, as against debts contracted prior to the latter date, attempts to conform to section 2828, he should set forth, with reasonable certainty in his declaration and claim, the lands selected; being governed in quantity and quality by the law in force at the time of the creation of the debt. *Clark v. Spencer, supra*. In the declaration and claim filed for record by appellee, he claims as exempt an undivided fifth interest in designated lands, and also the lands sold, of which he is the sole owner; and states that his interest in all the lands described does not exceed \$2,000 in value, being fourfold the statutory value. Section 2828 requires the valuation to be stated in the declaration, in order that it may appear that the land selected does not exceed the legal limitation. Unless the declaration and claim describe the selected land "in such manner that the same may be known and identified with reasonable certainty," coming within the requirements both as to quantity and value, there is no *prima facie* correct and valid claim of exemption,—no such declaration and claim as call on the creditor to take the preliminary step to contest before he can procure a levy to be made. It states no facts which it is necessary he should deny, and shows on its face that the entire land selected and claimed is not exempt. The claim of exemption as made and recorded, even if no particular class of debts had been specified therein, is not *prima facie* valid against any one of the classes of debts. As to debts contracted before the constitution of 1868 became operative, it exceeds the limited value; and, as to debts contracted thereafter, it exceeds the limited quantity.

The other mode of asserting the exemption applies in cases where levy of execution or other process has been made, and no declaration and claim of exemption has been filed for record under section 2828. In such case, the claimant may assert his claim in writing, under oath, as provided in said section, which shall be lodged with the officer making the levy, and which the plaintiff must successfully contest before the property can be sold. Code, §§ 2834, 2835. An execution was issued on the judgment, December 14, 1876, and levied on all the lands described in the declaration filed for record, after the levy, and on the same day the declaration was filed. February 27, 1877, the appellee lodged with the sheriff a verified claim of exemption in writing. Notice of the claim having been given to the plaintiff, he filed, in May, 1877, an affidavit contesting it, after the expiration of the time allowed by law, and a second affidavit in June, 1881, without a new claim of exemption having been made. No issue was ever made up, and no further proceedings were had in the matter of the contest until November, 1881, when the circuit court, on motion of defendant, dismissed the contest for want of prosecution. Appellee further insists that these proceedings preclude the plaintiff to procure a levy and sale of the lands under the execution issued in September, 1884.

This raises for the first time the question whether, where land has been levied on under execution, and a claim of exemption lodged with the sheriff, none being recorded in the probate court, the judgment creditor can have a subsequent execution levied on the land without first contesting the previous claim lodged with the sheriff.

The contestation of a claim of exemption, it has been said, is essentially a suit, in which the plaintiff in the process is the actor, and of which the levy is the institution. The right of exemption being determinable on the state of facts existing when the lien attaches, the contest must be determined on the grounds as they existed at that time. Events subsequently occurring will not operate either to support or defeat the right of exemption. *McCrary v. Chase*, 71 Ala. 540; *Hines v. Duncan*, 79 Ala. 112. It follows that, had an issue been made up and judgment rendered thereon, it only would have been conclusive of the right to the exemption at the time the levy was made under the execution and the claim interposed. Certainly a dismissal of the contest, without issue and trial on the merits, cannot have any greater effect. After judgment on the contest in favor of the claimant, he may abandon his homestead by leasing it beyond the term permitted by the statute, or losing it otherwise, whereby it becomes subject to the payment of his debts; and in the absence of express declaration in the statute, or clear implication, it will not be intended that in such case the execution creditor is precluded to have the property levied on and sold. It may be said that under this construction a heartless judgment creditor can annoy an unfortunate debtor by the issue and levy of successive executions, imposing the burden to interpose as many successive claims. But the debtor is not necessarily subject to such annoyance and hardship. He may protect himself by making and filing for record a declaration and claim as provided in section 2828, after the making and filing of which the statute intervenes, and prohibits the levy of any execution, attachment, or other process, without the preliminary institution of a contest. No such effect is given to lodging a claim of exemptions with the officer after a levy has been made. The only effects are to suspend the sale under the execution levied, if there be a contest, until it is decided; and on a successful assertion of the right, or if the plaintiff declines to contest, a discharge of the levy. The claimant may elect in which mode to assert his right and claim to exemptions, receiving the benefits, and incurring the consequential burdens, of the mode elected. The claim of exemption which appellee lodged with the sheriff, though defective in material respects, was held sufficient, being amendable in the court from which the process issued, to put upon the plaintiff the duty of contestation. *Block v. Bragg*, 68 Ala. 291. And the judgment dismissing the contest was affirmed by this court. *Block v. George*, 70 Ala. 409. Such proceedings, and the judgment of dismissal, because of the failure of the plaintiff to prosecute, after having instituted the contest, may be regarded a *quasi* judicial admission of the right to the exemption at the time the claim was made. An insufficient claim of exemption filed in the office of the probate court furnishes, by itself, no ground for vacating the sale. *Sheffey v. Davis*, 60 Ala. 548. The sale should not have been set aside on the ground, merely, that defendant, in February, 1877, filed for record the declaration and claim shown by the record, in the absence of other evidence of irregularities, or of facts affecting the fairness and equity of the sale. A different result may follow, if it should appear, as to which the record is silent, that personal notice of the levy was not given as required by the statute, so as to afford defendant an opportunity to make a new or amended and sufficient claim of exemption. Reversed and remanded.

(85 Ala. 91)

**COLLIER *et al.* v. WOOD *et al.***

(Supreme Court of Alabama. July 19, 1883.)

**1. ASSIGNMENT FOR BENEFIT OF CREDITORS—MORTGAGE OF ENTIRE ESTATE.**

Under Code Ala. § 1737, a mortgage of all one's personal property and a crop to be grown during the year, being substantially all the debtor's property, to secure advances previously made by a certain creditor and other advances to be made to enable the debtor to produce the crop, is a general assignment, which will "inure to the benefit of all the creditors of the grantor equally," save as to such advances made and contracted for contemporaneously with its execution.<sup>1</sup>

**2. EXECUTION—LIEN—HOW LOST.**

An execution issued December 21, 1884, was returned April 8, 1885, and a mortgage of all the debtor's personal property was executed May 21, 1886. Code Ala. § 2894, provides that the lien of a *f. fa.* shall continue so long as the writ is regularly issued and delivered to the proper officer "without the lapse of an entire term." Held that, "an entire term" having elapsed before the execution of the mortgage, the lien of the execution was lost, and the issue of an *alias* execution in July following the execution of the mortgage will not restore the lien so as to give priority over the mortgage.

Appeal from chancery court, Pike county; JOHN A. FOSTER, Chancellor.

Suit in equity by Wood Bros. against G. C. Collier and Thomas H. Jones, as partners under the firm name of Collier & Jones, and E. Warrick, to have a mortgage declared a general assignment for benefit of creditors. The bill alleged that on the 9th day of May, 1884, the complainants obtained a judgment against the defendant E. Warrick on a promissory note containing a waiver of exemptions as to personal property; that execution was issued on this judgment, and returned "No property found," and that *alias* executions were continuously issued upon the said judgment in order to keep the same alive, the next to the last being returned on the 8th day of April, 1885; that the last execution issued July 23, 1886, which was also returned "No property found;" that on the 21st day of May, 1886, the said Warrick executed a mortgage to his co-defendants, Collier & Jones, conveying to them, as security for advances previously made and to be made to him, all his personal property and the crop to be grown by him during the year of 1886; and that at the time of the issuance of said last execution the defendants Collier & Jones had not advanced to Warrick anything near the amount of the consideration as stated in said mortgage. Upon these averments the complainants sought to have the mortgage declared a general assignment; and that an account be taken to find out the indebtedness of Warrick to Collier & Jones, and that the complainants be declared to have a right to a distribution of the assets of Warrick, as conveyed to Collier & Jones, and some of which were then in their hands. In their answer defendants showed that the consideration, as expressed in the mortgage, was for antecedent debts, for advances made during past years, and also to secure them in the advances they expected to make to Warrick during the year of 1886, to enable him to make a crop; and that the property conveyed in the mortgage was not more than enough, if, indeed, enough, to liquidate his indebtedness to them, and set out a statement showing this fact. Upon a final hearing, after reference to the register, the chancellor decreed that the mortgage be declared a general assignment; that the complainants were entitled to the relief prayed for; and that the execution in favor of the complainants was a lien on the property conveyed, which should prevail over the mortgage. From this decree defendants appealed. Code, Ala. § 1737, provides that "every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and inure to the benefit of all the creditors of the grantor equally; but this section shall not apply to or embrace mortgages given to se-

<sup>1</sup> See note at end of case.

cure a debt contracted contemporaneously with the execution of the mortgage and for the security of which the mortgage was given."

*M. N. Carlisle*, for appellants.

STONE, C. J. As to all the property then in actual existence, conveyed by Warrick's mortgage of May 21, 1886, and as to all the debt to Collier & Jones, save that part which was contracted simultaneously with the execution of the mortgage, we agree with the chancellor that the conveyance must be held a general assignment. Code 1886, § 1737. It is clearly shown, and without conflict, that the conveyance contains substantially all of Warrick's property, and it must "inure to the benefit of all the creditors of the grantor equally." *Holt v. Bancroft*, 30 Ala. 193; *Stetson v. Miller*, 36 Ala. 642; *Crawford v. Kirksey*, 55 Ala. 282; *Bromberg v. Heyer*, 69 Ala. 22, 74 Ala. 524; *Watts v. Bank*, 76 Ala. 474. In holding that Wood Bros. had a vital lien by virtue of their execution, which prevailed over the mortgage, the chancellor erred. Their latest execution, issued prior to the making of the mortgage, bore date December 21, 1884, and was returned April 8, 1885. This was more than 12 months before the mortgage bears date,—May 21, 1886. This caused a lapse of more than an entire term, and the lien was lost. Code 1886, § 2894, and authorities cited. The execution issued in July afterwards could not restore the lost lien. Under the principles declared above it becomes important to inquire what part of the debt to Collier & Jones was contracted contemporaneously with the execution of the mortgage; for as to such part the doctrine of general assignment does not apply. This will include everything purchased or received by Warrick at that time, and everything purchased and received by him subsequently, pursuant to the terms of the agreement then made. *Tison v. Association*, 57 Ala. 323; *Lovelace v. Webb*, 62 Ala. 271; *Collier v. Faulk*, 69 Ala. 58. Both the crops and the other property conveyed are subject in the first instance to Warrick's debt, contracted contemporaneously with the mortgage, and this will include advances afterwards made, pursuant to the mortgage agreement. After satisfying this part of the debt due to Collier & Jones, then any balance of the property mortgaged, including crops and everything else conveyed by the mortgage, inures equally to Collier & Jones and the complainants, *pari passu*, and to any and all other creditors in whose favor Warrick has waived his exemptions of personal property. Creditors not having waiver of exemptions, it would seem, have no recourse against exempt property, if claimed. *Shirley v. Teal*, 67 Ala. 449; *Danner v. Brewer*, 69 Ala. 191. Reversed and remanded.

#### NOTE.

CHATTEL MORTGAGE—WHAT CONSTITUTES—ASSIGNMENT FOR BENEFIT OF CREDITORS. A chattel mortgage covered substantially all the debtor's property, which was worth no more than its amount. The mortgagee was to take immediate possession by an agent, and proceed to dispose of the mortgaged goods, and apply the proceeds in payment of his debt. It appeared that the debtor honestly believed that the goods would be more than sufficient to cover the mortgage debt. Held, that the transaction could not be considered as virtually an assignment. *Van Patten v. Thompson*, (Iowa,) 84 N. W. Rep. 768. In Iowa, a debtor in failing circumstances may mortgage the whole of his property for the security of a portion of his creditors, even though the effect of the transaction is to defeat the collection of his unsecured debts. *White-Lead Co. v. Haas*, (Iowa,) 88 N. W. Rep. 667. See, also, note, and cases cited therein. A debtor has the right to prefer his creditors and pay or secure those preferred. The execution of chattel mortgages to preferred creditors, if made in good faith to secure *bona fide* debts, even if made to a considerable number of such creditors at or about the same time, no trust being created, will not constitute an assignment for the benefit of creditors if not so intended. *Davis v. Scott*, (Neb.) 84 N. W. Rep. 353. A mortgage or other conveyance of a portion of the property of an insolvent debtor, with the *bona fide* intention of securing one or more creditors, does not operate as a general assignment. *Bonns v. Carter*, (Neb.) 81 N. W. Rep. 381, and cases cited in note. As to what constitutes an assignment for benefit of creditors, and what a mortgage, see *Bank v. Noe*, (Tenn.) 5 S. W. Rep. 433; *Landauer v. Viotor*, (Wis.) 84 N. W. Rep. 220, and cases cited in note. See, also, *Hembree v. Blackburn*, (Or.) 19 Pac. Rep. 73.

(32 Ala. 274)

**MILLER *et al.* v. LOUISVILLE & N. R. Co.***(Supreme Court of Alabama. December Term, 1887.)***1. EQUITY—RESCUSSION—PRINCIPAL AND AGENT—PURCHASE BY AGENT.**

Plaintiff, in consideration of \$5,000, by power of attorney appointed M. its agent to sell certain lands at any time within 80 days, at a price not less than \$500,000. *Held*, that the contract was not one of option, but of agency, though in the event of sale the \$5,000 was to be applied on the purchase price; and that a bill to set aside a sale made by M., charging that the purchaser was a minor without property, which was known to M., and that M. was interested in the purchase, was good on demurrer.<sup>1</sup>

**2. SAME—PLEADING—TENDER BACK OF CONSIDERATION.**

The bill averred that plaintiff, immediately upon learning of the pretended sale, tendered back the money paid and notes given on account of the same, repudiated the sale, and notified M. and the purchaser that it would not comply with the contract. *Held*, that the bill need not offer to bring the money and notes into court, as it was only necessary that this be done before final relief granted.

**3. SAME—REFORMATION—PLEADING.**

A bill for reformation of a power of attorney, which seeks also to set aside a sale made thereunder because of defendant's alleged bad faith in making the same, need not aver a request to correct the mistake before filing the bill, as the court having jurisdiction to set aside the sale will administer complete relief.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Bill by the Louisville & Nashville Railroad Company against F. W. Miller and Richard E. Jones, Jr., to set aside a contract for the sale of lands to defendant Jones made by Miller as complainant's agent on the ground of fraud and collusion. It also sought to reform, on the ground of mistake, the power of attorney under which Miller acted in making the sale. The power of attorney was as follows: "Know all men by these presents, that for and in consideration of the sum of \$5,000, to the Louisville & Nashville Railroad Company, a corporation chartered by the state of Kentucky, in hand paid by F. W. Miller & Co., the receipt whereof is hereby acknowledged, the said Louisville & Nashville Railroad Company hereby makes, constitutes, and appoints them, the said F. W. Miller & Co., its true and lawful agents during the term of thirty days from the 18th December, 1886, for and in its name to sell, bargain, and dispose of, to such purchasers as they may procure, all the lands as per list attached,—namely, 44,080 acres in fee simple, 22,206 acres of mineral rights, and 400 acres of surface rights,—at a sum not less than \$500,000; payable in five equal annual payments, with six per cent. on deferred payments from date of deeds until paid. And the said Louisville & Nashville Railroad Company does make and declare this power irrevocable, until after the expiration of said term of thirty days from said 18th December, 1886. In testimony whereof," etc. The bill averred that, although the power was executed in favor of F. W. Miller & Co., F. W. Miller was the only person interested in it. It also averred that "by mistake and inadvertence" the instrument did not express the real contract between the parties, which was that one-fifth of the purchase money should be paid in cash, the \$5,000 paid to be a part of the cash payment, and the remainder in four equal annual installments with interest. The sale to Jones was made January 14, 1887, \$10 in cash being paid, and the purchaser's five notes for \$100,000 each, payable in one, two, three, four and five years, respectively, being given for the deferred payments. There was a demurrer to the bill, and from an order overruling the same defendants appeal.

*S. J. Cumming* and *B. L. Hibbard*, for appellants. *Hewitt, Walker & Porter* and *Martin & McEachin*, for appellee.

**STONE, C. J.** The Louisville & Nashville Railroad Company, by power of attorney bearing date December 16, 1886, empowered Miller & Co. to make

<sup>1</sup> See note at end of case.

sale of certain lands and mineral interests, at any time within 30 days, and "at a sum not less than five hundred thousand dollars." The contract, or power, whichever it may be termed, has an additional stipulation, which is unusual in such instruments. It contains no stipulation for compensation to the agents making the sale; but, if it were simply silent on this subject, the law would imply a promise to make reasonable payment for the services to be rendered. It is not silent. On the contrary, it recites a consideration of \$5,000 paid, or to be paid to the railroad company, for the 30-days privilege of making the sale. Options to buy, and options to sell, are sometimes bought and sold. To purchase, and at large price, the privilege of becoming the agent of another to make a sale, is certainly an anomaly. It is an anomaly, because the agent stands in a fiduciary relation to his principal, and is not permitted to be interested in the purchase, nor to make a profit on the transaction, beyond his reasonable compensation. 2 Add. Cont. § 924; *Adams v. Sayre*, 76 Ala. 509. In the present case, the agent was authorized to sell at not less than \$500,000; and he was to sell as agent. It was his duty to sell for as much more as he could obtain, and whatever sum he might realize above the fixed minimum of \$500,000 he was bound to account for to his principal. Other clauses of the instrument might be commented on, but we need not. Parties, however, if *sui juris*, may make their own contracts; and if they violate no principle of law, or of public morality, they must perform their contracts as they make them. It is our province to enforce, not to make, contracts for parties.

What we have to say in this case, will be confined to the case made by the bill. The bill charges that the alleged sale was to a minor, known to Miller to be such, and that the alleged purchaser had no property, which Miller also knew. It also charges that Miller was to have an interest in the purchase. Each of these charges, unexplained and un rebutted, implies bad faith and fraud on the part of Miller, and, *prima facie*, arms the railroad corporation with the right to disaffirm and annul the contract of sale. And Jones cannot claim to be an innocent, *bona fide* purchaser, if he allowed complainant's agent, with whom he made the contract, to acquire an interest with him in the purchase. True, the averments of the bill as to the nature and extent of the interest Miller was to have are not very specific, (see *Flouellen v. Crane*, 58 Ala. 627; *Chamberlain v. Dorrance*, 69 Ala. 40;) but we think them sufficient to uphold the equity of the bill, at this stage of the litigation. If deemed advisable, the charges can be made more specific.

Many of the grounds of demurrer complain that the complainant fails to tender the notes and money to the purchaser, and yet claims rescission. The bill avers that "on the 18th day of January, 1887, [the alleged sale was made January 14, 1887,] and immediately after it was known to orator that the said pretended sale had been made, orator tendered to said Miller the said money and notes, repudiated the said pretended and unauthorized contract of sale, and notified said Miller and said Jones that orator would not comply with such contract." This averment would probably have been more complete, if it had offered to bring the money into court, to abide any order the court might make, and to bring in the notes, to be restored to Jones, or to be canceled. But, at the present stage of the proceedings, we do not consider this omission fatal to the equity of the bill. Of course, the chancellor will not grant the relief prayed for, without requiring the complainant to do equity.

If reformation of the contract was the sole purpose for which the bill was filed, it would then become necessary to inquire whether Miller should not have been requested to correct the alleged mistake before filing the bill to have it corrected. *Robbins v. House Co.*, 74 Ala. 499. We have seen, above, however, that the bill rests on an independent equity,—the alleged bad faith of Miller, in which Jones is charged to have participated. Having jurisdiction for one purpose strictly equitable, the court will dispose of the whole controversy,

even though, in doing so, it may be called on to administer relief which pertains to courts of common law. Affirmed.

#### NOTE.

**PRINCIPAL AND AGENT—CONFIDENTIAL RELATIONS—PURCHASE OF TRUST PROPERTY BY AGENT.** A party will not be permitted to purchase property, and hold it for his own benefit, when he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. *King v. Remington*, (Minn.) 20 N. W. Rep. 352, and note. Where an agent takes title to property of his principal, of which he has charge of the latter, fraud is presumed, and, in order to maintain his title, the agent must show affirmatively that he has not abused the trust reposed in him. *Le Gendre v. Byrnes*, (N. J.) 14 Atl. Rep. 621; *Rochester v. Levering*, (Ind.) 4 N. E. Rep. 208, and note.

The owner of land, who had lived at a distance and had never seen it, left the general control of it for many years to an agent, who did everything necessary for its management and preservation, but did not have power to sell, the relation of intimacy and confidence existing. The agent, through correspondence, procured a sale for the benefit of himself and another, who had knowledge of the facts, without disclosing all the facts calculated to enhance the value. *Held*, that the relation was sufficient to charge the agent with full disclosure of all facts touching the land, and, not having done so, the vendor was entitled to have the sale rescinded, and the title declared to be held in trust for him. *Keith v. Kellam*, 35 Fed. Rep. 243.

Where an agent employed to purchase lands for his principal, and with the latter's money, upon the purchase thereof, takes the title thereto in his own name without the knowledge or consent of the principal, he will be adjudged to hold the title as trustee for the latter, and, if sold and transferred by him, the proceeds in his hands will be impressed with a similar trust, and the court will compel him to account therefor. *Kraemer v. Deustermann*, (Minn.) 85 N. W. Rep. 276, and note.

Plaintiff was the owner of certain real estate purchased of a corporation of which defendant was an officer and director. The corporation derived its title from certain heirs, but the purchase price had not all been paid. These heirs brought suit to compel payment or a sale of the land. Payment not being made, a sale was ordered. Defendant had assured plaintiff, when the action was begun, that the company would protect the rights of its grantees, and make their title good. At the sale defendant became the purchaser of the land, and then refused to confirm plaintiff's title. *Held*, that by his assurances to plaintiff defendant voluntarily assumed a confidential relation in the nature of a trustee, and as between the parties, the title to the property should be held in precisely the same situation it was when defendant assured plaintiff his rights should be protected. *Allen v. Jackson*, (Ill.) 13 N. E. Rep. 840. See, also, note.

(83 Ala. 542)

#### WESTERN UNION TEL. CO. v. WAY.

(*Supreme Court of Alabama*. December Term, 1887.)

##### 1. TELEGRAPH COMPANIES—LIMITATIONS ON LIABILITY—FAILURE TO TRANSMIT.

A stipulation limiting the liability of a telegraph company for mistakes or delays in the transmission or delivery, or for non-delivery to the next connecting telegraph company of any unrepeatd message, and exempting it from liability for errors in transmitting cipher or obscure messages, does not exempt or limit the company's liability for failure to transmit a cipher message from the receiving office.<sup>1</sup>

##### 2. SAME—LIMITATION ON PRESENTMENT OF CLAIM.

A stipulation exempting a telegraph company from liability in all cases when the claim is not presented within 60 days "after the sending of the message," does not apply to a claim for damages for failure to send the message from the receiving office.

##### 3. SAME—FAILURE TO TRANSMIT—CIPHER DISPATCHES.

A telegraph company, which negligently fails to send a message containing an acceptance of an offer to purchase cotton, whereby the bargain is lost is liable to the sender, in addition to the amount paid for transmission of the message, for damages caused by such loss, although the message was in cipher, and its contents uncommunicated to the company.<sup>2</sup> *SOMERVILLE, J.*, dissenting.

<sup>1</sup>A condition in a telegraph blank, relieving the company from liability for mistakes or delays in the transmission or delivery of unrepeatd messages, does not reasonably extend to failure to deliver after transmission. *Railroad Co. v. Miller*, (Tex.) 7 S. W. Rep. 658. See, on the general subject of the power of telegraph companies to limit their liability by contract, note to *Id.*; *Fowler v. Telegraph Co.*, (Me.) 15 Atl. Rep. 29, and note.

<sup>2</sup>It is no defense to an action against a telegraph company for failure to transmit and deliver a telegram, that such telegram was in cipher, provided it was plainly written.

## 4. SAME—SUNDAY CONTRACTS.

A message containing an acceptance of an offer to purchase cotton was delivered to the telegraph company for transmission on Saturday, and required to be delivered to the addressee in Germany on the following day. *Held*, that the contract was wholly completed on Saturday, and therefore not within Code Ala. § 2188, declaring contracts made on Sunday void, and that, in the absence of evidence, it would not be presumed that the Sunday delivery was prohibited by the laws of Germany.

## 5. SAME—ACTION—PLEADING—AMENDMENT.

A complaint for failure to deliver a message which alleges that it was a reply to an offer to buy 1,000 bales of cotton, which offer was in fact an acceptance of a previous proposition by plaintiff to sell 3,500 bales, is, under the Alabama statute relating to amendments, properly amended so as to aver a direct and positive offer to purchase 3,500 bales, though the amendment is made more than a year after the filing of the original petition, as such amendment does not introduce a new cause of action.

## 6. SAME—EVIDENCE—SECONDARY.

Delivery of a cablegram to the addressee by the company as coming from "Victoria," with proof that that was the cipher name of the addressee's correspondent at the place from which the message was sent, is *prima facie* sufficient to show as against the company that it was sent by such correspondent; and where the message delivered to the addressee has been lost or destroyed, and the one delivered for transmission is without the jurisdiction of the court, secondary evidence of their contents is admissible, whichever may be regarded as the original.<sup>1</sup>

## 7. SAME—STATEMENTS OF AGENT.

Statements of the agent of a telegraph company are not competent, as against the company, to prove that a message was not transmitted, when not made in performance of any duty relating to its transmission.

## 8. SAME—MEASURE OF DAMAGES—SENDER'S OWN ACTS.

Where the telegram which the company fails to send contains an acceptance of an offer to buy from plaintiff certain cotton, and also to purchase for his account certain contracts for future delivery, losses which would have been sustained on the latter purchases must be deducted from the amount of the damage from the loss of the contract to sell; nor can the plaintiff extend from month to month on a falling market his contract of sale, and recover the loss from the company; he must make an effort to sell.<sup>2</sup>

## 9. SAME—SPECIAL DAMAGES—UNCOMMUNICATED CIRCUMSTANCES.

Loss on account of future contracts carried over from the previous year, and on account of a purchase of cotton made by the sender a few days before receiving the offer, is not an element of recoverable damages, the special circumstances not having been communicated to the company.<sup>3</sup>

and the words therein are in the letters of the English language. *Telegraph Co. v. Hyer*, (Fla.) 1 South. Rep. 129. A request that a message, written partly in cipher, unintelligible to the operator, be sent promptly, so that it might, if possible, reach its destination "before the cotton market opened," does not make known to the operator the importance of the message, and of its speedy and accurate transmission, in terms sufficiently distinct to render the company liable for a short delay, in the absence of gross negligence on the part of the company and its servants. *Cannons v. Telegraph Co.*, (N. C.) 6 S. E. Rep. 731.

<sup>1</sup> Where one selects the telegraph as a medium through which to communicate a message, the telegraph company is his agent, and the message actually delivered would be the primary and best evidence, and, its loss being shown, secondary evidence is admissible. *Wilson v. Railroad Co.*, (Minn.) 18 N. W. Rep. 291. A transcribed copy of a telegraphic message is not admissible in evidence without proof of its authenticity. *Burt v. Railroad Co.*, *Id.* 289. Parol evidence of the contents of a telegram cannot be received until a sufficient excuse is shown for the non-production of the original dispatch. *McCormick v. Joseph*, (Ala.) 8 South. Rep. 796. For circumstances under which a copy of a telegram was admitted in evidence, see *Riordan v. Guggerty*, (Iowa,) 89 N. W. Rep. 107. On the general subject of what is necessary to render admissible secondary evidence of the contents of writings, see cases cited in note to *Riordan v. Guggerty*, *supra*.

<sup>2</sup> A telegraph company will be held for only nominal damages for delay in transmitting a message, where the only damages proved are the loss of an opportunity to make a speculative bargain. *Cannons v. Telegraph Co.*, (N. C.) 6 S. E. Rep. 731. Mere speculative damages are not recoverable in actions for the negligent transmission of telegraphic messages. *Telegraph Co. v. Crall*, (Kan.) 18 Pac. Rep. 719; *Telegraph Co. v. Hall*, 8 Sup. Ct. Rep. 577.

In an action against a telegraph company for negligence in transmitting to plaintiffs a telegram announcing a rise in the price of cotton, whereby plaintiffs sold their cotton for less than they could have obtained had they received the telegram promptly, it appeared that the sender was under no legal obligation to inform plaintiffs as to the price of cotton, and that plaintiffs did not rely on receiving information from him. *Held*,

## 10. SAME—SENDER'S EMBARRASSED CONDITION.

Evidence of the sender's embarrassed financial condition is not admissible as bearing on the question of damages for loss of the bargain.

## 11. SAME—MARKET PRICE—EVIDENCE.

In determining the question of damages for loss of a contract for the sale and delivery in Germany of cotton purchased in the United States, evidence of the price of cotton in Liverpool is inadmissible in the absence of evidence of an influencing relation between the markets.

## 12. SAME—EXTENT OF CONTRACT—PROVINCE OF JURY.

In reply to a proposition by letter to sell 8,500 to 5,000 bales of cotton on stated terms a cablegram was sent, "We offer firm for 1,000 bales," etc. In response the following cablegram was delivered by plaintiff for transmission, and lost, "Accept the offer. How much?" *Held*, that there was no question of ambiguity as to the amount contracted for in case the contract had been consummated to be submitted to the jury, and that they should have been instructed that the contract, had it been completed, would have been for the sale of 1,000 bales only.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Action by Charles H. Way against the Western Union Telegraph Company to recover damages for defendant's failure to transmit a message. There was a judgment for plaintiff, and defendant appeals. The message was delivered for transmission at Montgomery, Ala., in cipher, and was in these words: "Victoria, Bremen. Lurching prepotent;" which meant, "Johannes Roth, Bremen. Accept the offer. How much?" This message was a reply to a cipher message received from Roth on the same day, as follows: "Slowness, absentees, expenses, provided, pleasure, harbinger, November, New York, ponderable," which meant: "We offer firm for 1,000 bales, average middling, nothing under low middling, at 6½ d. cost, insurance and freight; and 6 per cent.; prompt shipment by steamer; price 1-32 d. more, September delivery; provided give us authority to buy, at yesterday's closing quotations, November, New York, for your account." The message was written on a printed blank, containing a stipulation that "all messages destined for points beyond the United States *via* the Atlantic cables to Cuba, which are received by this company for transmission, will be so received, and sent forward over its lines to the terminus thereof, and then delivered to the next connecting telegraph company only on the terms and conditions printed on the back hereof." The material printed conditions were that the company should not be liable for mistakes or delays in transmitting or delivering unrepeatable messages beyond the amount of their charges; and that the company should not be liable for mistakes in the transmission or delivery, or for non-delivery to the next connecting telegraph company, of any repeated message beyond fifty times the amount the company received from the sender; and that it should not be liable in any case for errors in cipher or obscure messages. It was also provided that the company should not be liable for damages unless the claim was presented in writing, within 60 days after the sending of the message. Plaintiff testified that on delivering the message for transmission he explained its contents to Winter, the agent of defendant, and that two days after, in a conversation with plaintiff, Winter remarked, "I am afraid Bremen has gone back on you." Afterwards, on plaintiff learning of the failure to transmit the message, he wrote to Winter, inquiring about the matter, and received a reply expressing regret for the failure, and saying that he could give no explanation in the absence of the clerk who received the message. The defendant specifies in all 63 assignments of error to the judgment against it.

*Gaylord B. Clark and Jones & Falkner*, for appellant. *Rier & Wiley*, for appellee.

that the damages claimed were too remote to be recovered. *Frazer v. Telegraph Co.*, (Ala.) 4 South. Rep. 881.

See further, as to the measure of damages in actions against telegraph companies for the negligent transmission of messages, *Harkness v. Telegraph Co.*, (Iowa,) 84 N. W. Rep. 811; *Telegraph Co. v. Landis*, (Pa.) 13 Atl. Rep. 467; *Telegraph Co. v. McKibben*, (Ind.) 14 N. E. Rep. 894.

CLOPTON, J. The appellee brings the suit to recover damages for the alleged negligent omission to forward a message addressed, "Victoria, Bremen," which he delivered at the office of the appellant in Montgomery, June 14, 1884, for transmission. The message was intended for Johannes Roth, who resides in Bremen, Germany, Victoria being a cipher used to represent his name; and was a responsive acceptance of an offer to buy cotton, made by a cablegram which plaintiff received from him on the same day. The grievance complained of is that, by reason of the negligence of the defendant's agents, the message was not forwarded, and plaintiff lost the benefit of the sale. The complaint, as originally filed, contained but one count. More than a year after the commencement of the suit it was amended by the addition of two other counts, to the first of which the defendant pleaded the statute of limitations, basing the defense on the ground that the count introduced a new cause of action. The original complaint alleges that Roth's offer was to buy 1,000 bales of cotton, but was intended to be, and was, in fact, an acceptance of a previous proposition made by plaintiff to sell 3,500 bales. The amendment avers a direct and positive offer to purchase 3,500 bales. The message in response and in acceptance of the offer, and the failure to forward which constitutes the causes of action, is substantially the same as set forth in both the original and amended complaint. The difference in the counts consists in the mere manner of stating Roth's proposal, which was the inducement to sending the message. There are also averments of other and additional special damages. The cablegram containing the offer does not enter into, nor constitute a part of, the real cause of action, and is only material as affecting the amount of recovery, not the right to recover. The amendment varies the descriptive allegations of matter alleged as inducement, but does not introduce new matter, or a cause of action not already in issue. It was allowable under our statute, and related to the commencement of the action. *Railroad Co. v. Arnold*, 80 Ala. 600, 2 South. Rep. 337.

2. The cablegram was delivered to plaintiff as coming from Victoria. Its delivery by defendant is the equivalent of an admission that Victoria was the sender; and, in connection with proof that Victoria is the cipher name of Roth, is *prima facie* sufficient to show, as against the defendant, that it was sent by him. The general rule that secondary evidence of the contents of a writing is inadmissible unless the absence of the original is accounted for, is applicable to cablegrams. It is immaterial in this case, which is considered the original,—the message delivered by the sender to the forwarding office, or the telegram delivered by the company to the sender at the point of destination. If the message delivered by Roth at the office in Bremen be the original, it is without the jurisdiction of the court; if the cablegram delivered to the plaintiff be regarded the original, the preliminary proof of loss was, *prima facie*, sufficient. In either case, the secondary evidence of the contents was properly admitted. *Whilden v. Bank*, 64 Ala. 1.

3. It is well settled that an agent has no power to bind his principal by admissions, unless they come within the scope of his authority, and are so proximate to the main fact in point of time as to be regarded a part of the "*res gesta*," serving to elucidate or explain the nature and character of the transaction. *Railroad Co. v. Hawk*, 72 Ala. 112. For the purpose of showing that the message was not forwarded, the plaintiff was permitted, against the objection of defendant, to testify to a conversation in reference thereto with Winter, an agent of defendant, and also to introduce a letter to Winter, and his reply. At the time of the conversation and of writing the letter, Winter was not in the performance of any duty relating to the transmission of the message, and had no authority to bind the defendant in the premises. They were merely narrations of a past transaction.

4. The lines operated by defendant do not extend to Bremen, and messages to be transmitted in that direction were delivered in Nova Scotia, to a con-

necting cable line. The defendant is not compelled by any duty to the public to receive for transmission, or to secure the transmission, of messages beyond its own lines; and, if such service be undertaken, may fix terms, conditions, and regulations, not contrary to law or public policy, on which it will receive and undertake to secure the transmission of cablegrams to points of destination in foreign countries. Cablegrams were required to be written on forms used by the company, on the back of which were printed the terms and conditions on which they would be received, sent forward on its lines to the terminus thereof, and there delivered to the next connecting company. The message delivered by plaintiff was written on one of these forms, and signed by him. Immediately preceding the message the following is printed: "Send the following message, subject to the terms and conditions printed on the back hereof, which are agreed to." Several of the pleas of the defendant are founded on these terms and conditions. Those set out in the pleas and specially relied on are that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery to the next connecting telegraph company, of any unrepeatd message, beyond the amount of the charge which may or shall accrue to the company; nor for errors in cipher or obscure messages; nor for damages in any case where the claim is not presented in writing, within 60 days after the sending of the message. A repetition of the message was not required or requested. It was in cipher; and a written claim for damages was not presented within 60 days after the failure of the company to forward it. It was never forwarded, but by some inadvertence was placed in the receptacle of messages sent, and was checked as such. It is contended that the reception of the message for transmission was matter of contract, the terms and conditions of which regulate the duty and measure the liability of defendant; and that, the company being in the performance of a duty voluntarily undertaken, and the negligence not being gross or willful, the terms and conditions exonerate the defendant from liability for damages beyond the amount of the charge. Many authorities are cited by counsel to sustain the reasonable character of these and similar terms and conditions, which, however, it is unnecessary for us to consider; for, if their reasonableness be conceded, before this arises another question, whether, on a proper construction, they govern and measure the liability of the company under the circumstances shown by the record in this case. A telegraph company is engaged in a public calling, exercises important rights and powers, and owes corresponding duties to the public. By the established doctrine of this state a carrier cannot stipulate for exemption from liability for negligence, whether gross, or willful, or otherwise. *Railroad Co. v. Johnston*, 75 Ala. 596. The same rule has also been applied to telegraph companies. *Sweatland v. Telegraph Co.*, 27 Iowa, 433. On well-settled principles, founded on public policy, a telegraph company cannot contract to be relieved from the exercise of due care and diligence in the transmission of telegrams to a point of destination over its own lines; and when it undertakes to secure the transmission of a message to a point of destination beyond the terminus thereof over connecting lines, the same rule applies as to transmission to the terminus of its own lines. A construction that the terms and conditions secure immunity from the consequences of the fault or neglect of the company's officers or agents, would condemn the contract as contrary to law, and deny it any force or effect. *Ayer v. Telegraph Co.*, 10 Atl. Rep. 495; Gray, Tel. § 49. Under the influence of the rule that, when a contract is reasonably susceptible of two constructions, one contrary, and the other agreeable to law, that construction should be adopted which will uphold the contract, and give it operation, we construe the terms and conditions as only an undertaking to exonerate the defendant from liability for errors which may be committed in the transmission of cipher or obscure messages, not caused by neglect, and for mistakes or delay in the transmission or delivery, or for the non-delivery

of unrepeatd messages, which may be caused by any of the disturbing or obstructing agencies to which transmission by electricity is subject,—generally, it may be said, in all cases where the negligence of the company is not the cause of the error, mistake, or delay, or non-delivery. They have no operation, and are inapplicable, when the message is never started from the receiving office in the course of transmission. A failure to start the message is not an error, mistake, or delay in its transmission or delivery, or a non-delivery, as employed in the terms and conditions, but is a breach of the entire contract. A stipulation that, when there is no effort to forward the message, the company should only be liable for repayment of the charge, would be, in effect, to release the company from all obligation to perform the contract, because released from all liability for an entire breach, tantamount to its rescission. *Birney v. Telegraph Co.*, 18 Md. 341; *Sprague v. Telegraph Co.*, 6 Daly, 200.

6. The limitation as to the time in which a claim for damages must be presented, is in the nature of a condition subsequent, the non-performance of which operates a forfeiture of all damages. A condition operating as a forfeiture, not being favored, will not be extended beyond the express or clearly implied terms. The terms and conditions do not contemplate that the company's agents would wholly fail to send a telegram in the regular and usual course of business, and do not provide, when there is no effort to forward the message, for immunity from damages by reason of omission to present the claim within the contractual period of limitation. By the express words of the contract the limitation does not commence to run until and from the time the message is started,—“after the sending of the message.” There can arise no implication from these words that it was meant and intended that the limitation should begin to run from any date prior to the sending of the message,—from the time it is received for transmission. It has no operation, unless there has been a partial performance by forwarding the message. When there is no attempt to start it, no effort to perform the contract, the right of action is not barred, unless the period prescribed by the statute of limitations has expired.

7. The next most important question relates to the measure of damages. It is manifest that, if the message was received and not forwarded, the plaintiff is entitled to recover at least the amount paid for its transmission. For this reason, if no other, the affirmative charge requested by the defendant was properly refused. But the material question is, what, beyond this charge, constitutes recoverable damages? It is insisted that the only damages recoverable are such as were in the contemplation of the parties at the time the contract was made; and that, the message being in cipher, and its purport and importance not having been communicated, no damages in excess of the charge paid could have been in their contemplation. Counsel claim that such is the import of the rule established in *Hadley v. Baxendale*, 9 Exch. 341, and cite many authorities to support their contention. That case was fully considered and reviewed in *Daugherty v. Telegraph Co.*, 75 Ala. 168. This decision is now assailed as unsupported by the weight of authority, and as not founded on reason and right. The contention is based on a misunderstanding of the rule intended to be declared in the *Hadley Case*, and of the effect of the ruling in the *Daugherty Case*. We do not understand the latter as intending to depart from the principle declared in the former, when properly understood and applied. That principle, as declared, was construed by this court in reference to the facts of the case and the questions involved, which called for the declaration of a rule applicable to recoverable damages arising from special circumstances. The principle, as thus construed, is that special circumstances which take the contract out of the usual course of things, must be communicated, in order to become an element of the duty in reference to which the parties are presumed to contract, and, if unknown, damages suf-

ferred by reason of the existence of such special circumstances are not recoverable; but that, in all cases, the damages which would naturally, generally, and proximately result from a breach of the contract, "according to the usual course of things," are recoverable. Whether or not actually contemplated by the parties, the law conclusively presumes them to have been in their contemplation. Such, as this court understands, is the proper construction to be placed on the words, "in the contemplation of both parties at the time they made the contract," as employed in the statement of recoverable damages in *Hadley v. Baxendale*. It is true, the opinion in *Daughtery's Case* criticised this phrase, so often used as generally expressive of recoverable damages, as inapt and misleading, subjecting the rule to misapplication; but beyond this criticism of the mere language no attack was made on *Hadley v. Baxendale*. The contention in *Daughtery's Case* was, as in this, that in respect to telegraph messages in cipher, the contents of which are not communicated, only the damages that were in the contemplation of the parties are recoverable. The ruling was that the liability of the telegraph company for damages does not depend on the knowledge the operator may have of the contents of the message. The argument sustains the conclusion, and relieves us of any necessity of a rediscussion. We adhere to the doctrine declared, and hold that, on the facts shown by the record, if the message was not sent, and the failure to send it was in consequence of the fault or neglect of the company's agents, as to which we intimate no opinion, the plaintiff is entitled to recover the damages which, according to the usual course of things, naturally grew out of such failure; but not damages arising from any special circumstances, the same not having been communicated.

9, 10. In estimating the damages, the contract with Roth, as it would have been made had the message of acceptance been delivered, must be regarded as an entirety. The plaintiff cannot accept a part of the contract, and claim its benefits, and reject another part, and avoid its burdens. The offer contained a condition that Roth should be authorized to purchase, for account of plaintiff, November contracts in New York, at the closing quotations of the day previous. It is undisputed that plaintiff would have sustained losses on such contracts. The net profits which would have been realized from the contract as an entirety, constitute the actual damages suffered by plaintiff. There is, however, a modification of this rule. As soon as he was informed the message had not been sent, it became the duty of plaintiff to take, within a reasonable time, steps to prevent further loss. If he had the cotton to deliver, or had arranged to procure it for delivery, he should have made an effort to sell it; and, if he made future contracts for its purchase, for the purpose of fulfilling his contract of sale, he was not authorized to extend them from month to month, on a declining market, and fasten the loss on defendant. *Daughtery v. Telegraph Co., supra*.

11, 12. Under the rule we have declared as regulating the measure of damages, the losses on account of the future contracts carried by plaintiff from the business of the previous season, and of the cotton bought from Clisby, cannot be regarded or estimated as elements of recoverable damages; and the evidence showing such losses was irrelevant. They are uncommunicated special circumstances. Neither was the evidence relevant which tended to show the embarrassed financial condition of plaintiff. It raised a remote collateral issue, on which neither the liability of the defendant, nor the proper ascertainment of the damages depends.

13. But, as data from which to ascertain the amount of damages, the court, on the evidence, submitted to the jury as an inference of fact, whether there was an arrangement between the parties by which the cablegram was understood to mean, and did mean, a purchase of 3,500 bales of cotton, and whether Roth would have been bound to accept that number of bales. The evidence on which the construction of the contract was thus left to the jury consists

of a previous correspondence between the parties by mail, the cablegram, and the message delivered by plaintiff at the office of defendant. It is as follows: In May, 1884, plaintiff received a letter from Roth, proposing to buy cotton, the contents of which are not made known. About the last of the same month, plaintiff wrote Roth, rejecting his offer, and proposing to sell him from 3,500 to 5,000 bales, if he would take the pence price in Europe and November contracts in New York on the day the trade is made as the basis. On June 14th, thereafter, Roth sent plaintiff a cablegram in cipher, which is translated as follows: "We offer firm for 1,000 bales average middling, nothing under low middling at 6-8 d. cost, insurance and freight, and six per cent., prompt shipment by steamer, price 1-32 of a penny more, September delivery, provided give us authority to buy, at yesterday's closing quotations, November, New York, for your account." In response the plaintiff delivered, for transmission to Roth, the following message: "Accept the offer. How much?" In view of the fact that the proposition of the plaintiff was to sell from 3,500 to 5,000 bales, the inquiry, "How much?" indicated that plaintiff did not understand the cablegram to be an offer to purchase any definite number. If the construction of the contract was properly submitted to the jury, and the cablegram can be reasonably construed as an acceptance of the previous proposition of plaintiff, no specific quantity of cotton was agreed on, and there was no operative sale. But was the construction of the contract properly submitted to the jury? When the legal effect and operation of a written instrument depends upon evidence of collateral facts *in pais*, the inference of fact may, and should be, submitted to the jury; but when the evidence consists wholly of writings, and the legal effect and operation solely depend upon the meaning and construction of the words employed, it is the province and duty of the court to construe written instruments, and declare their legal effect. *Boykin v. Bank*, 72 Ala. 262. The evidence on which the construction of the contract was submitted to the jury consists wholly of written instruments; being an offer of undisclosed terms to purchase, its rejection, accompanied by a counter-proposition to sell, which, without more, is followed by the cablegram, and the acceptance of the offer thereby made. There is nothing indeterminate or obscure; nothing for construction, or requiring the aid of extrinsic evidence. The cablegram varies the terms of plaintiff's proposition, not only as to the number of bales, but also as to the price at which the November contracts should be purchased; the proposition being that the basis should be the prices on the day the trade is made, and the cablegram being the closing quotations of the previous day. On no principle of legal construction can an offer to purchase a specified number of bales on specified terms be regarded an acceptance of a proposition to sell a larger and indefinite number on different terms. Had Roth's offer been accepted, he would not have been bound to take any number other than that stated in the cablegram. The court should have construed the writings, and instructed the jury that, had the contract been completed, it would have been for the sale of 1,000 bales, and no more.

14. The record does not make a case for the allowance of exemplary damages. The operator was not cognizant of the contents or importance of the message. The evidence does not tend to show that there was any negligence, wanton or willful, or so gross as to evince an entire want of care, and to raise the presumption of "a conscious indifference to consequences." *Lienkauf v. Morris*, 66 Ala. 406; *Railroad Co. v. Arnold*, *supra*. Under the circumstances disclosed by the evidence, the plaintiff is only entitled to a just compensation for the actual loss sustained, if the failure to send the message was the result of negligence. The actual loss is the profits which he would have made had the contract of sale been perfected. In order to determine the profits, the difference between the contract price and what it would have cost plaintiff to procure the cotton and deliver it in Bremen in time for the Sep-

tember delivery, must be first ascertained. From this difference must be deducted the amount of the losses which plaintiff would have sustained had the November contracts been purchased on the closing quotations of the day previous. The remainder, with the amount of the charge paid by plaintiff for the transmission of the message, with interest, is the measure of recoverable damages. On the other hand, if the completion and performance of the contract, regarded as an entirety, would have resulted in loss to the plaintiff,—that is, if the losses on the November contracts would have exceeded the gains on the sale to Roth,—he is not entitled to recover any damages, as growing out of the mere failure to complete the contract, other than nominal.

15. The cablegram purporting that plaintiff should procure the cotton in this country, for shipment to Bremen, evidence of the price of cotton in Liverpool is irrelevant, there being no proof of an influencing or regulating relation, or of a mutual dependence, between the markets; and all evidence relating to gains or losses should be excluded which does not tend to afford proper *data* from which to ascertain the actual gain or loss arising from the contract on the principles herein declared.

16. Evidence was introduced in reference to the character of the contracts. The defendant had the full benefit of defense of illegality on the trial. There being no evidence tending to show that there was to be no delivery of the cotton, we need not consider the sufficiency of the pleas based on the gambling character of the contract. We may observe, however, that the pleas do not aver any law of Germany, where performance was to be made, which declares such contracts illegal, and we are without presumption. *Castleman v. Jeffries*, 60 Ala. 380. And there is no immediate or dependent connection between the offer of Roth and the future contracts of purchase made previously to the offer. These, we have already said, are not to be regarded as elements of damage.

17. By usage, Roth was not bound by the acceptance of his offer, unless it was delivered to him within 24 hours after the receipt of the offer. It was delivered to the telegraph company for transmission late on Saturday, and, to come within the required time, the delivery to Roth would have been on Sunday. On this ground, the defendant contends that plaintiff's act, sending the telegram, is illegal, and therefore he could not have been legally damaged by the failure of the company to forward it. Ordinarily, a contract by telegraph is complete when a telegram of acceptance, the offer not having been withdrawn, is placed by the offeree with the telegraph company for transmission, the parties having adopted such mode of communication in making the contract. All that plaintiff could reasonably have done to complete the contract was done on Saturday. A delivery within the limited time would have related back, and constituted a complete contract from the time the telegram of acceptance was deposited in the Montgomery office. By statute, contracts made on Sunday, and not within the statutory exceptions, are void. Code, § 2138. The contract to transmit the message was wholly made on Saturday, and its validity is not destroyed or impaired by a condition that, in order to bind the offeree, it must be delivered within a limited time, though compliance therewith may require delivery in Bremen on Sunday. The mere delivery of a telegram on Sunday is not an act prohibited by either statutory or common law; and, in the absence of proof, we cannot presume that such delivery is prohibited by the laws of Germany. The condition that the acceptance must be delivered within a specified time is a condition in favor of the offeree, and may be waived by him. The defendant cannot set up that a compliance with the condition would necessitate a delivery on Sunday, to avoid the consequences of an entire breach of a valid and legal contract.

Other questions presented become, under the views we have taken of the case, unimportant and immaterial, and their consideration is unnecessary. Reversed and remanded.

SOMERVILLE, J., (*dissenting*.) I do not concur in the rule announced in the case of *Daugherty v. Telegraph Co.*, 75 Ala. 168, and affirmed in the foregoing opinion, relating to the proper measure of damages for neglecting to transmit or deliver cipher dispatches, or such as are wholly unintelligible to the agents of the telegraph company, upon whom the duty of transmission devolves. In my judgment, the rule which is best supported by reason, which more fairly comports with the ends of justice, and is sustained by the overwhelming weight of authority, limits the measure of damages in such cases to such as are nominal, or, at most, the price paid for sending the message. With due deference for the opinion of my associates, it seems to me that this is the necessary and logical result of the rule declared in *Hadley v. Baxendale*, 9 Exch. 341, 23 Law J. Exch. 179, which comes to us with the enlightened sanction of the civil law, and is now so firmly incorporated into our common-law system of jurisprudence, as no longer to be doubted, or even modified in the accepted interpretation which has, almost with one voice, been imputed to it by the most learned law-writers and eminent jurists of the present century. This rule has been universally accepted to mean that liability for damages, in cases of mere breach of contract, must have some necessary relation to what may naturally be expected to follow its violation, or to such results as may be fairly supposed, in the eye of the law, to have entered into the contemplation of the parties when they made the contract. The knowledge which is the basis of this liability, and which imputes notice of the object of the contract, can be derived only in one of two ways: (1) From the face of the message itself; or (2) from extrinsic information imparted by the sender. Unintelligible or cipher messages give no clue as to the special damage that may result from negligence in transmitting them, and afford no ground for the company to suppose that any loss other than nominal can follow from a failure to send them. The wisdom and justice of the rule is nowhere better illustrated than in the transmission of such dispatches. When the sender elects to studiously conceal from the operator the contents or nature of the message, he thereby deliberately puts the telegraph company in the darkness of ignorance as to the character of the duty imposed upon it, or the magnitude of its liability. The company cannot know, therefore, whether the breach of the obligation will probably be followed by a hundred, or a hundred thousand dollars damages. This is both unreasonable and unjust, for the reason that telegraph companies are not common carriers, or insurers, but their liability, like that of ordinary bailees, is based upon the degree of care or negligence exercised by them in the discharge of their duties. The care and diligence must, then, upon every well-settled principle of our jurisprudence, be in proportion to the duty in hand, varying according to the magnitude and nature of the subject-matter of the bailment. *Birney v. Telegraph Co.*, 18 Md. 341; 81 Amer. Dec. 607, 614, note. Nothing is more important or just, in this view of the subject, than that the law should require the sender at his hazard to disclose the meaning or nature of the message, in order that the company may observe such precautions as may be necessary to guard itself against the risk incident to the duty to be performed. *Telegraph Co. v. Gilderslove*, 29 Md. 232, 96 Amer. Dec. 519. The contrary rule, moreover, opens wide the door for the perpetration of unlimited frauds and perjuries; especially where, as now under the statutes of this state, parties to suits are permitted to testify without regard to the degree of interest they may have in the results of the pending litigation. The policy of the rule adopted in *Daugherty's Case* would seem, therefore, to be most pernicious in its tendencies.

In addition to these considerations, the rule allowing only nominal damages in cases of this kind is sustained, as I have said, by the overwhelming weight of authority in this country, as well as in England. I am opposed to any departure from this salutary and settled rule, based, as I believe it to be, upon the broad foundations of justice, fair dealing, and sound public policy. I need

but refer to the following authorities in support of these views: *Baldwin v. Telegraph Co.*, 45 N. Y. 744, 6 Amer. Rep. 165; *Allen*, Tel. Cas. 613; *Landsberger v. Telegraph Co.*, 32 Barb. 530; *Daniel v. Telegraph Co.*, 61 Tex. 452, 48 Amer. Rep. 305; *Telegraph Co. v. Gildersleepe*, 96 Amer. Dec. 519; *Bank v. Telegraph Co.*, 30 Ohio St. 555, 27 Amer. Rep. 486; *Stevenson v. Telegraph Co.*, 16 U. C. Q. B. 530; *Gray*, Tel. (1885,) §§ 87-97; *Telegraph Co. v. Martin*, 9 Bradw. 587; 3 Suth. Dam. 298-300; *Wood's Mayne*, Dam. § 35 *et seq.*; *Sanders v. Stuart*, 45 Law J. C. P. 682, 17 Moak, Eng. Rep. 286; *Beaupre v. Telegraph Co.*, 21 Minn. 155; *Mackay v. Telegraph Co.*, 16 Nev. 222; *Candee v. Telegraph Co.*, 34 Wis. 471, 17 Amer. Rep. 452; *Camp v. Telegraph Co.*, 71 Amer. Dec. 472, note; 1 Sedg. Dam. (7th Ed.) 228, note; *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577. The only other courts of last resort that have taken an opposite view touching this subject of liability for cipher dispatches, so far as I have been able to discover, are those of Virginia and Florida, and these decisions are by divided courts. *Telegraph Co. v. Reynolds*, 77 Va. 178, 46 Amer. Rep. 716; *Telegraph Co. v. Hyer*, 1 South. Rep. 129.

(24 Fla. 378)

*Ex parte* BRYANT.

(*Supreme Court of Florida*. August 11, 1888.)

1. FINES—COMMITMENT TO ENFORCE—WHAT CONSTITUTES PENALTY.  
In a case of larceny, where the convict is sentenced to pay a fine, with directions for commitment to custody until it is paid, the fine is the penalty, and the commitment only a process for enforcing the payment thereof.
2. CONSTITUTIONAL LAW—"INDEFINITE IMPRISONMENT"—COMMITMENT TO ENFORCE FINE.  
A sentence to pay a fine, and that the "sheriff do keep you in custody until the judgment of the court is complied with," is not in itself a violation of section 8 of the bill of rights of this state in regard to "indefinite imprisonment." The sentence with award of process does not necessarily create any imprisonment; and neither the award nor a holding under it can be said to create indefinite imprisonment, in the absence of circumstances shown making it so.

(*Syllabus by the Court*.)

Petition by Lott Bryant for writ of *habeas corpus*.

*John S. Beard*, for petitioner. *The Attorney General*, for the State.

MAXWELL, C. J. At the fall term of the circuit court for Leon county, Lott Bryant was convicted of larceny. The sentence was, "that you, Lott Bryant, for your said offense, do forfeit and pay to the state of Florida the sum of two hundred dollars, and that you pay the costs of this prosecution, including a fee of ten dollars to the state's attorney, to be taxed by the clerk; and that the sheriff do keep you in custody until the judgment of this court is complied with." Thereupon he was taken to jail. He now files a petition in this court, representing that he is "illegally held and detained in the common jail of said county by the sheriff, upon and by virtue of a commitment issued upon said judgment and sentence, which sentence [he] submits is void, as being contrary to and in violation of section 8 of the bill of rights of the state of Florida," and praying for writ of *habeas corpus*, which was granted. The sheriff makes return that he holds petitioner by virtue of the commitment aforesaid.

Is the sentence void for the reason alleged? The section 8 referred to is this: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment, or *indefinite imprisonment* be allowed, nor shall witnesses be unreasonably detained." It is contended that the sentence, in case the fine is not paid, amounts to perpetual imprisonment, and that this is in conflict with the protection allowed by the clause italicized. This view rests upon the assumption that in committing the prisoner to custody until he paid the fine, that was a part of the penalty imposed. But such assumption is not well founded. The penalty, or the punishment adjudged, was the

fine; the custody adjudged was the mode of executing the sentence,—that is, of enforcing the payment of the fine. This is in accordance with the rule of the common law, under which a sentence in larceny to pay a fine was accompanied, as in the present case, with an order of commitment until the payment was made. Bish. Crim. Proc. §§ 1132, 1135; *Davis v. State*, 22 Ga. 101; *Hill v. State*, 2 Yerg. 248. The commitment might be to the sheriff, or generally until payment of the fine. *King v. Bethel*, 5 Mod. 21. We are cited to *Howard v. People*, 3 Mich. 207, and to *Gurney v. Tufts*, 37 Me. 130, for authorities sustaining a different rule. In the latter case imprisonment was ordered "until [the party] perform the sentence, or be otherwise discharged by due course of law." The court held this to be illegal, because the statute applicable to the case only authorized a sentence that the party "stand committed for thirty days in default of payment." This was a case, therefore, in which there could be no general commitment, the court being restrained by special statute. The Michigan case is different. It does hold a doctrine in conflict with that of all the other authorities we have seen, but professes to base it on certain statutes, which, so far as we can see, do not call for the decision given. We cannot follow this in opposition to the well-established rule of the common law. What, then, is meant when it is said "indefinite imprisonment" shall not be allowed? If it be doubtful whether it relates alone to the penalty awarded, and not also, as in a case of larceny where a fine is imposed, to the imprisonment under the process to enforce the penalty, still, in the case before us, we do not see that the sentence of the court violates the prohibition. A *capias* is the writ which our statute provides for the execution of the sentence. Section 8, McCl. Dig. 294, reads: "Whenever any person shall be adjudged to pay \* \* \* fines, forfeitures, fees, or costs, a *capias* may be issued against the body of the person adjudged to pay, and the said *capias* shall have, in addition, the force and effect of a *fiert facias*," etc. The sentence to pay a fine, with award of process, does not necessarily create any imprisonment. The effect of the clause complained of in the sentence is nothing more than an award of the process, and the mere fact that the petitioner is held under such process is not a case of indefinite imprisonment. The sentence does not, of itself, impose an indefinite imprisonment; nor are any circumstances creating such an imprisonment shown to exist in the case made by the petitioner. He merely shows that he is held under the proper writ for enforcing the payment of a fine. The petitioner will be remanded.

(26 Fla. 267)

### MCKINNEY *et al.* v. BOARD OF COMMISSIONERS.

(Supreme Court of Florida. August 9, 1888.)

#### 1. INJUNCTION—PROCEDURE—WHEN DENIED.

On an application for an injunction the chancellor may consider the merits of the bill, and should deny the writ if the case made by it does not entitle the complainant to an injunction.

#### 2. SAME—ALLEGATIONS OF BILL—AMENDMENT.

Where a bill not only fails to allege matter material to the right to a preliminary injunction, but also makes a showing indicating that such matter does not exist, the complainant cannot, on an application for such injunction, avail himself of the showing made by the answer of the existence of such matter without amending his bill.

#### 3. ELECTIONS AND VOTERS—INJUNCTION TO RESTRAIN ELECTION—PLEADING.

Where a bill seeks to enjoin county commissioners from holding a county-site election, on the ground that a previous election, at which the county-site of the county was located, precludes the calling or holding the second election for a period defined by the statute regulating the subject, which period has not passed, the bill should show that the former election was legal, or such as to preclude the calling of the second one.

#### 4. SAME.

If the bill indicates that there was a jurisdictional defect in the proceedings of the commissioners in calling the former election, the injunction should be denied,

although the answer of the defendant may make a contrary showing. The complainant cannot avail himself of such showing made by the answer without first amending his bill.

**5. COUNTIES—COUNTY SEAT—LOCATION.**

A petition under the present county-site election statute, according to the settled construction given it, must, to give jurisdiction to the county commissioners to call an election for the location of the county-site, pray for a change of the location of the county-site. An order of the county commissioners calling an election, and reciting that the petition upon which it is based prayed for an election "to locate the county-site," does not of itself show a jurisdictional petition, but indicates that the petition was fatally defective in not showing a desire for a change of location of the county-site. A further recital in the order, that it appeared to the satisfaction of the board that the petition was "regular and in conformity to the statute," does not change the effect of the previous recital.

**6. SAME—SUFFICIENCY OF PETITION.**

Allegations in a bill of complaint that a petition presented to a board of county commissioners under the county-site election statute for the second of the above elections was fraudulent and void, in that it contained signatures not affixed thereto by the voters themselves, or in their presence by any authorized person, and that many of the names signed to the petition were not the same as the names of the voters on the registration lists, who were counted as having signed such petition by the county commissioners in ascertaining that one-third of the registered voters had signed the same, do not show that the petition did not have on it the requisite number of genuine signatures of legally registered voters, independent of those to which such objections apply; and, assuming that the questions involved in these objections have not been committed by the legislature to the investigation and judgment of the county commissioners, such allegations do not show that the petition was illegal.

**7. SAME—CONSTRUCTION OF STATUTE—PETITION.**

The statute regulating county-site elections does not preclude the use of several petitions signed by different registered voters. Several petitions in proper form, signed by, in the aggregate, "one-third of the registered voters" of the county, are a "petition" within the meaning of the statute.

**8. SAME—ELECTION FOR COUNTY SEAT—INJUNCTION.**

An injunction should not be granted to restrain the holding of a county-site election, when the day for holding such election has passed; nor is an injunction the proper remedy for correcting removal made by county officers pursuant to a county-site election.

(*Syllabus by the Court.*)

Appeal from circuit court, Bradford county; JAMES M. BAKER, Judge.

Action by Matthew L. McKinney and others against the county commissioners of Bradford county for an injunction to restrain the holding of an election. On petition for rehearing. For former opinion, see 3 South. Rep. 887.

C. P. & J. C. Cooper, for appellants. *Bugg & Wills* and A. W. Cockrell & Son, for appellees.

**RANEY, J.** The complainants, who are appellants, allege in their bill filed July 21, 1887, that they are residents, tax-payers, and registered voters of Bradford county, and real-estate owners in or near the town of Lake Butler, the county-site; the residence and home of several of them being in said town, and the others residing within a few miles thereof.

That the county-site has been located, and the county records kept, at said town ever since the creation of the county, in 1858, as the county of New River, from which name a change to Bradford was afterwards made. The court-house and jail are located at said place, and owned by the county, and all the county offices are kept and suitably provided for there.

That on March 11, 1885, at a meeting of the board of county commissioners of the county, on a petition "presented to them by the requisite number of registered voters of said county, an election was ordered to locate the county-site of said county," and that the notice of such election was published according to law, and the election held at the different precincts of the county on May 5, 1885, in conformity to such order, and in accordance with the published notices, to locate the county-site. A copy of the order for the election is annexed to the bill as part thereof. It recites the presentation of a petition

"asking for an election to locate the county-site," and "it appearing to the satisfaction of the board that said petition is regular and in conformity with the statutes," and orders an election to be held at the different precincts in the county on the day stated, "to locate the county-site" of the county, and directs the publication of notice of the election in a newspaper published in the county.

That according to the returns of the election from the several precincts, which returns were canvassed by the county commissioners May 11, 1885, and according to such canvass, 1,277 votes were cast, of which votes Starke received 629 and Lake Butler 648, and the county commissioners declared Lake Butler to have been elected the county-site of said county, and made due entry of the same on their records. The entry is set out in the bill of complaint.

That notwithstanding such election was held with the result aforesaid, the present board of county commissioners have lately entertained a pretended petition for a change of location of the county-seat, and on July 5, 1887, ordered an election for such purpose, the same to take place on August 17, 1887, and have ordered the clerk to publish notice of such election in a newspaper published in the county, and that the clerk has published the notice, and a copy of the same is annexed to the bill.

That there is no statute by virtue of which the election proposed as aforesaid could be held, as the legislature has failed to provide a law to carry into effect section 4 of article 8 of the constitution, "even if they were not estopped by the action of the board had as aforesaid in May, 1885, and the statute then in existence and of force in such cases and under the general principles of law applicable to matters that ceased to be *in fieri* and are *res adjudicata*."

That under the act approved June 2, 1887, entitled "An act to provide for a general election, and for the return of elections," until a new registration is had of voters, as provided therein, and that no such registration has been had in such county, and no provision made to carry the act into effect in said county.

That the said second or pretended petition is fraudulent and illegal in that it contains signatures not affixed thereto by the voters themselves, or in their presence by any one authorized by them to do it, and many of the names signed to the petition are not the same as the names of the voters on the registration list, who were counted as signing such petition by the board of commissioners in ascertaining that one-third of the registered voters had signed the same, and in that it was not in the form of one petition signed by the requisite one-third of the voters, but was presented in several different petitions signed or purporting to be signed as aforesaid.

The prayer is for an injunction restraining the commissioners and clerk of the circuit court "from proceeding or continuing to publish said order or notice of election for locating the county-site of Bradford county, or for any purpose having in view the agitation of the question of the removal of said county-site, and from holding or ordering an election in said county for said purpose, and from doing any act by which such election may be held or recognized by them, and from receiving any return of such election, and from canvassing any votes cast thereat, and from declaring any result in the premises," and for further relief and subpoena.

On July 22, notice was served on the defendants to the effect that on August 2, 1887, an injunction "as prayed for in the bill" would be applied for.

The answer of the majority of the commissioners admits the allegations of the bill as to the residences, *status*, etc., of the complainants, and those as to Lake Butler having been the county-seat since the organization of the county, and as to the court-house, jail, and county offices.

It admits the election of May, 1885, with the result stated, but says that the prayer of the petition upon which this election was ordered was that the county-site be changed from Lake Butler to Starke, and not for a change of

the location of the county-site. A copy of the petition is annexed as a part of the answer. It is for "a change of the county-site from Lake Butler to Starke, and for the purpose of effecting such change in accordance with law in such cases made and provided that your honorable body call an election in the several precincts of the county on the 11th day of May, 1885."

As to the election of 1887, it says the prayer of the petition was for a change of location, but denies that the petition is fraudulent or illegal, and the other allegations in the last of the above paragraphs giving the statements of the bill, except that as to there being several petitions, and averring the presence of genuine signatures of more than one-third of the registered voters of the county affixed thereto by the registered voters themselves, or by their authority, and that the several petitions were identically alike.

We granted a rehearing in this case, because it seemed to us at the time of doing so that we might not have considered with sufficient care whether or not the rule it adopts would be applicable in case the election held in 1885 was valid, and precluded, as illegal and entirely beyond their power, any action whatever by the county commissioners, as to another election on the question of changing the location of the county-seat, until after the lapse of 10 years. Section 4, p. 321, McClell. Dig.; Adams, Eq. 212.

It seems to me now that, if the lapse of the time was a good reason for refusing to consider the cause on its merits, the form of our order should have been a dismissal of the appeal, instead of an affirmance of the order appealed from, and that to this extent there was technical error, yet, in view of the reservations in such order, not a substantial error, if such lapse of time is ground for a dismissal. Confessing, as I do, that doubts have upon further reflection arisen in my mind as to the correctness of a practice which would dismiss an appeal under the circumstances of this case, we have concluded to postpone, until it shall come before a full bench, the final determination of the practice to be followed in such cases, and to dispose of this case on other grounds.

On an application for an injunction, a chancellor may go into the merits as disclosed by the bill, and which are intrinsic and dependent upon its express allegations and charges. *City of Apalachicola v. Land Co.*, 9 Fla. 340. Again, relief cannot be granted for matters not charged in the bill. The complainant must stand on the case made by his bill, and cannot have advantage of material matter not put in issue by it, although such matters may be shown by other pleadings or the evidence. Story, Eq. Pl. §§ 257, 264; 1 Daniell, Ch. Pr. marg. pp. 326, 327, note 6, and marg. p. 361, note 1; *Land Co. v. Campbell*, 5 Fla. 560; *Pasco v. Gamble*, 15 Fla. 562. He may amend his bill, and incorporate such material matter in it. *Id.*

The bill in this case fails to show that the election of May, 1885, was ordered upon a petition asking for a change of the location of the county-site. It neither alleges expressly that such was the case, nor shows the fact by annexing a copy of the petition to it, or otherwise. It is true, it annexes a copy of the order for the election, but the recital of facts in this order is that the petition presented prayed for an election "to locate the county-site." If there was in the petition any prayer or expression of desire for a change of location of the county-site, the bill does not inform us of it. The doctrine of *Lanter v. Padgett*, 18 Fla. 842, relied upon by counsel for appellant, is decisive of the point that a petition praying for an election "to locate the county-site" is insufficient, and that an election ordered upon such a petition is void. The fact that the commissioners of 1888 were satisfied that such a petition was "regular and in conformity to the statutes," did not make it so, nor give jurisdiction to the board of county commissioners of the question of calling the election.

This bill, assailing, as it does, the action of the county commissioners in calling the election of 1887, on the ground that the effect of the election of

1885 was to render illegal and beyond their authority or powers any action in 1887, or before the lapse of 10 years, as to another county-site election, should have affirmatively shown the former election to have been such as to have the effect stated; but, instead of this, the bill, considered with reference to this feature of the case made by it, (and independent of the allegations as to the irregularities in the second election, none of which are of a jurisdictional character,) has made such a showing as indicates that the petition was in such form as to render invalid the election. Seeking, as it does, to show that the subsequent action was beyond their power in consequence of the former action, it should make it appear affirmatively that the former action was of the character to have this effect.

Considering the bill in the above aspect, we do not think it presented a case for an injunction. If, upon remanding this cause, it shall be that the county-site has not been removed, but the commissioners are about to remove it pursuant to an election held on 17th day of August, 1887, an amendment of the bill should be allowed. If, on the other hand, the election has been held and canvassed, and the county-site shall, when the amendment is applied for, have been actually removed, we do not think injunction will be the proper remedy for correcting such past acts, assuming them to have been illegal. *Smith v. Davis*, 22 Fla. 405, and cases cited; 1 High. Inj. § 23; and the former opinion in this case, 3 South. Rep. 887.

The objection made to the election of 1887, on the ground of absence of legislation to carry into effect section 4 of article 4 of the constitution, and that as to there having been no new registration under the act of June 2, 1887, and no provision made to carry such act into effect in Bradford county, we understand counsel for appellants to have abandoned on the hearing.

The other objections made to such election of 1887, which are set out in the paragraph immediately preceding that giving the prayer of the bill, are insufficient. That as to there being several different petitions, instead of one petition, does not invalidate the election. *Douglass v. County Com'rs*, 23 Fla. 419, 2 South. Rep. 776. We see no objection to having several petitions of the same kind, to be signed by different electors. Considered as a whole they are "a petition," and having several, instead of one, does not violate the meaning or spirit of the statute. Assuming that the other objections set up in said paragraph are not matters which the legislature has committed to the judgment of the county commissioners, it is still evident that the bill does not show that the persons or names to which such objections apply are sufficient to reduce the names on the petition to a number below the requisite "one-third of the registered voters" of the county; or, in other words, it is not shown that the petition did not also have on it the genuine signatures of legally registered voters to the number required by the statute. These allegations are altogether insufficient to justify an injunction. Their amendments will be governed by the same rule as is announced above as to an amendment of the first defect pointed out in the bill, according as the county-site shall or shall not have been removed.

The bill is therefore deficient, and the order appealed from is affirmed.

(40 La. Ann. 690)

MCCALL v. IRION *et al.*

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

**REPLEVIN—PETITORY ACTION—PLEADING—EXCEPTIONS.**

In a petitory action, exceptions filed by a defendant, the allegations of which, to be sustained, require the introduction of evidence of title upon which the exceptor must rely to maintain himself in the possession and ownership of the property, should be referred to the merits. A party in possession of immovable property by an apparent judicial title cannot force the plaintiff to a trial on an exception that

he must first bring a separate and distinct action to annul the judicial proceedings on which he relies for title. Such a proceeding affords the defendant alone an opportunity to offer his evidence of title.  
(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; THOMAS OVERTON, Judge. *E. N. Cullom, Jr.*, for appellant. *Thorpe & Peterman* and *A. B. Irion*, for appellees.

MCENERY, J. John Graham Wilson purchased, in 1857, from Sarah Akenhead, wife of John Akenhead, immovable property, situated in the parish of Avoyelles, one mile below Holmesville, containing some eighteen or nineteen hundred acres, being the undivided half of the Revelry plantation, for the price of \$60,000, payable in installments, the last for \$18,600, falling due 1st April, 1861. The notes were secured by mortgage and vendor's privilege. John G. Wilson failed to pay the last note. Sarah Akenhead died shortly after her sale of the property to Wilson. John G. Wilson confessed judgment on said note, with recognition of mortgage and vendor's privilege, in favor of George R. King, the executor of Mrs. Sarah Akenhead. Judgment was obtained on this confession, and it was made executory on the 31st October, 1886. Execution issued on the judgment, and the property described in the act of mortgage, the undivided half of Revelry plantation, was seized and sold at sheriff's sale, on the 5th day of January, 1887. Walter Akenhead and Sarah McMath were the last and highest bidders, and the property was adjudicated to them for the price of \$4,500. In his return on the execution, the sheriff stated that the purchasers had failed to comply with their bid. Walter Akenhead and Sarah McMath, however, entered into possession of the property. The sheriff's deed to them was never recorded until after the institution of this suit. Walter Akenhead died in 1879, and his portion of the property was sold at succession sale, and purchased by Henry M. Payne on the 22d day of November, 1879. Payne sold his portion to A. B. Irion, 24th day of February, 1881. Mrs. Elizabeth McMath's portion was seized and sold under a writ of *fi. fa.*, issued in execution of the judgment of *Gertrude B. Akenhead, Tutrix, v. William and Jessie McMath*, and was purchased by John Chaffe & Sons, who sold this property to Thomas D. Miller. A. B. Irion and Thomas D. Miller are the present possessors of the property acquired by John G. Wilson from Mrs. Sarah Akenhead. John G. Wilson died in the city of New Orleans in 1879. Mrs. Olivia McCall, the plaintiff, instituted this suit against A. B. Irion and Thomas D. Miller, the parties in possession of said property, and alleges in her petition that she is the sister and only legal heir of John G. Wilson; that her deceased brother was the owner of the property acquired by him from Sarah Akenhead until the day of his death, the 14th day of February, 1879. She alleges that he had never been divested of ownership of said property by legal process or conventional transfer, and that on or about the 5th day of January, 1867, Elizabeth McMath and Walter Akenhead, during the absence of her brother from the parish of Avoyelles, took possession of the undivided half of the property, known as the "Revelry Plantation;" and that they never acquired title to said property, or any portion thereof; and that, having no right or title to said property, they could not convey any legal title to said property; and that Alfred B. Irion and Thomas D. Miller are in possession of said property without legal right; and that they are possessors in bad faith. She prayed for judgment decreeing her to be the owner of said property, and for a money judgment against each of the defendants. The defendants Irion and Miller answered, and called their vendors in warranty, H. M. Payne, warrantor of A. B. Irion, and John Chaffe, Christopher Chaffe, and H. Chaffe, composing the firm of John Chaffe & Sons, the warrantors of Thomas D. Miller. The warrantors appeared, and excepted to the action. They allege that Walter Akenhead and Elizabeth McMath be-

came the purchasers of said property at a judicial sale, and obtained a regular sheriff's deed to the same, and that the plaintiff cannot ignore the judicial proceedings by which John G. Wilson was divested of his title and possession, nor can they contest said proceedings in any other way than by a direct action to annul and set them aside, and prayed for a dismissal of the suit. The plaintiff filed a motion to refer this exception to the merits. The motion was overruled. On the trial of the exception, judgment was rendered in favor of the warrantors. From this judgment the plaintiff has appealed.

The plaintiff's suit is a petitory action, founded upon the title which her brother John G. Wilson acquired by purchase from Sarah Akenhead, and with which she says he never parted by any legal process or conventional transfer. There is no allegation in the petition of the facts disclosed on the trial of the exception. The defendants and warrantors, on the trial of the exception, by documentary and oral evidence, set out the title upon which they, on a trial on the merits, would rely to be maintained in the possession and the ownership of the property. The plaintiff could not, on the trial of the exception, offer any evidence as to her title. The exception alleged matters which it required evidence to sustain, and of such a character as could only be considered on the trial of the case when at issue, and on the merits. The authorities referred to by appellees to support the position taken by them on the exception were all cases in which there was a trial on the merits, and do not sustain the position that before bringing this suit the plaintiff was required to bring a separate and distinct suit to set aside the judicial proceedings under which Walter Akenhead and Sarah McMath went into the alleged ownership and possession of the property. The judge *quo* erred in overruling the motion to refer the exceptions to the merits. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and this case be remanded to the lower court, to be proceeded with according to law, the appellees to pay costs of appeal.

FENNER, J., excused on the ground of affinity to warrantor Payne.

(40 La. Ann. 692)

GLAZE *et al.* v. DUBON, Sheriff, *et al.*

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

1. HUSBAND AND WIFE—GIFTS AND CONVEYANCES—DATION EN PAIEMENT.

A *dation en paiement* by a husband to his wife, whereby she assumes and agrees to pay debts of the husband to his vendors, is a contract not authorized, but prohibited by law, and does not pass the property from the former to the latter.<sup>1</sup>

2. SAME—INSEPARABLE CONTRACT.

A *dation en paiement* of property consisting of movables, and of an interest in real estate, for one and the same price, is indivisible, and must stand or fall as an entirety; but this is not the case where two distinct valuations have been put on each class of property.

3. CONTRACTS—RESCISSION—SEPARABLE COVENANTS.

An ostensible contract containing two agreements or covenants, one of which is reprobated and another which is sanctioned by law, each of which is complete in itself, may be maintained as to the latter, although rescinded as to the former, as either may be treated as an independent and disconnected transaction.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; E. D. ESTILETTE, Judge. Lewis & Bro., for appellants. Kenneth Baillie, for appellees.

<sup>1</sup>As to the validity of contracts between husband and wife, under the various statutes, see *Alexander v. Alexander*, (Va.) 7 S. E. Rep. 836, and note. Concerning the power of a married woman to bind herself for the payment of her husband's debts, see *Jones v. Holt*, (N. H.) 15 Atl. Rep. 215, and note.

BERMUDEZ, C. J. The plaintiff enjoins the sale of certain property seized by a judgment creditor of her husband, and charges that it belongs to her for having been given to her by him in payment of her claims against him. The property consists in movables, and in a two-third interest in certain real estate. The defense is that the *dation en paiement* is an absolute nullity, for the reason that the wife has, by the act, assumed anterior claims,—debts due by her husband,—and that such assumption is expressly prohibited by law. There was judgment annulling the *dation* as concerns the interest in the real property, but maintaining it as to the movables, as to which the injunction was perpetuated. There was a reserve made in favor of plaintiff for the assertion and vindication of what rights she may have by some other proceeding. The defendants pray for an amendment of the judgment by an allowance of damages sustained in consequence of the wrongful issuance of the injunction. The plaintiff also asks that damages be allowed her for the wrongful seizure of the property, which consists in her liability for counsel fees. The case was ably argued by counsel on both sides, and the reasons assigned in writing by the learned judge *a quo* show that it received at his hands an elaborate and thorough examination. The act of *dation en paiement* enumerates the items of liability of the husband to the wife, showing it to amount to \$4,751. It states that, in order to secure her against loss, he gives, assigns, sets over, and delivers unto her stock and farming utensils, and his two-third interest in certain real estate, that seized by the judgment creditor, and now claimed by the plaintiff. The price is credited with the sum of \$1,615; and the rest, \$2,900, due by the husband to the Tucker heirs, his vendors, is assumed by the wife, with the distinct statement that the same will be paid to them by her.

It is evident that this contract between a husband and a wife, not being authorized by law, comes within the ban of article 1790, Rev. Civil Code, which expressly prohibits all transactions between such parties, when the same are not formally sanctioned and legitimated. A long line of precedents establishes beyond dispute that the capacity of such parties to contract is restricted to the cases specially mentioned, and that it is immaterial whether the wife be or not separated in property from the husband. She is not, in any case, permitted to bind herself or her property, either with or for her husband, for debts due by him, whether before or after marriage. It is true that there are precedents from which it appears that the wife has been recognized the right of acquiring incumbered property, the amount secured by anterior mortgages or privileges being deducted from the purchase price; but there are also cases in which a different doctrine has been formally announced. All the authorities may well be reconciled by the simple distinction that a wife may acquire *cum onere*, without making herself personally liable, while she is not allowed to do so where she assumes to pay, as her own, the debt of her husband. The reason for this is obvious: that, in the first case, she retains the amount and takes the property with the privilege of surrendering it in the event of an hypothecary action or the like, without incurring any personal obligation, should it not realize sufficiently to satisfy the debt; and that, in the second case, that of assumption, not only would the property be liable to seizure and sale, for the payment of the debt, but, besides, would she, in case of deficiency, be personally responsible, and her separate estate subjected to the payment of the wanting amount? Hence the laborious effort of the plaintiff to establish that she did not assume, but acquired, *cum onere*. This is unavailing, as the fact is indisputable that she accepted the *dation* with the express understanding that she assumed the debt of her husband to his vendors, binding herself to pay it to them. The argument has no force that a married woman can legally accept a *dation en paiement* by her husband, even though she agrees to assume to pay a debt of his, secured on the property at the time of the contract between them, provided the transaction inures to her benefit. The dis-

inction might have had some weight, were the Spanish law which once prevailed here still in existence; but such is not the case. 61 Toro; *Herman v. Sprigg*, 7 Mart. (La.) 465. No reasoning has been offered or authority quoted to support the proposition. The contract must or not be valid at the date of its formation, and cannot be made to depend upon contingencies, particularly when the rights of third parties may be affected thereby. Were the contract between the husband and the wife in this case one between a third party and the wife, a question might well arise whether the wife could acquire such property for her own account, and whether it would not be a purchase for the benefit of the community. The spectacle would be presented of a wife, having no more than \$1,615 in cash, and no prospect of acquiring more, purchasing property for \$4,515; that is, incurring herself for twice the amount in hand. The law does not favor speculations of such a character by a married woman. It watches with as much solicitude over them and their property as it does over minors and their estate. *Bouligny v. Fortier*, 16 La. Ann. 215. The act of *dation* does not discriminate in the price, which is one for both the stock, the implements of husbandry, and the interest in the land, and, the transaction being a unit, cannot be legally divided. It cannot stand as an entirety, and must therefore be completely undone, and fall with the declaration that the property, which was the object of it, not having passed from the husband to the wife, was liable to seizure by the former's creditors. The *dation*, having been made in violation of a prohibitory law, is a nullity, and the arrested writ must be proceeded with. We think that the execution of a money judgment, having been arrested by the injunction, and the writ having been dissolved as wrongfully obtained, the seizing creditor is entitled to special damages for attorney's fees in obtaining the dissolution, which may be put down at \$150. It is therefore ordered and decreed that the judgment appealed from be reversed so far as it maintains the *dation* of the movables, and perpetuates the injunction as to them; and it is now ordered that said injunction be dissolved as to said movables. It is further ordered that said judgment be amended by allowing the defendant's seizing creditors the sum of \$150, and that, thus reformed and amended, said judgment be affirmed, with costs.

#### ON REHEARING.

The plaintiff complains that this court erred in not recognizing her title to the movables given to her in payment by her husband, and which were seized under the writ of the judgment creditor. In support of that complaint her counsels call our attention, for the first time, to the consideration which he admits not to have urged before, that in the *dation* the movables were valued at a price totally distinct from that fixed for the interest in the land. Verification establishes that, indeed, the movables, which were not incumbered, had been valued at \$1,075, while the land interest was appraised at \$4,515. A discrimination thus being legally possible, the *dation* is not an indivisible unit, and can well be severed. In other respects the plaintiff acquiesces in the correctness of the opinion delivered. It is therefore ordered that our previous decree, so far as it reverses the judgment of the lower court maintaining the *dation* of the movables, and perpetuates the injunction as to them, be set aside and considered unwritten; and it is now ordered that said judgment be affirmed, and that in other respects our said decree remain undisturbed.

(40 La. Ann. 669)

STATE v. WASHINGTON *et al.*

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

## 1. CRIMINAL LAW—SERVICE OF VENIRE LIST—NOL. PROS.—ARRAIGNMENT ON INFORMATION.

When a party is indicted, and notice of the *venire* list is served on him, and the indictment is afterwards *nolle pros'd*, and an information is filed against the accused at the same term of court, charging the same offense, it is not necessary to again serve a copy of the *venire* on the accused.

## 2. SAME—EVIDENCE—CONFESSIONS—ORDER OF INTRODUCTION.

When the accused has made several distinct confessions, at different times, the state cannot be required to prove that the first confession was obtained without threats, violence, or undue influence, before interrogating the witnesses as to the other confessions. The state cannot be controlled in the order of introducing these confessions in evidence.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; Cocco, Judge.

J. N. Ogden, Dist. Atty., and Jas. Andrews, Dist. Atty., 12th Dist., for appellee.

L. J. and J. H. Ducote, for appellants.

MOENERY, J. The accused were indicted by the grand jury of the parish of Avoyelles, under section 851, Rev. St., and were charged with burglary, with intent to commit rape. The accused were arraigned on said indictment, and the trial fixed for the 14th June, 1888. A copy of the indictment was served on them, and on the 7th day of June, also, was a list of the *venire* for that term of court. The district attorney, discovering some flaw in the indictment, filed an information against the accused under the same statute, charging the same offense. A copy of this information was served on the defendants on the same day, and was filed the 13th day of June. The case was called for trial on the 14th day of June, and the district attorney dismissed the prosecution under the indictment. The case was fixed for trial on the 16th day of June. The accused complain that they were entitled to the jury-list two days before the trial. The jury-list was served on them, as appears by the sheriff's return, on the 7th day of June. It was not necessary to again serve a copy of the *venire* on the filing of the information. The information was filed at the same term of court, for the same offense, and they had notice of the jury-list duly served, which had been summoned for the next term of court. The law was fully complied with. The accused had notice, two whole days, before they were tried, of the jury that was to pass upon their case.

2. There were several confessions made by the accused. The accused objected, on the trial, to the interrogations of the witnesses upon the several confessions, without the state first showing that the first confession had been proven, and had been made without force, violence, or threats. The first confession may have been obtained by improper means, while the others may have been made voluntarily. There is nothing to show but that all the confessions were voluntary.

3. It was a matter in the discretion of the district attorney as to the manner in which he should introduce the evidence, and as to which confession he should use as evidence on the trial. There is no force in the objection made by defendants. The accused, it appears from the record, had a fair and impartial trial, and there were no errors, on the trial, shown by the bills of exception. Judgment affirmed.

(85 Ala. 183)

**BAXLEY et al. v. SEGRIST.***(Supreme Court of Alabama. July 26, 1888.)***1. ATTACHMENT—WRONGFUL ATTACHMENT—GROUNDS FOR DIFFERENT FORM OF ATTACHMENT.**

A general attachment sued out by a landlord against the estate of his tenant, when none of the causes upon which such an attachment can issue, under Code Ala. 1886, §§ 2929, 2980, exist, cannot be justified on the ground that a cause existed for the issuance of an attachment to enforce the landlord's lien under section 8061.

**2. LANDLORD AND TENANT—LIEN—ENFORCEMENT—ATTACHMENT.**

An affidavit that the tenant "has removed a part of the crop grown on the rented premises," etc., will not justify an attachment to enforce the landlord's lien, under Code Ala. 1886, § 8061, authorizing such attachment, where the tenant has "removed from the premises" a part of the crop, without paying rent, and without the consent of his landlord.

Appeal from circuit court, Macon county.

Action on an attachment bond given on an attachment sued out by John H. Baxley against the estate of G. W. Segrist, who recovered judgment against Baxley and his sureties in the court below, from which judgment appeal is taken.

*W. F. Foster* and *W. D. Bulger*, for appellants. *Abercrombie & Bulbro*, for appellee.

CLOPTON, J. The appellant sued out an attachment against the estate of appellee under sections 2929, 2980, Code 1886. The ground upon which the attachment was issued is, as set forth in the preliminary affidavit, that appellee "has fraudulently disposed of some of his property." It is an ordinary original attachment, sued out for the collection of a debt, without reference to any relation between the parties other than creditor and debtor, and creating a lien on the property seized; which we shall term a "general attachment," for the purpose of distinguishing it from attachments authorized for the enforcement of existing specific liens, which, as has been said, may be regarded as exceptional. Appellee seeks by the action, the foundation of which is the attachment bond, to recover damages for the wrongful and vexatious suing out of the process. The defendants introduced as a defense evidence conducing to show, that the relation of landlord and tenant existed between the plaintiff and defendant in the attachment suit; that the latter was indebted to the former for advances; and had removed a part of the crop grown on the rented premises without paying plaintiff for the advances, and without his consent. Appellant's contention is that the existence of one of the statutory grounds, upon which a landlord may sue out an attachment for rent and advances is a full defense to an action on a bond given by the landlord to procure the issue of a general attachment, though neither of the causes which authorized the issue of such attachment may exist.

The general rule is unquestionable that, in an action on an attachment bond, the defense is not limited to proof of the particular ground stated in the affidavit, and that proof of any one of the several grounds prescribed by the statute, upon which the particular writ may be sued out, is a complete defense. The rule is rested on the principle that, as the grievance complained of is the wrongful or vexatious suing out of the attachment, no legal damage can be sustained, if any one of the causes existed which warranted a resort to such process. *Lookhart v. Woods*, 38 Ala. 681; *Kirksey v. Jones*, 7 Ala. 622. But the general rule has also been qualified and limited. In *Reynolds v. Culbreath*, 14 Ala. 581, which was an action on a bond executed upon suing out an original attachment, the defendants offered evidence tending to show that the plaintiff in the suit, at the time the attachment was sued out, was about to dispose of his property fraudulently, with intent to avoid payment of the debt. By the statute then in force the ground thus sought to be

v. 4so. nos. 25, 26—55

proved was one of the causes prescribed for which an ancillary, but not an original, attachment might issue. The circuit court ruled that such cause, if shown or proved, was not a defense to the action, but only went in mitigation of damages. After considering the general rule, it is said: "Conceding that the defendant was about to dispose of his property to avoid the payment of the plaintiff's debt, still the existence of such a state of things did not warrant an original attachment to issue, commanding its seizure. This being the case, the evidence adduced by the defendant, if available for any purpose, could not exert greater potency than was accorded to it by the circuit court." The principle is that, though the statute may authorize the issue of attachments of different kinds, and for distinct purposes, in different classes of cases, when resort is had to the process in one class it is wrongfully sued out if neither of the grounds prescribed by the statute on which the process may issue in the particular class exists, though a statutory cause for issuing the writ in some other class may be shown. The form, purposes, and effect of an ordinary general attachment and an exceptional attachment are entirely distinct. The former creates, the latter enforces, a lien; the former commands the seizure of the estate generally, the latter, of the particular property on which the lien exists. It is manifest that there may be legal damage resulting from the issue of an attachment commanding the seizure of property generally, and creating a lien thereon, which could not result from the seizure of particular property on which a lien has been previously created. In such case the reason of the general rule ceases. Had the defendant proved the existence of any one of the grounds which warrant a resort to the process for the enforcement of a landlord's lien, it would not have been a defense to the action. But the evidence adduced by the defendants did not tend to show the existence of either one of these causes. The evidence introduced for this purpose, as recited in the bill of exceptions, is that the defendant in attachment "had removed a part of the crop grown on the rented premises, without paying the landlord said advances, and without the consent of his said landlord." The ground prescribed by the statute is that "the tenant has removed from the premises, or otherwise disposed of any part of the crop, without paying such rent and advances, or either, and without the consent of the landlord." Code 1886, § 3061. An affidavit, setting forth the grounds in the words of the bill of exceptions, would fail to conform to the statutory requirement, and would be defective. *Knowles v. Steed*, 79 Ala. 427. Affirmed.

(84 Ala. 546)

## GRAYSON v. LATHAM.

(Supreme Court of Alabama. December Term, 1887.)

Supplemental opinion on application for rehearing. For original opinion, see 4 South. Rep. 200.

STONE, C. J. This suit was instituted in the name of Caroline P. Robinson, styling herself transferee, and also styling herself administratrix of the estate of William Robinson, deceased. The corn, which was the consideration of the warrants sued on, was of the estate of William Robinson. Pending the suit in the circuit court, the death of Mrs. Robinson was suggested, and the suit was revived in the name of John W. Grayson. In the order of revivor, as found in the transcript before us, is the following language: "Leave is granted by the court to revive the cause in the name of John W. Grayson, as administrator of Caroline P. Robinson, as party plaintiff; and issue being joined," etc. In other parts of the transcript Grayson is described as the administrator of William Robinson, deceased. It is not shown that any question was raised on this discrepancy in the court below, or that the attention of the court was called to it. It was not called to our attention un-

til after we had announced our decision on May 16th ult. We will announce no special ruling on this question, but will leave it for consideration in the court below.

(84 Ala. 231)

**LINN et al. v. BASS.**

(*Supreme Court of Alabama. December Term, 1887.*)

**VENDOR AND VENDEE—VENDOR'S LIEN.**

A vendor's lien attaches to a purchase-money note payable to a third person, and held by him as collateral security for the vendor's debt to him, though the debt is evidenced by promissory notes which he does not surrender.

Appeal from chancery court, Birmingham county; THOMAS COBBS, Judge.

A bill to enforce vendor's lien. The bill was filed by the administrator of Hudson, which averred that the vendor, Samuel Linn, was, at the time of the contract of sale, indebted to Hudson, and as part of such contract A. J. Linn, the vendee, executed his note for the purchase money, which was held by Hudson as collateral security for the indebtedness to him of Samuel Linn; which indebtedness was evidenced by two unpaid promissory notes signed by Samuel Linn, and payable to Hudson.

*James Weatherly*, for appellants. *Hewitt, Walker & Porter*, for appellee.

STONE, C. J. There is no question that the bill in this case contains equity. *Buford v. McCormick*, 57 Ala. 428; *Young v. Hawkins*, 74 Ala. 370; *Coleman v. Hatcher*, 77 Ala. 217. The averments of the bill are satisfactorily proved, and the decree of the chancellor is affirmed.

(84 Ala. 66)

**DAUGHTRY v. STEWART.**

(*Supreme Court of Alabama. December Term, 1887.*)

Appeal from probate court, Bullock county; S. F. FRAZER, Judge.

Petition by surety on guardian's bond for *supersedeas* of execution and discharge from decree on final settlement.

*Norman & Son* and *Abercrombie & Bilbro*, for appellant. *W. F. Foster*, for appellee.

CLOFTON, J. Affirmed, on authority of *Evans v. Daughtry*, 84 Ala. 63, 4 South. Rep. 592.

(84 Ala. 348)

**ELLIS et al. v. ELLIS.***(Supreme Court of Alabama. December Term, 1887.)***EXECUTORS AND ADMINISTRATORS—SALES—RESCISSIION.**

Where the proceeds of land sold under a void order of the probate court are applied by the administrator in part to the payment of debts of the estate, and the balance given to the guardian, and by him used for the benefit of the minor heirs of the intestate, they, never having tendered restitution of the purchase money, are estopped from asserting title to the land.

Appeal from chancery court, Pike county; JOHN A. FOSTER, Judge.  
*Gardner & Wiley*, for appellants. *Parks & Son*, for appellee.

STONE, C. J. The decree of the chancellor is affirmed, on the authority of *Robertson v. Bradford*, 78 Ala. 116.

(76 Ala. 421)

**GANNEY v. SIKES.***(Supreme Court of Alabama. December Term, 1884.)***EQUITY—REFORMATION OF DEED—PLEADING AND PROOF.**

Under Code Ala. §§ 8840, 8841, conferring jurisdiction in equity to correct a misdescription in a deed of decedent's lands, made by an administrator under authority of the probate court, before relief is granted it must appear, by proper allegations and proof, that the price paid was reasonable, and that the vendee was a *bona fide* purchaser.

Appeal from chancery court, Crenshaw county; JOHN A. FOSTER, Judge.  
 Bill in equity for reformation of an administrator's conveyance of lands sold under probate decree.

*Rice & Wiley*, for appellant. *John Gamble*, for appellee.

SOMMERVILLE, J. The chancery court of this state, apart from the power conferred expressly by the Code, would probably have no jurisdiction to correct a misdescription of lands in a deed made by an executor or administrator under authority of the probate court, where an order of sale has been granted on application to sell the lands of a decedent. *Rogers v. Abbott*, 37 Ind. 138; *Rice v. Poynter*, 15 Kan. 268. However this may be, this particular jurisdiction is conferred in express terms by sections 8840 and 8841 of the present Code, (1876,) where it is made to appear, by proper allegations and proof, that the price paid was reasonable, the vendee was a *bona fide* purchaser, the funds paid for such lands have been paid to the proper representative of the estate, or appropriated for the benefit of the estate, and the parties interested have received regular notice of such probate proceedings or sale, as is provided by law. In all such cases, the court of chancery of the proper district is authorized to grant relief to the purchaser of such lands, to his heirs, devisees, or assigns, fully correcting any mistake, omissions, or inaccuracy in the matter of such description. Code 1876, §§ 8840, 8841; Acts 1869-77, pp. 390, 391. We have examined the evidence, and fail to find any satisfactory proof that the amount paid by Rogers, as purchaser of the lands in controversy, at the administrator's sale made by Compton, in January, 1869, was a reasonable price or value for such land; nor is there any averment of this fact in the bill. Without such allegations and proof, the jurisdiction in question should not have been exercised. In other particulars we discover no error in the record. Reversed and remanded.

(84 Ala. 348)

## GANNEY v. SIKES.

*(Supreme Court of Alabama. December Term, 1887.)*

Affirmed on authority of the former decision in this case. *Ganey v. Sikes*, ante, 868.

Appeal from chancery court, Crenshaw county; JOHN A. FOSTER, Judge. *J. H. Parks and Rice & Wiley*, for appellant. *Gamble & Richardson*, for appellee.

SOMERVILLE, J. The decree must be affirmed on the authority of *Ganey v. Sikes*, 76 Ala. 421, ante, 868. The bill has been amended since the last appeal, and additional testimony taken, so as to correct the only defect of allegation and proof pointed out in the opinion of the court. Affirmed.

(40 La. Ann. 701)

## SUCCESSION OF GAGNEUX.

*(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)*

## 1. EXECUTORS AND ADMINISTRATORS—DATIVE EXECUTOR—LIABILITY.

In the absence of prayer and proof that a dative executor had received sums of money from the executor, his predecessor, no judgment can validly be rendered against him.

## 2. SAME—RIGHTS AGAINST PREDECESSOR—PRESCRIPTION.

In order to recover from such predecessor, suit must be brought against him, or, in case of his death, his succession. Although prescription be suspended against the creditors of an insolvent, the principle is inapplicable to successions, whether solvent or insolvent.

## 3. MORTGAGES—LIEN—EXTINGUISHMENT—FAILURE TO REINSCRIBE.

The right of a mortgage creditor is lost by the failure to reinscribe within 10 years, although previous to the expiration of that delay the mortgagor had died.

## 4. SAME—REINSCRIPTION—SALE OF PROPERTY.

But no reinscription is necessary when the mortgaged property is sold within the 10 years.

## 5. JUDGMENT—ACTIONS ON—PRESCRIPTION.

Payment of a judgment not reinscribed and not revived cannot be sought after the expiration of the 10 years by which it is prescribed.

*(Syllabus by the Court.)*

*Breaux & Renoulet*, for A. Adler, Executor, et al., appellant. *Crow & M. E. Girard*, for appellees.

BERMUDEZ, C. J. The original executor presented an account setting forth receipts, \$309.70, and disbursements, \$418.57, and mortgage claims of several parties named, aggregating a little upwards of \$2,500. In connection with these claims, which he placed on a footing of equality, he stated that the proceeds of property on hand, when realized, would be applied to those creditors concurrently. At his death this account had not been homologated, and A. Adler, one of the creditors claiming a mortgage, had himself appointed dative executor, and qualified. After selling the property undisposed of, he prepared an account proposing a distribution of proceeds, and opposed the account of his predecessor. By this account he acknowledges the amount on hand, proceeds of the unsold property, some \$1,909, and states privileged claims for some \$200. Referring to the account filed by his predecessor, he charges that it is deficient in not accounting for \$750, the proceeds of the sale of some land received by the executor. He denies the liability of the estate in favor of the parties placed thereon as creditors; claims that the succession of the executor should be made to account for the \$369.70 admitted by him to have been collected; and further charges that he himself is a mortgage creditor for \$525.27, as transferee of Hirsh and Adler & Co., mentioned in the account, and that he is entitled to be paid in preference to all others. Some short time after the filing of his account, he opposed that presented by his

predecessor, which has not as yet been homologated, urging substantially the same complaint. His account is opposed by other parties, who contest his pretensions to a first rank. The district judge rendered judgment, holding the dative executor liable for the \$750 and the \$369.70, over and above the amount acknowledged by him, some \$1,909, the aggregate amount being \$2,479.70. The court admitted liability for \$798.05, and decreed that the residue, \$1,686.65, be distributed *pro rata* among the parties claiming to be mortgage creditors, on the ground that they had, by themselves or their agents, agreed to be put on the same level. From this judgment the dative executor appeals. His complaints are (1) that he ought not to have been charged with the amounts which had come to the hands of his predecessor, and which he has never received; and (2) that his claim ought to have been recognized with a first-ranking mortgage, and paid accordingly.

1. It does not appear from the oppositions filed to the account presented by the dative executor that any opponent asked that he be held liable for the two amounts in question, and even had there been prayer to that end, it is impossible to conceive how he could have been thus held, in the absence of proof that he had received them, or that, by his fault or negligence, the amounts which could have been recovered had become dead losses to the creditors. Had the pleadings and proof been otherwise, then surely the dative executor could have been held; but certainly, under the showing made, there is error in the finding against him. The opposition of the dative executor to the account of his deceased predecessor, though a salutary, was an insufficient, proceeding to fasten judicially upon the succession of the latter the liability for the two amounts. The opposition was salutary in this, that it prevented the homologation of an account charged with incorrectness and error, but it was insufficient to warrant, even if well founded, any judgment against the succession of the executor, which had not been made, and was not, a party to the proceeding on a proper issue. The proper action should have been a direct suit by the dative executor against the administratrix of the executor's succession, for a judgment for the two amounts. It therefore follows that, on the face of the proceedings, neither the estate of the executor, nor the dative executor, could have been held responsible to the creditors of the succession for those two amounts, however true it may be that there is proof in the records that the executor has actually received in cash and notes the \$750, proceeds of the land sold by him.

2. The next question to be considered is whether the dative executor is, in his individual capacity, a mortgage creditor for the amount stated, with first rank, so as to be paid by preference over all others. Pretermittting all inquiry into the validity of the alleged agreement, by which it is claimed that A. Adler, or those whose transferee he is, had consented to forego the rank now claimed, and which would perhaps require unnecessary attention, as it would involve the extent of the power of the party that undertook to act as an agent on the occasion, it is safer to consider whether, if the claim was once entitled to a first rank, it has or not lost that privilege and advantage. The mortgage was consented on November 30, 1875, and was recorded on the same day, in the proper mortgage book of the proper office. René Gagneux died on the 25th of February, 1876, in a state of thorough insolvency, and the mortgage has never been reinscribed. In *Succession of Flower*, 12 La. Ann. 216, the court held that although prescription does not run, but is suspended against the creditors of an insolvent, the principle is inapplicable to successions, whether solvent or insolvent, and that consequently the right of a mortgage creditor is lost by the failure to reinscribe within 10 years, although, before the 10 years had expired, the mortgagor had died. The court rested its reasoning and conclusions on article 3327 of the Code of 1825, which is now article 3363 of the Revised Code. This ruling has been followed since, (see *Marks v. Martin*, 27 La. Ann. 527; *Succession of Gayle*, Id. 552; *Sorrels v. Stamper*, Id. 630; *Leonard v.*

*Smith*, 28 La. Ann. 811,) and is adhered to. For that reason, at least, the judgment of the district court, placing the creditors, not privileged, on an equal footing, is correct. It is therefore ordered and decreed that the judgment appealed from, as far as it holds the dative executor liable for the two sums of \$750 and \$369.70, amounting together to \$1,119.70, be reversed; and it is now ordered and decreed that said dative executor be declared not to be liable therefor. It is further ordered and decreed that the right of the dative executor to recover the same from the succession of his predecessor, E. E. Mouton, by a direct action, be recognized and reserved. It is further ordered and decreed that, thus reformed, said judgment be affirmed; the costs of appeal to be paid by the succession.

#### ON REHEARING.

1. The dative executor justly complains that by the judgment herein rendered Queyronze & Bois, who claim to be judicial mortgage creditors, and who were ranked among the mortgage creditors by the district judge, were not stricken from among them. It appears that the judgment on which they claim was rendered on December 22, 1875; that not only never was it reinscribed in order to preserve the mortgage secured by the inscription, but that it has, besides, never been revived. It is therefore clear that the claim has ceased to have any existence whatever. It was incumbent on Queyronze & Bois, in order to be retained on the account, to have proved, not only their judgment, but its inscription, reinscription, and revival; and this without the necessity of the filing of any plea of prescription against it.

2. The dative executor is also right when he charges that his individual claim as a mortgage creditor ought to have been allowed with first rank. We held that, as the mortgage had not been reinscribed within the 10 years, the inscription of the mortgage had perempted. Such is no doubt the law, but the law does not apply to cases in which the property mortgaged has been sold within the 10 years, (*Succession of Dejean*, 8 La. Ann. 505; *Succession of Martin*, 18 La. Ann. 557,) and proceeds reduced to possession. Our attention is called to the material fact, which we had not discovered in the mixed-up transcript in the case, that the property mortgaged in favor of Hirsh and Adler & Co. was actually sold within these 10 years, and that the proceeds are in the hands of the dative executor. It therefore follows that a reinscription would have been an idle and barren ceremony. This view necessarily imposes upon us the inquiry, whether, as was held by the district judge, the first rank to which Adler & Co. were entitled had been relinquished so as to constitute them, or their assignee, A. Adler, a simple ordinary creditor. We have looked carefully into the matter, and have ascertained that the power of attorney given to E. E. Mouton in relation to this claim merely conferred upon him the right to collect the claim, and consequently to enforce the mortgage. Surely he had no authority to give up to any extent the security by which the claim was guaranteed, and the consent which he gave to have the same placed among the ordinary debts was wholly unauthorized, and is not binding on Adler. As the mortgage was the first recorded, it first affected the property, and is entitled to the first rank. As the claim will absorb the residue of the proceeds of the real estate sold at the instance of the dative executor, it would serve no useful purpose to pass upon the pretensions of the other mortgage creditors, whose rights are reserved, should the dative executor realize funds from the succession of E. E. Mouton, the executor, and he proposes to distribute them. It is therefore ordered and decreed that the last portion of our previous decree, which affirmed the judgment appealed from, be set aside; and it is now ordered and decreed that said judgment be reversed; and it is now ordered and decreed that the names of Queyronze & Bois, figuring among those of the mortgage creditors, be stricken therefrom, and that A. Adler be recognized to be entitled to be paid as first mortgage creditor out of the proceeds of the property, securing his claim, and that the rights, if any, of the

other parties claiming to be mortgage creditors be reserved to be exercised when other funds are realized and proposed for distribution. It is further ordered that, thus amended, our previous decree remain undisturbed, and that the costs of appeal be paid by the succession.

(40 La. Ann. 687)

**BOYER v. JOFFRION, Sheriff, et al.**

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

**1. MORTGAGES—LIEN—BONA FIDE LENDER—NOTICE.**

A money lender may safely deal, as far as the question of ostensible ownership goes, with one whose title to real estate properly appears on the public records, and cannot be affected by any anterior transfer of the property, unless the same was made by the ostensible owner, his authorized agent, or by judicial authority, and the transfer was patent by proper registry.

**2. SAME—CONSTRUCTIVE NOTICE—PENDENTE LITÆ.**

Such party cannot be charged with notice, unless the notice result from a valid registry of the transfer, and is not bound by judicial proceedings in which the title of the property is involved, but to which he was no party. Notice, as a rule, is not equivalent to registry.

**3. INJUNCTION—DISSOLUTION—DAMAGES.**

On the dissolution of an injunction arresting an order of seizure and sale, not a money judgment, damages cannot be allowed.

Appeal from district court, parish of Avoyelles; A. V. Coco, Judge.  
*Joffrion & Bordelon*, for appellant. *Thorpe & Petterman*, for appellees.

**BERMUDEZ, C. J.** This is a petitory action. The plaintiff claims to be the owner of certain real estate, advertised to be sold under executory process, issued by Jean Artignes against A. L. Boyer, to foreclose a mortgage. He avers a purchase of the property by him from Mrs. Longane, on December 17, 1885, by act duly recorded on the same day in the conveyance book, and by inheritance of the property by his vendor, from her father, Eugene Amet, who died in 1875. He calls in Mrs. Longane to make good his title, and, the latter appearing, calls in A. L. Boyer to defend her title, by virtue of a clause in a private writing, which is a submission to arbitrators of a litigation once pending in the succession of Amet, in which the property in question was involved, and to which A. L. Boyer was a party. The plaintiff coupled his demand for recognition as owner, with a prayer for an injunction to arrest the sale, which was granted. The defense moved to strike out the call in warranty, because the law does not authorize such a proceeding by a plaintiff, and because the plaintiff averred the mortgage to have been subsequent to his purchase. The call in warranty was stricken out by the court. For answer the seizing creditor denied any title in the plaintiff that could prevail over his mortgage, and averred that, long prior to the alleged purchase of plaintiff, *i. e.*, May 18, 1878, the property had been sold, at the succession sale of Amet, to one Bielkiewicz, who had on the same day transferred it to A. L. Boyer, and that the two acts had been seasonably and properly recorded. He further contends that, at the time of execution of the mortgage in his favor, by A. L. Boyer, *i. e.*, May 29, 1886, the conveyance books disclosed no alienation of the property by A. L. Boyer to any one. He concludes by praying for the dissolution of the injunction, with damages. There was judgment dissolving the injunction without damages. The plaintiff appeals, and Artignes prays for an amendment of the judgment by allowing him the damages which he claimed below.

We deem it unnecessary to review the judgment of the lower court striking out the call in warranty made by plaintiff. Conceding *arguendo* that the plaintiff had authority to proceed in the manner in which he did, and which was objected to, his right to the property in question would not be in the least advanced thereby; for it is clear that, whatever his rights may be, if any, against Mrs. Longane, and those of the latter against A. L. Boyer, the de-

fendant in injunction and plaintiff in the executory proceedings, cannot in the least be affected thereby. Further, it is objectionable to ingraft upon the litigation between the plaintiff and Artignes claims which the former may have against parties who are utter strangers to the latter. The record clearly shows that on the 29th of May, 1886, when A. L. Boyer mortgaged the property in question in favor of Jean Artignes, the public records showed that he had acquired it from Bielkiewiez on May 18, 1878, who had himself become the adjudicatee thereof, at the sale of the succession property of Amet, and does not disclose the fact that he had previous to or on that day disposed of his title to it. It is true that A. L. Boyer, the transferee of Bielkiewiez, was a party to the controversy in which the validity of the adjudication of the property to the latter was involved; that the finding of the arbitrators annulling it, and the judgment of the court homologating it, were binding upon him; that this occurred in 1873, prior to the conveyance to him by Mrs. Longane; and that this sale was recorded in December, 1883, more than two years before the mortgage was consented to by A. L. Boyer in favor of Artignes. But all this, as far as Artignes is concerned, was perfectly immaterial. The finding of the arbitrators, and the judgment upon it annulling the adjudication, divesting A. L. Boyer of any title to the property, had not been recorded previous to the granting of the mortgage. Neither had the sale of the same property by Mrs. Longane to A. L. Boyer been recorded. To this date neither appears to have been recorded in the proper conveyance book of the proper office. It is worth notice that the act of sale by Mrs. Longane to the plaintiff of the property contains no derivation of title. It does not state that the property sold belongs to the vendor, Mrs. Longane, having been inherited by her from her father, and that it once stood in the name of A. L. Boyer; but that his ostensible title thereto had been judicially annulled and divested, so that it cannot be pretended that, by an inspection of the conveyance book, a third person could at the time of the mortgage have ascertained from it the least vestige of a mutation of title. No third person, under the peremptory provision of the law, can, as a rule, be bound by an alienation of real estate in or to which he may have some title or claim, unless it appear from the proper public records that his debtor, whoever he be, had parted with his title, or has incumbered his estate; and even then only to the extent, if any, expressly prescribed by law. *Moore v. Jourdan*, 14 La. Ann. 414. A different interpretation of the law would prove destructive of the benefits which it intends to confer, and would place capitalists at the mercy of their debtors, and jeopardize loans of money on mortgage security. We therefore conclude that a money lender may safely deal, as far as the question of ostensible ownership goes, with one whose title to real estate appears on the proper public records, and that he cannot be injuriously affected by any anterior transfer of the property, unless the same be made by the ostensible owner, or by his authorized agent, or by judicial authority, and the transfer has become patent by proper registry. No other notice can prove knowledge. The plaintiff has not proved that the defendant ever had legal and sufficient notice of the transfer of the property to him, by Mrs. Longane, previous to the date of the mortgage, and Artignes is not bound by the arbitration proceedings, which, as to him, are *res inter alios acta*. The injunction was properly dissolved. As it did not arrest the execution of a money judgment, but simply of an order of seizure and sale, the district judge was right in not allowing damages. Judgment affirmed.

(40 La. Ann. 667)

## GIBERT v. SEISS.

(Supreme Court of Louisiana. July Term, 1893. 40 La. Ann.)

NEGOTIABLE INSTRUMENTS—ACTIONS—FACTOR AND BROKER—REMEDIES AGAINST PRINCIPAL.

When a planter executes his notes, and discounts them with his factor, who places their proceeds to his credit on account, the same may be sued upon *via ordinaria* by the latter, the right being reserved the former to prove a want or failure of consideration therefor.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; THOMAS OVERTON, Judge. J. C. Chappel and David Todd, for appellee, Gilbert. Thorpe & Peterman and Wm. Voorhies, for appellant, Seiss.

WATKINS, J. Suit *via ordinaria* is brought upon two promissory notes, secured by mortgage. They were executed by the defendant as collateral security for his account with the plaintiff, as his commission merchant. To the petition defendant tendered an exception of no cause of action, and, it having been overruled, he filed an answer in which he pleaded the general issue, the discharge of this debt, evidenced by the notes and mortgage, and a demand in reconvention for the sum of \$1,500. On the trial the judge *a quo* gave the plaintiff judgment for \$3,400, but rejected his demand for the recognition of his mortgage, and allowed the defendant \$715.37½ on his reconventional demand. There is also a stipulation in the decree to the effect that it shall not become executory until certain notes, other than those sued on, are canceled and returned to the defendant. From this judgment the defendant has appealed.

For relief at our hands his sole reliance is placed on his exception, which he insists was improperly overruled. His insistence is that if he owes anything to the plaintiff it is only a balance of account, and not on the notes; that this balance is represented by the notes sued on as collateral security; that he has no cause of action on the notes, or for the foreclosure of the mortgage securing their payment, but is restricted to suit for a liquidation and settlement of accounts. This objection is technical. In addition, it has served defendant every purpose he could have expected, for, on the trial, the plaintiff did not rest his case on the introduction of the notes and mortgage in evidence, but he offered his own depositions, twice taken, with all of defendant's accounts, from the commencement of his transaction, in 1880, to its termination, on the 10th of March, 1885, showing a debit balance of \$3,794.15. The defendant was not restricted in the introduction of evidence in his favor. He produced and filed plaintiff's account against him for 1883-84. He was examined as a witness in his own behalf, and upon his evidence the reduction of the plaintiff's demand was secured, and the allowance was made on his reconventional demand.

We do not understand that any complaint is made of the correctness of the judgment appealed from, in any essential particular. This case comes fairly within the principle announced in *Chaffe v. Whitfield*, ante, 563, recently decided at Monroe, in which we held that a mortgage note, furnished by a planter as collateral security for advances to be made by his commission merchant for the working of a plantation, may be sued directly by the holder for the exact amount of the advances; and that, in the absence of proof of a want of consideration, and in the presence of evidence showing that the advances have been made, payment of the note may be enforced. Such was the view entertained by our immediate predecessors in *Lanata v. Bayhi*, 31 La. Ann. 229. Such a note not only secures the debt on open account, but liquidates it, and enables the factor to place it with his creditors or bankers. *Mix v. Creditors*, 39 La. Ann. 628, 2 South. Rep. 391; *Pickersgill v. Brown*, 7 La.

Ann. 307; *Morris v. Cain*, 39 La. Ann. 730, 1 South. Rep. 797. In this instance the defendant's notes were discounted, and the proceeds placed to his credit. Same were disbursed for his account, and at the close of the season nothing remained to his credit, and there was nothing applicable to the credit of the notes at their maturity except the amount for which credit was given in the judgment. *Lehman v. Godberry*, 40 La. Ann. —, ante, 816. There appears to be nothing to be adjusted on open account. It was balanced and closed, and the only sum that is due to the plaintiff is that remaining due on the defendant's discounted papers. Had the proof disclosed a further sum unexpended by the defendant, he would have been entitled to credit, therefore, likewise. This case is easily distinguished from an ordinary suit upon a promissory note and mortgage, against which unliquidated demands cannot be urged in compensation. We think defendant has had the fullest opportunity of showing the want or failure of consideration of the notes, and that is all that justice and equity entitle him to demand. Judgment affirmed.

(40 La. Ann. 661)

LAPLEINE v. MORGAN'S L. & T. R. & S. S. CO.

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

1. WITNESS—COMPETENCY—HUSBAND AND WIFE.

In a suit by the father of a minor child for the latter's separate use and benefit, the mother is not disqualified as a witness, because she does not testify for or against her husband, but for or against the child; and the case is not affected by the provision of law giving to fathers and mothers the enjoyment of the estate of their minor children.

2. NEGLIGENCE—REMOTE AND PROXIMATE CAUSE.

When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause which sets the other cause in motion.<sup>1</sup>

3. SAME—INJURIES RESULTING FROM PHYSICAL CONDITION.

The duty of care and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated, the measure of damages is the injury done, even though such injury might not have resulted but for the peculiar physical condition of the person injured, or may have been aggravated thereby.<sup>2</sup>

4. SAME.

Thus, though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical *dilatation*, which had never exhibited itself before the accident, and might never have developed but for it, the party in fault will be held for the entire damage as the direct result of the accident.<sup>3</sup>

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; JAMES MOUTON, Judge.  
Robert S. Perry, for plaintiff. Don Caffery, for defendant.

FENNER, J. The plaintiff sues in behalf of his minor child, Marie Lapleine, to recover damages for injury inflicted upon her through the fault of the defendant company. He alleges that in April, 1885, Marie, with other children, was at play in the rear part of her father's yard on the inside of a plank fence separating said yard from the railroad track of said defendant, when a train of cars belonging to the latter and loaded with split lumber, passed along said track, and the stakes confining said lumber becoming loose or disarranged, the lumber broke away from its fastening, and tumbled off the car, part of it being precipitated over the fence, and falling into plaintiff's yard, striking the child, Marie, and inflicting on her the injuries complained

<sup>1</sup> On the general subject of proximate and remote cause in actions for negligent injuries, see *Phillips v. De Wald*, (Ga.) 7 S. E. Rep. 151, and note; *Woodward v. Railway Co.*, (Wia.) 33 N. W. Rep. 347, and note.

<sup>2</sup> On the subject of predisposition to disease as affecting the question of proximate and remote cause, in actions for negligent injuries, see *Owens v. Railroad Co.*, (Mo.) 8 S. W. Rep. 350, and note; *Railroad Co. v. Jones*, (Ala.) 8 South. Rep. 902.

of. The evidence is, to our minds, conclusive on the following points, viz.: *First*, that the lumber was precipitated from defendant's car, over plaintiff's fence and into his yard, substantially in the manner charged; *second*, that this was caused by the improper loading or insufficient fastening of the lumber, and by the imprudent handling of the train, and is imputable exclusively to the negligence and fault of defendant; *third*, that the child, Marie, was struck and injured by the falling lumber; *fourth*, that the child was entirely free from any fault or contributory negligence of any kind whatever. As to all the above points except the third, there is no room for the slightest dispute. As to the third point, the evidence is conflicting, but after a thorough scrutiny we are perfectly satisfied that Marie was struck and injured by the lumber. The child was undoubtedly in the yard, and was where the lumber fell. The lumber was pitched over into that yard. Immediately afterwards the child was found with a wound upon her head and bruises on her body, and she stated she had been hurt by the falling lumber, although, by reason of her age and condition, she was not admitted as a witness. The colored nurse, Mary Coleman, was the only immediate witness of the injury to the child. She is a curious example of utter depravity and insensibility to the obligation of truthfulness. She pretends to have been bribed by both parties, and her only complaint was that neither had paid the promised bribe. She was put on the stand by plaintiff, and testified on every point in her favor. The counsel for defendant then produced a written statement made by her before a notary, and under oath, some time before, in which she contradicted nearly everything she had just been saying. Of course, such a witness is unworthy of belief. But it is a significant fact that in the statement above referred to, which had been obtained from her by the agents of defendant, and was produced by it on the trial, she stated positively that Marie was struck and hurt by the lumber. On this point we believe she told the truth. She is confirmed by Mrs. Lapleine, the mother of Marie, who saw the child when she was withdrawn from the lumber that had fallen upon her. Her testimony was objected to on the ground that she was incompetent under the provision of article 2281, Rev. Civil Code, which declares that "a husband cannot be a witness for or against his wife, nor a wife for or against her husband." It is clear that this is not the husband's suit, but that of the child. The petition itself expressly declares that he sues "in his capacity as father to his minor child, Marie, and for her separate use, benefit, and advantage." The circumstance that, under article 228, Civil Code, "Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation," subject to the obligation of supporting and educating them, is not sufficient to disqualify either of them as witnesses in cases in which their children are parties. If it would disqualify either, it would disqualify both, since the law gives the enjoyment to "fathers and mothers."

There is much other corroborating and confirmatory testimony; and the whole, taken together, completely overwhelms the efforts of one or two employees of the railroad to establish that Marie was not struck by the lumber, but was some distance from where it fell, and was hurt by tripping and falling as she ran away in alarm. Not only is this theory inconsistent with all the facts and other testimony, but it is utterly insufficient to account for even the apparent physical injuries which Marie undoubtedly received. The foregoing points being thus settled, it conclusively follows that the defendant is responsible for the damages legally occasioned by its negligent fault. As to the nature and extent of the injury, it is shown, without any semblance of contradiction, that up to the moment of this accident, Marie, then eight years old, had been a bright, intelligent, active, and thoroughly healthy child. From that moment she became and has remained a constant invalid, seriously affected in mind and body, her nervous system shattered, subject to headache,

to attacks of nausea and vomiting, to frequent and sudden fainting or falling fits, emaciated, indisposed to physical or mental exertion, dragging her limbs in walking, and otherwise afflicted. At the time of this trial about two years had elapsed since the accident, and, though slightly improved, the child continues to a great extent affected as above indicated. The medical testimony indicates that it is doubtful when, or whether she will ever entirely recover. If the foregoing injury and suffering has been occasioned by the accident as the legal proximate cause, it would be difficult to say that the verdict of the jury for \$7,500 was excessive. But defendant maintains that the physical injuries directly inflicted upon the child were slight and unimportant, and utterly inadequate in themselves to produce the disastrous results which have been manifested; that these results have been occasioned by the peculiar constitution of the child, who inherited from its mother a hysterical tendency or *diathesis*, the development of which has intervened as the operative and efficient cause of her affliction and sufferings; and that the accident is not, therefore, the true *causa causans*—the proximate and efficient cause—casting responsibility on defendant. We are by no means satisfied that the external manifestations indicate conclusively the extent and nature of the injury received, or that the shock and derangement of the nervous centers and spinal cord may not have been sufficient to produce like results in an ordinarily constituted child. It is, however, proved that the mother of the child is subject to hysteria; that hysteria is, in many cases, heritable; and that the symptoms of the child's affliction are, in many respects, of a hysterical character. But it is very certain that the child had never exhibited the slightest symptom of hysteria or other constitutional disease, prior to this accident. The medical testimony does not establish that hysteria is necessarily or universally inherited; and it does not appear that, but for this accident, Marie might not have passed her entire life without the slightest development of hysteria. Admitting, therefore, that the child had a latent hysterical *diathesis*, in order to escape liability it would devolve on defendant to show that such *diathesis* was by itself a sufficient independent cause which would have operated in producing or aggravating the damage independently of the accident. In this, defendant has entirely failed. If the hysterical *diathesis* concurred with the accident in producing the damage, in determining which of the two is the proximate cause, we must inquire which was the cause that set the other cause in motion. In the language of the supreme court of the United States: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in motion." *Insurance Co. v. Boon*, 95 U. S. 117. We are cited to a Colorado case, which holds that where the physical condition of the person injured is at the time of the injury such that the injuries caused by the negligence are thereby aggravated, the railway is not liable for that aggravation. *Car Co. v. Barker*, 4 Colo. 344. We think, however, the doctrine is not sound, and is not in accord with the weight of authority. The duty of care and of abstaining from injuring another is due to the weak, the sick, the infirm, equally with the healthy and strong; and, when that duty is violated, the measure of damage is the injury inflicted, even though that injury might have been aggravated, or might not have happened at all, but for the peculiar physical condition of the person injured. Thus, in one case, a person afflicted with scrofulous disease was injured by the negligence of a municipal corporation in failing to keep its streets in repair, and suffered damage greatly in excess of what he would have suffered but for his disease; yet the court held that the corporation was bound to keep its streets in repair, for the sick and infirm as well as for the well, and held the city liable for the whole damage. *Stewart v. Ripon*, 38 Wis. 584. In another case a pregnant woman was injured, resulting in malformation of the child carried, and its subsequent delivery dead; and the author of the negligence was held liable for the whole damage. *Shartle v. Minneapolis*, 17 Minn. 308, (Gil. 284.) So a railway

was held liable for cancer following at an interval of three weeks after a blow on the breast of a female. *Railway Co. v. Kemp*, 61 Md. 74. See, also, *Railway Co. v. Buck*, 96 Ind. 346; *Jucker v. Railroad Co.*, 52 Wis. 150, 8 N. W. Rep. 862; *Dotis v. Railroad Co.*, 51 Wis. 400, 8 N. W. Rep. 265; *Sauter v. Railroad Co.*, 66 N. Y. 50; *Beauchamp v. Mining Co.*, 50 Mich. 163; *Barbee v. Reese*, 60 Miss. 906; *Patt. Ry. Accident Law*, §§ 29, 278; 2 *Thomp. Neg.* 1099. The inheritance of an hysterical *diathesis* (if it existed) was a misfortune, but certainly not a fault, in this child; in no manner diminished her right to protection from injury by the fault of defendant. Prior to this accident she had never suffered from this latent constitutional taint. But for the accident she might never have suffered from it. The accident was the direct, immediate, and efficient cause which set in motion all other causes which created or aggravated the damage; and the defendant is justly bound to answer for these deplorable consequences of his fault. There is evidence, however, showing that the child's affliction and injury have been aggravated by the injudicious conduct and treatment of her mother. For such aggravation of the damage suffered, it goes without saying, that defendant cannot be held liable. We need not particularize as to the nature of this conduct, except to say that it does not reflect upon her sincerity, but only on her injudicious sympathy, encouragement, and excitement of the child's disordered nervous system. This and some other considerations lead us to reduce the damages allowed by the jury. It is therefore ordered and decreed that the verdict and judgment appealed from be amended by reducing the principal thereof to \$5,000, and as thus amended it be affirmed, appellee to pay cost of appeal.

(40 La. Ann. 710)

**LOUIS *et al.* v. GIBOIR *et al.***

(*Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.*)

**1. PUBLIC LANDS—TITLE—EFFECT OF PATENT.**

A patent granted by the United States under section 2447, Rev. St. U. S., operates only as a quitclaim or relinquishment of any claim on the part of the United States to the land, and is without prejudice to adverse claimants.

**2. SAME—SPANISH TITLES—GRANT ANTEDATING CESSION TO UNITED STATES—PRESCRIPTION.**

When it concerns land which had passed into private ownership under Spanish grants, antedating the cession to the United States, and subsequently confirmed by acts of congress, such land will be considered as having been fully severed from the public domain, from the date of such confirmation, and fully subject to prescriptive titles. Finding that defendants have established all the elements essential to maintain their plea of prescription, it must be sustained.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lafayette; L. L. BOURGES, Judge.

*Felix & Dan Voorhies* and *Edward Simon*, for appellants. *M. E. Girard*, for appellees.

FENNER, J. This is a petitory action brought by the legal representatives of Jean Louis, deceased, to recover certain lands in the possession of the several defendants. The title set forth in the petition is as follows: "That said property belongs to your petitioners, for having inherited the same from Jean Louis, f. m. c., who had title thereto by virtue of a confirmation from congress, and by a patent issued in or about the year 1880 or 1881, by the government of the United States, in favor of said Jean Louis." In support of this title plaintiffs offer (1) a report or decision of the register of the land-office, dated November 10, 1880; (2) a certificate of survey by the surveyor general of Louisiana, dated December 13, 1881; (3) a patent from the United States government, dated January 16, 1882. From these documents it appears that the claim of Louis is based upon a purchase by him from Laville

<sup>1</sup>15 N. W. Rep. 65.

Bauvre, who held under a Spanish grant, and occupancy and cultivation for 18 consecutive years preceding December 22, 1815, upon a certificate of survey made by the United States surveyor, dated June 22, 1814, and upon confirmation by act of congress, approved February 25, 1825. The decision of the register simply recognizes the validity of the foregoing claim, but concludes as follows: "This decision shall in nowise be considered as precluding a legal investigation and decision, by the proper judicial tribunal, as between the parties to the above conflict of claims, but shall only operate on the part of the United States as a relinquishment of all title to the land in question." The patent also contains the statement that "this patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between the adverse claimants to said land."

From the foregoing it is apparent that these documents do not operate, or purport to operate, as a present conveyance of the land, but are a recognition of a prior divestiture, dating back to the Spanish *regime*; from which date unquestionably the land covered by it was severed from the public domain, had passed into private ownership, and was subject to all the modes of acquiring ownership provided by law. The defendants claim under Spanish grants yet more ancient, and equally confirmed by the government of the United States. If the conflict of the original titles was open to investigation, the only questions that would arise would be, which grant embraced the land in controversy, and, in case it was covered by both, which was the superior title? But, however those questions might be decided, there could not be the slightest doubt that the land had passed into private ownership before the cession to the United States, and never became incorporated into the public domain of the latter, and that therefore the confirmations, patents, and other dealings of the United States government with reference thereto were simply recognitive, and intended and purported to operate as mere quitclaims. There is therefore no obstacle to the right of defendants to plead prescription against action brought by plaintiffs. *Lavedan v. Trinckard*, 85 La. Ann. 540. They have pleaded the prescription of 10 and 30 years, and the former was maintained by the judge *a quo*. His decision is manifestly correct. This land has been held and dealt with as owners by defendants and their authors from a very ancient date. Their possession and occupation, for more than 10 years prior to the institution of this suit, have been complete and unequivocal. Their good faith does not admit of question. Their titles rest on sales fully translativ of property received from persons whom, without doubt, they believed to be the real owners. It is only necessary to read the articles of the Code treating of this prescription to see that defendant's possession combines every element therein prescribed as necessary to support the plea. Civil Code, arts. 3478-3498; *Barrow v. Wilson*, 38 La. Ann. 209; *Pattison v. Malonsy*, Id. 885. Judgment affirmed.

(40 La. Ann. 705)

**EASTIN et al. v. BOARD OF SCHOOL DIRECTORS.**

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

**JUDGMENT—RES ADJUDICATA—PRINCIPAL AND SURETY.**

When the principal and sureties on an official bond are sued together, the judgment as to the principal is *res adjudicata* as to the sureties; and, within the limit of the amounts for which they are held under the terms of their bond, they are bound to make good the entire judgment against the principal, including the penalty. (Syllabus by the Court.)

Appeal from district court, parish of Lafayette; C. DEBAILLON, Judge.  
*M. E. & C. Girard*, for appellants. *R. C. Smedes*, Dist. Atty., and *C. D. Caffery*, for appellees.

FENNER, J. The board of school directors brought suit on the official bond of J. N. Judice, against him and his sureties, Eastin and Breaux, to recover a sum of \$2,641.72, for which said Judice, as treasurer of the board, was a defaulter, in which they recovered judgment against Judice "for \$2,641.72, with five per cent. per month interest thereon from August, 1886;" and against Breaux and Eastin, each, for the sum of \$2,500, with legal interest of 5 per cent. per annum from judicial demand,—\$2,500 being the amount for which each had bound himself as surety on the bond. This judgment was appealed from, and affirmed by this court. *School Directors v. Judice*, 39 La. Ann. 896, 2 South. Rep. 792. That this judgment operates as *res adjudicata* as to the amount of Judice's indebtedness, binding on all the parties to that suit, does not admit of question. It does not lie in the mouth of the present plaintiffs to dispute its correctness. The judgment against themselves for \$2,500 each, with legal interest, is equally beyond dispute; but, as they are sureties only, of course that judgment can be enforced against them only to the extent necessary to satisfy the judgment against their principal. But to the extent of their principal's liability, and within the limit of the judgment against themselves, they are undoubtedly and irrevocably bound. The board issued execution on its judgment for the total amount of the judgment against Judice, including the penalty of 5 per cent. per month. The sureties claim that they are only liable for the principal amount, with legal interest; and, on this ground, they enjoin the execution. There is not the slightest merit in their contention. It is not pretended that more is claimed of either of them than the amount for which they were adjudged to be liable; and, within that limit, they are unquestionably bound for the debt and penalty adjudged against Judice. It is well settled that sureties on official bonds are liable for the penalty, as well as for the principal amount of the claim against the officer. *State v. Hayes*, 7 La. Ann. 121; *Copley v. Dinkgrave*, Id. 596; *State v. Breed*, 10 La. Ann. 492; *State v. Hampton*, 14 La. Ann. 679; *State v. Powell*, 40 La. Ann. —, ante, 447. The judge did not err in dissolving the injunction. Judgment affirmed.

(40 La. Ann. 676)

## THOMPSON v. WALKER.

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

## PARTNERSHIP—ACCOUNTING—WHEN LIES.

Where only a partial settlement of a partnership has been effected, and where certain matters have been expressly reserved for future settlement and adjustment an action will properly lie for a further and complete settlement.

(Syllabus by the Court.)

Appeal from district court, parish of St. Mary; A. C. ALLEN, Judge.  
*Don Caffery*, for appellant. *Breaux & Renoudet*, for appellees.

FENNER, J. This case was before us at our last term at this place, upon exceptions filed by the defendant, and maintained by the lower court. We then reversed the judgment, overruled the exceptions, and remanded the case to be tried on the merits. 39 La. Ann. 892, 2 South. Rep. 789. As stated in that opinion, the action is for a settlement of a partnership between the parties. One of the exceptions was that the partnership had been finally settled. We stated that this exception properly belonged to the merits. The defendant now answers, setting up again that the partnership has been fully settled by a notarial act, and that the only matters outstanding, and which it is the object of the present action to recover, are individual personal claims by plaintiff against defendant, which cannot be enforced under the guise of an action for settlement, and against which he pleads prescription. As indicated in our former opinion, the notarial act referred to is not, and does not purport to be, a final settlement, but only a partial one. The matters touching which the present controversy arises were expressly exempted by the following language, viz., that they "are hereby specially reserved in this settlement, and are to be finally adjusted, settled, and concluded by referring the same to arbitrators," etc." The arbitrators have never been appointed or called for by either party, and no offer or demand for arbitration is ever made. Plaintiff's right to sue for a completed settlement of the partnership, so as to embrace these matters, cannot, therefore, admit of question. They are matters arising out of the partnership relations, and recognized by both parties in the notarial act referred to as properly involved in the partnership settlement, and defendant cannot now be heard to deny it. The evidence leaves no doubt as to the correctness and justice of plaintiff's claims, and the only object of this technical defense seems to be to subject them to a shorter prescription. They consist of funds retained by Walker, as liquidator of the partnership, out of the share coming to Thompson, under pretense of certain rights claimed by Walker, which are the subjects of dispute, and were reserved, as stated above, in the settlement. The effect of the judgment now rendered is to settle this dispute, to complete the settlement, and to award to Thompson his share of the partnership fund which had been retained by Walker as liquidator. Judgment affirmed.

v.450.nos.25,26—56

(40 La. Ann. 677)

SAVOIE *et al.* v. MEYERS *et al.*

(Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.)

**EQUITY—FRAUD—JUDGMENT—ASSIGNMENT—VENDOR AND VENDEE.**

In case the vendor really and seriously contemplates and agrees to sell a tract of land at a price which is fixed and certain, and the vendee, while offering and proposing to buy the land, obtained, also, a transfer of a judgment upon the false assertion that it operates as a judicial mortgage on the land sold, and in respect to which the vendor is really deceived, *held* that, on appropriate allegations and proof, the transfer of the judgment may be annulled, and the amount that has been realized thereon recovered of the vendee.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; KENNETH BAILLIO, Judge. Thos. H. Lewis, L. Dupre, G. A. Breauz, and Estillette & Dupre, for appellants. W. S. Frazee, for appellees.

WATKINS, J. On the 12th of November, 1885, Cleonise Savole, the widow of Zenon Broussard, acting through Louis Stelly, as her agent, conveyed, by authentic title, to the defendants a tract of 20 arpents of land, and a certain judgment, entitled Zenon Broussard *vs.* Alcide Dupré, administrator of the estate of Cyprien Dupré, deceased, for the aggregate amount of \$6,000. The price stated in the act is \$500. The plaintiffs in this suit are the widow and heirs of Zenon Broussard, and it has for its object the annulment and revocation of the transfer of the judgment, and the recovery of the amount that has been realized by the defendants under it. The principal averments made by the widow, Cleonise Savole, are substantially as follows, *viz.*: That, really and in fact, there was no sale contemplated or made of the judgment, and that no price was paid therefor; that previous to the execution of the act of sale she and her agent were, by the representations of the defendants, induced to believe that there was a defect in the title to the 20 arpents of land which they proposed to buy, and that this defect consisted in a judicial mortgage resulting from the aforesaid judgment, and which had not been canceled; that the defendants proposed to buy the land of her for the price of \$500, but they required that the judgment should be transferred to them, also, in order to cure the defect of title; that they caused their lawyer to make an abstract of title, showing that this judgment had not been canceled, and sent it to her; that the \$500 was paid and received as the price of the land exclusively; that at the time she was near 80 years of age, and necessitated to transact all of her business through an agent, and that the one she employed was a country gentleman, unskilled in legal proceedings; that she and her agent subsequently discovered that they had been deceived and led into error with regard to said judgment operating as a mortgage on the land, and that the title was perfectly clear, and unincumbered, but that the defendants were well aware at the time that their representations were untrue, and that same were made for the purpose of fraudulently obtaining a transfer of the judgment; and that they procured and caused the power of attorney and act of sale to be prepared in furtherance of that end. She represents that said judgment was obtained in 1867, and had been once revived, and that same had been in the hands of two different attorneys without anything having been realized; that at the date of the transactions herein recapitulated no property of the estate of Cyprien Dupré appeared on the inventory, out of which the judgment could have been realized; that neither she nor her agent knew of any; and the defendants were fully apprised of their ignorance of such property, and availed themselves of it to procure the transfer of the judgment. She avers that this judgment was a community asset, and owned jointly by her deceased husband and herself, and that at his death the children of the marriage inherited his share thereof, and that the only reason she transferred their interest, as well

as her own, was that she regarded it as of no value; that soon after the defendants obtained the transfer of it they procured an order for the sale of more than 1,500 acres of land in the parish of St. Landry, and about 1,800 acres in the parish of La Fayette, as the property of the estate of Cyprien Dupré, and caused the same to be sold for near \$12,000, of which they were the beneficiaries; that, at the time of the transfer, the defendants well knew of the existence of these large and valuable tracts of land, and withheld the information from her and her agent, with the fraudulent purpose of getting possession of the judgment, and of realizing on it; and that they are liable *in solido* to plaintiffs, and should be condemned to pay them the sum realized, to the amount of said judgment and interest from judicial demand. She specially avers that the transfer of the judgment was made in error on her part, and consummated in fraud, and without consideration on the part of the defendants; and that in respect to the interest of the heirs it was otherwise a nullity, having been the sale or assignment of the property of another. Under proper averments, the heirs join their mother, and allege the nullity of the sale of their interest and specially charge fraud and deception on the part of the defendants, in procuring the transfer. They join their mother in a prayer for the annulment of the transfer of the judgment, and for the recovery of the proceeds realized under it. Ophelia Broussard admits her signature to the power of attorney, and unites with her mother in all of her allegations. There is no demand for the revocation of the sale of the land. *In limine* the defendants tendered as exceptions the pleas of no cause of action and want of tender to them of the amount of the purchase price. These having been overruled, for answer defendants aver that their purchase of the land and the judgment was *bona fide*, and for a sound price. They deny any and all allegations of fraud and error, and aver that this suit was brought for the purpose of regaining what plaintiffs had lost by above trade. They further aver that, at the time of their said purchase, they had no knowledge of the existence of the lands which were subsequently sold; that same had never been inventoried in the succession of Cyprien Dupré, nor had they been assessed for taxes, but that same had been ferreted out by skilled land experts they had employed. They charge knowledge of and acquiescence in said sale by the heirs of Zenon Broussard, and plead same as an estoppel against them. In the alternative they set up a demand in reconvention for moneys disbursed in attorney's fees and other expenses incurred in searching for and procuring the sale of property of the succession of Cyprien Dupré, the proceeds of which were applied to the satisfaction of the transferred judgment, and aggregating in amount \$2,711.35, and they annex a bill of particulars to their amended answer, and pray for a judgment *in solido* against the plaintiffs therefor. On the trial of these issues there was a verdict and judgment for the defendants, and the plaintiffs have appealed.

1. It is perfectly obvious from the foregoing statement that the defendant's exceptions were properly overruled. The suit does not seek to set aside the sale of the land. It remains intact. Plaintiffs' contention is that Cleonise Savoie never made a sale of the judgment, but merely transferred it to the defendants as the purchasers of the land, and at their suggestion and request, and in order to free the land of a supposed judicial mortgage. On this theory there was nothing due to the defendants, and no tender to be made. The sale *vel non* of the judgment is the very question we are to decide, and for us to say that their suit must be abated because of plaintiffs' failure to make a previous tender of the purchase price of its sale would be to anticipate our own decree. Besides, there is an element of such uncertainty in the matter as to remove this from the class of cases in which a tender could have been successfully made. The fact that the mother of the heirs, who made the transfer of their share in the judgment, is one of the plaintiffs in this suit, cannot affect their rights; nor can we perceive any valid objection to their

being united in one suit. They have each a common object in view. Their interests are the same. The mother makes a judicial confession of the nullity of the transfer of the judgment, and upon that score there is nothing further to adjudge. The sole remaining question is whether the transfer of the judgment was and is a nullity in respect to the defendants as the transferees.

2. The salient facts of this case, which are necessary to be detailed, are substantially as follows, viz.: In October, 1885, Miss Ophelia received from A. Levy, managing partner of the firm of J. Meyers & Co., the following letter "*Miss Ophelia Broussard, Caranero, La.*—Miss: Our mutual friend, Mr Jos. Bloch, informs me that you are the owner of a piece of land on the west side of Opelousas. Please advise me, at your early convenience, whether it is for sale; if so, what is the lowest cash price. Awaiting your early reply, I remain, with regards, yours truly, ALPHONSE LEVY." The defendants were informed that the land was for sale, and the cash price was \$500. Defendants agreed to give \$500 for the land, provided the title was good, stating that they would have their lawyer examine the chain of title, and send Mr. Stelly, the agent, an abstract of it. Within a few days the defendant Levy wrote Mr. Stelly the following letter, and inclosed the abstract of title therein, viz.: "OPELOUSAS, LA., Oct. 21, 1885. *Mr. Stelly, Caranero, La.*—DEAR SIR: My delay in answering was caused by our attorney making out abstract of title, copy of which I herewith inclose. The judgment has never been canceled, and, as the original holder is now dead, the mortgage would bear until the judgment is prescribed by limitation. Our attorney advises me to get a transfer of the judgment, and that would place title beyond any further risk. I have been put to a great deal of trouble and expense lately on account of imperfect titles to lands held by us in full warranty, and hope that you will excuse me if you find me unnecessarily particular. Under the circumstances, I will agree to purchase the land for \$500.00 cash, provided the judgment is transferred to me in proper form with the land. Awaiting your reply, I remain, yours truly, ———." This abstract of title contains the following data, viz., that this 20-arpent tract of land was sold in the succession of Cyprien Dupré on the 15th of January, 1878, for \$880, on terms of credit, and again, in 1878, for the same amount in cash. At the foot of the abstract this statement is appended, viz.: "N. B. The judgment of Zenon Broussard against the estate of Cyprien Dupré, deceased, has never been canceled." While this correspondence was conducted by, and the interviews took place with, Levy, he was acting for his associate, Meyers, as well as himself. Indeed, there is no express denial of this. A few days after these negotiations were concluded, Cleonise Savoie executed a power of attorney, authorizing Stelly to make a transfer of the judgment and the land, and soon after he passed the authentic act of sale. To this act there was appended no certificate of mortgage. It was expressly avoided. During the progress of the negotiations, the defendant Levy explained his seeming anxiety in respect to the sufficiency of the title to the land by stating it to have been defendants' intention to construct a rice-mill on the property. It is in proof that, previous to the execution of the power of attorney and title, defendants sent their attorney to see and interview the agent with reference to the purchase of the land. On this subject the agent says: "Believing the statement of Mr. Levy, in his letter, I advised the old lady to transfer the judgment to cure the defect of title which Meyers claimed to exist." He further states that on the occasion of defendants' attorney's last visit he left a power of attorney with him, which he had the old lady sign, "as she was willing to sell the land and clear the title." He says that said attorney stated to him that the one he left "was the form necessary to be followed, and that as soon as that power of attorney was signed, I could then come and pass the sale of the land and transfer the judgment." That, in a day or two afterwards, he went to Opelousas, and completed the transaction, the said attorney having drawn up the act of sale. At the time of these

transactions none of the plaintiffs were aware of the existence of the lands that were subsequently sold as the property of the estate of Cyprien Dupré. On this subject Stelly says that, if he had known of their existence, or that of other property, he would not have induced Mrs. Broussard to transfer the judgment for the purpose of clearing the title to the land. He states explicitly that "not a cent of consideration was given for the judgment, and the only reason for transferring it was to clear the title which Mr. Levy claimed to be defective. The \$500 was merely the price asked and given for the land." That he exhibited and read the letters of Levy to Miss Ophelia and Mrs. Broussard, and that they all consulted together, and "agreed to let the judgment be transferred to cover the defects in the title. Neither Mr. Levy nor Mr. Meyers ever offered to buy the judgment by itself; nor have they ever spoken to me about that judgment, except in the abstract, as bearing a mortgage." He says that he has since ascertained that all the representations in reference to the judgment, operating a judicial mortgage on the land, were untrue in point of fact, and that the title was perfectly clear.

These statements of Stelly are corroborated in every essential particular by Miss Ophelia and Mrs. Broussard. Miss Ophelia says that she remembers that before the sale of the land Mr. Ogden offered \$750, part cash and the rest on a credit, for the 20 arpents of land, and the offer was refused because enough cash was not offered. Other evidence in the record establishes that the land was worth more than \$500. Mr. Levy says, as a witness in speaking of the letter he wrote Mr. Stelly, that "in making the offer of \$500 for the twenty arpents of land, I was under the impression that the land was bounded on the east by the railroad. Some time after the offer was made, and before the completion of the sale of the land and judgment, and on inquiry, I found that there were intervening tracts or lots between the railroad and the said tract. This discovery lessened, in my mind and that of my partner, the value of the land. We were not willing, after this discovery, to pay for the land the price first offered." Mr. Levy did not communicate this fact of such apparent importance to Mr. Stelly, and he states that between the date of this discovery and the date of the sale he did not see him. Yet he accepted the title, and paid the \$500 originally promised for the land. The defendants' attorney, as a witness, states that Mr. Levy came to see him, and requested him to go to the parish of La Fayette "in order to purchase a piece of land near Opelousas, stating, in substance, that he would give \$500 for the piece of land, meaning, I think, 20 arpents, provided a certain judgment, already alluded to in this case, would be transferred with the land." This attorney was asked this question, viz: "*Question.* What inducement did you offer Mr. Stelly, plaintiff's agent, to transfer the judgment? For what purpose was the transfer made? *Answer.* The conversation between Mr. Levy and myself, having occurred something over two years ago, I am not able to state positively the whole conversation that took place between us; but the impression that was made upon my mind was that the cause, or one of the causes, for the transferring of this judgment with the land was in order to remove any question as to the title of the land." Upon making an examination of the Levy letter, addressed to Stelly, he says: "I consider that the said document embraces about the same proposition that I was instructed to make." It appears that the judgment in controversy had never been recorded in the book of mortgages of the parish of St. Landry, and if, indeed, it had been so recorded, a judicial mortgage would not have resulted therefrom, because it was rendered against the administrator of the succession of Cyprien Dupré, and had only the effect of liquidating the debt, and making it payable in due course of the administration. Mr. L. Dupré, another attorney of the defendants, says, as a witness: "I knew the judgment did not affect the 20 arpents of land at that time, and I never told any one that it did." In answer to a question by plaintiff's counsel Mr. Dupré said: "The conversation to which you allude, took place some two years

age. I cannot recollect any but parts of that conversation, as I have stated in my examination in chief. It is probable that Mr. Levy mentioned the matter of the judgment to me. I know he seemed very anxious as to the title of the land." The question under consideration was the abstract of title, and that date and instrument were referred to. It appears from the evidence that defendants, at and previous to the date of the sale in controversy, were engaged in a mercantile business in the city of Opelousas, and devoted considerable attention to land speculations and investments in that vicinity. It appears that, notwithstanding the objections urged by the defendants to the want of proximity of the land to the railroad, they accepted the title, paid the \$500 in cash, and entered into possession thereof, but nothing further is heard of the erection of a rice-mill thereon. They subsequently sold the land. Their attention appears to have been immediately directed to the collection of the judgment. Another lawyer was consulted and employed with that view. The services of experienced land experts were at once secured in pursuit of same object. On the 2d of December, 1885, only 20 days after the transfer, the defendants, acting through their recently employed counsel, filed a petition in the district court of the parish of St. Landry, in which they represent themselves to be the transferees of said judgment, on which there is a balance remaining due of \$6,000, and that they are entitled to have same executed. They represent that there is property which still belongs to the estate of Cyprien Dupré, "some of which is situated in the parish of St. Landry, and which should be sold to satisfy said judgment as far as it will go." To this petition there is appended a list of the lands referred to. Reference to the list shows that there were 1,552.44 acres. That all of them were entered at the land-office, in April and May, 1860, and are situated in townships 7 and 8, and ranges 2 and 3. On the same date an order was granted for their sale for cash, and same were sold on the 6th of January, 1886, with the exception of one small lot, to A. Levy & Co., for \$3,100. On the 11th of January, 1886, only five days after the foregoing sale, the same parties filed another petition, and procured another order for the cash sale of other lands of the estate of Cyprien Dupré, situated in the parish of Lafayette, a list of which is appended thereto. An examination of it discloses that all of these lands were likewise entered in April and May, 1860, and are situated in townships 10 and 11, and ranges 3 and 4. Of them there are 1,805.46 acres. On the 17th of February, 1886, these were sold and adjudicated to A. Levy & Co. a sufficient quantity of these lands to aggregate the sum of \$2,435.40, and to another party \$160.68, and leave remaining unsold 798 acres. By these two sales there was yielded the aggregate amount of \$5,696.08, less the expenses of sale, and within less than three months from the date of defendants' acquisition of the judgment. Leonce Littell testifies that he was employed by Alphonse Levy, one of the defendants, on the 21st of November, 1885, as a surveyor, to locate the lands which were situated in St. Landry parish—those above mentioned. He says: "I returned on the evening before Thanksgiving, [November 25, 1885,] after having spent three days in locating said lands. \* \* \* At the time he employed me he told me that I need not mention for whom I was locating the lands. The lands in said list are not worth less than three dollars per acre, average cash valuation." He says that "most of said lands are good and cultivable." The gentleman who abstracted the titles of the lands which were sold in St. Landry states that he was employed by the defendants on the 13th or 14th of November, 1885, only a day or two after the transfer of the judgment. In the month of December following he visited the parish of La Fayette, and abstracted the titles to the lands sold in that parish in the month of February, 1886. There are many other facts and circumstances which might with equal propriety be given a place in this opinion as having an important bearing on the issues involved, but those already cited are quite sufficient to determine the validity of the sale.

3. To much of this testimony the defendants objected, and excepted to the introduction of same in evidence, and particularly to that part of it tending to contradict or explain the recitals of the act of sale and transfer in respect to the consideration, on the ground that there was no allegation in plaintiffs' petition charging that such recitals were made in error. We are of a contrary view. There are several allegations, which are here quoted, directly to the effect that Mrs. Broussard never sold or transferred the judgment for any consideration; that none was offered or paid by the defendants; and that the \$500 mentioned in the deed as the price thereof was the price of the land exclusively. These averments were ample, and quite sufficient for the attainment of the object aimed at. The testimony was properly admitted to the jury.

4. The defendants' counsel urgently press upon our attention what he considers a fatal defect in the initiatory proceedings—the want of a proper default, or putting *in mora*, upon the theory that this is in the nature of an action of damages *ex quasi contractu*, for the passive violation of a contract. But in this we feel bound to disagree with the learned counsel, for whose views we have the greatest respect. This is in no proper or legal sense an action of damages. It is a suit for the proceeds of the sale of property of the succession of Cyprien Dupré, which were applied to the satisfaction of the judgment in controversy, and which were illegally in the possession and under the control of the defendants, and who unduly received the same. In such case the want of a previous amicable demand should have been excepted to, previous to default. After answer, such a plea is unavailing.

5. It is quite unnecessary for us to protract this opinion for the purpose of summing up, discussing, and making an application of the facts herein enumerated. No useful purpose would be attained by commenting on the motives which influenced the actions of the defendants, their agents, and employees, in the premises. It will suffice for us to state our conclusions in reference to the matter in hand. They are that it was the sole object and purpose of Mrs. Broussard to sell the 20-arpent tract of land to the defendants for the stipulated price of \$500. That it was the real purpose of the defendants to surreptitiously obtain the control of the judgment with the view of realizing on it as they did; and the possession and acquisition of the land was a secondary consideration with them. That when Levy stated in his letter, addressed to Stelly, on the 21st of October, 1885, "that the mortgage would bear (on the land) until the judgment is prescribed by limitation," he must have known, as his attorney, Laurent Dupré, did, that there was no mortgage resting against the land; and, knowing this, he must have intended it to create a false impression upon the agent's mind, as it did. That, at the time of the transfer to the defendants, and before, they were fully advised of the existence of the lands of the estate of Cyprien Dupré, which they caused to be sold soon after, and their value and availability constituted the motive for the acquisition of the judgment. That Mrs. Broussard and her daughter and agent were not aware of their existence, and had no convenient opportunity of ascertaining their existence. That, considering that the gratuitous transfer of the judgment was the result of artifice, and misrepresentations of the defendants, which superinduced error on the part of Mrs. Broussard, and which, if sustained, would cause the plaintiffs great injury, same should be annulled. The Code declares that "fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other." Rev. Civil Code, art. 1847. Not only should the transfer of the judgment be annulled and set aside, but the defendants should be sentenced to make restitution of the amounts they have recovered. But justice demands that the plaintiffs should allow such reasonable sums as may have been necessarily expended in the search, recov-

erty, and sale of the land. But upon a careful examination of defendants' bill of particulars, and the evidence adduced in support of same, we are of the opinion that some reductions should be made, and the following is a list of items that are disallowed or diminished, viz:

The price of the land disallowed,	-	-	-	-	\$	500	00
Clerk's fees, and cost in Lafayette, ditto,	-	-	-	-		81	35
Surveyor's fees diminished by	-	-	-	-		150	00
Services of C. C. Duson, ditto,	-	-	-	-		300	00

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\$1,031 35

Total amount of reductions aggregating \$1,031.35. This amount, being deducted from the total credit claimed, \$2,711.35, will produce as the true amount of credit to which the defendants are entitled, viz., \$1,680. There is another item of credit claimed on the bill of particulars, viz: "Deduct 40 acres sold in error, \$60.00; and 160 acres in dispute, \$723.69—\$783.69." The proof on this question is not quite clear, and, for the purposes of justice, we will not conclude either party, but allow the credit, reserving the rights of the plaintiff in another suit.

We find the amount realized to be	-	-	-	-	\$5,696	08
Amount to be deducted,-	-	-	-	-	1,680	00

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Amount to which plaintiffs are entitled, - \$4,016 08

One-half of this sum is due to the plaintiff Cleonise Savoie and the residue to the heirs of Zenon Broussard, jointly and in division, the whole sum to bear legal interest from judicial demand. On the whole, this is not such a case as should make the verdict of the jury of peculiarly binding force. It is stated to be a fact that the trial was a protracted one. Many witnesses were interrogated in their presence; numerous deeds and documents were offered in evidence; and many perplexing questions of law were involved. There is no very serious conflict of testimony. Under these circumstances the jury may well have been misled as to the determinative fact or decided the case under a misapprehension of the law. We deem it our duty, under a solemn conviction of the justice and equity of the plaintiffs' demands, to set their verdict aside, and proceed to render a different judgment. It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment of the court *a quo* thereon based be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed that the sale and transfer of date November 12, 1885, in so far as the same purports to transfer and convey to the defendants the judgment in controversy, be, and the same is, annulled and set aside; and it is further ordered, adjudged, and decreed that the plaintiffs do have and recover of and from the defendants *in solido* the sum of \$5,696.08, with legal interest from the 14th of July, 1886, same being the date of judicial demand, subject to a credit of the sum of \$1,680. It is further ordered, adjudged, and decreed that the plaintiffs' rights be reserved to claim the sum of \$783.69, as above specified, and which has been allowed to defendants as a credit. It is further ordered, adjudged, and decreed that all costs of both courts be taxed against the defendants and appellees.

#### ON APPLICATION FOR REHEARING.

Counsel have confined their application to alleged errors in the calculations made in our opinion, and make claim for an increased allowance on defendants' reconventional demand. (1) An "examination of the figures has disclosed one error, and that consists in our having taken, as the basis of our calculation, the amounts stated in the *proces-verbals* of sales. We think that was wrong. We now take the amounts stated in the defendants' bill of particulars, which shows the net balance, after costs have been deducted, viz:

Proceeds of sale in St. Landry, - - -	\$2,997 80
"    "    "    Lafayette - - -	2,451 68
	<hr/>
	\$5,448 98
In lieu of our former balance, - - -	5,696 88
	<hr/>
Difference, - - -	\$ 247 10

—(2) We do not consider the item of \$81.35 established by the evidence. It forms no part of the cost of the sale of land in La Fayette parish. (3) With regard to the item of \$150 deducted from the surveyor's fees, his own receipt only shows that he received \$50, and the parol evidence does not satisfy us that the defendants paid any more for that service. (4) We think the deduction of \$300 from Mr. Duson's claim is both equitable and just. The only proof of the amount defendants paid him is his receipt. It is for \$860 "in full for services rendered in ferreting and locating properties belonging to the estate of Cyprien Dupré, said lands being situated in St. Landry, Acadia, La Fayette, and Vermillion parishes, and for general services in the *Bandoin Case*, and attending to the *Matter of Severine Le Blanc*, and pertaining to the succession of Cyprien Dupré. [Signed] W. W. DUSON." He was not summoned nor sworn as a witness. No explanation is furnished of the character or nature of the services he rendered. It appears that no land was found or sold in Acadia or Vermillion parishes. It does not appear what connection there is between the transaction under consideration and the *Bandoin Case* or the *Matter of Severine Le Blanc*. Considering the absence of proof we think \$500 a liberal allowance. The opinion allows a credit of \$1,680. We will allow \$247.10 in addition,—\$1,927.10. This, we submit, is quite a large allowance for the collection of \$5,448.98, particularly when the whole work was accomplished in less than 90 days, and through *ex parte* proceedings. But of this sum (\$247.10) there has been carried into the calculation made by us the sum of \$60, as shown by defendants' application. It must be reduced. The additional credit will then be \$187.10. But a rehearing is unnecessary. It is therefore ordered, adjudged, and decreed that our former decree be, and the same is, corrected by allowing the defendants the additional credit of \$187.10, and as thus corrected and amended it remain undisturbed. But inasmuch as we have made one reservation in behalf of the plaintiffs, we also reserve the defendants' right to sue for the items that are disallowed, viz., \$81.35, \$150, and \$300, aggregating \$531.35; but this reserve is not to affect the finality of our decree. Rehearing refused.

(40 La. Ann. 707)

#### BARBE V. HANSON *et al.*

(*Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.*)

#### NEGOTIABLE INSTRUMENTS—CONSIDERATION—PRINCIPAL AND SURETY.

Several individuals enter into an agreement to become the sureties *in solido* of another on the following terms, viz.: Their principal was to purchase from a third person a quantity of land which he was to buy from the United States government at \$1.25 per acre, and which was to aggregate in value a stipulated sum, and where, upon a special mortgage and vendor's lien was to be retained as a security therefor. Their principal's vendor was to give his consent thereto, and on this condition the securities signed a note in his favor. Such third person, as payee of this note, purchased land of the government, but not for the aggregate amount specified; but he sold it to their principal for that amount. *Held*, that proof of these averments does not establish a want of consideration, in the absence of proof that the land conveyed was worth less than the price it sold for.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lafayette; C. DEBAILLON, Judge.  
Geo. H. Wells, for appellants. A. R. Mitchell and M. E. Girard, for appellees.

WATKINS, J. On the 22d of March, 1884, the plaintiff sold to the defendant S. H. Clement a tract of land for \$2,300, for which he executed his promissory note, and consented to a special mortgage and vendor's lien thereon, as securing the same. This note was signed by the other defendants, Thomas Hanson, A. Rigmaiden, and H. C. Drew, as securities *in solido*. The act of sale and mortgage contains the stipulation of 10 per cent. attorney's fees in the event of suit, and the non-alienation clause. Suit *via ordinaria* is brought against the principal and sureties, and judgment is demanded against them *in solido* for the principal and interest of the debt, and the 10 per cent. attorney's fees, and also for the recognition and enforcement of his special mortgage and vendor's lien on the land. For answer, the securities make the following declaration, substantially, viz.: That they signed the note in error, and there was a want of consideration for their signatures, in that before they signed same, and at the time they were requested by Clement so to do, the latter informed them that he wished to procure the sum of \$2,300 from the plaintiff for the purpose of purchasing timbered lands from the United States government, and on which he proposed to secure them by mortgage when purchased. That afterwards, and before reaching a final agreement, one of their number informed the plaintiff and Clement that if the former would himself purchase lands from the government with said sum of money, instead of advancing the \$2,300 to Clement, and would then sell the land to Clement for \$2,300, and retain a special mortgage and vendor's privilege thereon to secure the payment of the purchase price, he and his associates would sign Clement's note as securities. That this arrangement was consented to by the plaintiff and Clement, and "it was upon this agreement and understanding that they signed the note sued on." They charge that by means of a fraudulent collusion between the plaintiff and Clement, and without their knowledge, "the plaintiff did not use the whole amount of said sum of \$2,300 in the purchase of government lands" by the sum of \$500, which he loaned to Clement, and the contrary recitals of the plaintiff's petition and act of sale are untrue. They further aver that, if they were to pay said note to plaintiff, they would thereby become subrogated to his rights of privilege and mortgage as against their principal, and "therefore they have been seriously injured and defrauded by said collusion and fraudulent conduct, \* \* \* because, if plaintiff and said Clement had performed in good faith [their contract] as aforesaid, \* \* \* the said Clement would have had nearly \$500 worth—at the government price of \$1.25 per acre—of said lands more than he acquired by his said purchase," on which such mortgage and privilege would have rested; and that by this means, and to this extent, their security has been and would be reduced in the event of their making payment with subrogation. Subsequently they amended their answer by averring that since their original answer was filed they have been informed that the plaintiff really employed in his purchase of land from the government only a little more than \$1,500; and that he did not loan any portion of the \$2,300, which was the ostensible consideration of the note, and nominal price of the land which he conveyed to Clement. They allege the intervening insolvency, and pending and undetermined cession, of Clement, and pray for their entire release and discharge from liability. On the hearing, the judge *a quo* disregarded the defense set up, and gave judgment as prayed for by the plaintiff, and defendants have appealed. In this court the plaintiff and appellee requests us to give him judgment of 10 per cent. on the amount of the judgment appealed from, as damages for the prosecution of a frivolous appeal.

We have taken pains to give in detail the substantial averments of the defendant's answers for the sake of precision, and for the reason that we regard them as stating no defense to their liability on the note. There is neither allegation in their answers, nor proof in the record, of the inadequacy of the land mortgaged as a security for the debt. Hence, if they should pay

it, they could presumably be reimbursed. What matters it to them; if their theory be correct, and that representations were made as stated? The fact that their principal has become insolvent since the note was executed, and has made a cession under the insolvent law, does not absolve them from either their obligation or duty. Neither does his surrender impair the value of their security, or deprive them of their rights to procure a seizure and sale of the property. The proof is positive to the effect that the land is worth \$2,300, and has not been disposed of by the syndic of the insolvent. With regard to the rights of mortgaged and privileged creditors of an insolvent, see *Spears v. His Creditors*, ante, 567, (decided at Monroe at our recently adjourned term.) The judgment appealed from is correct, and should not be disturbed; but we do not regard this as a proper case for the infliction of damages for the prosecution of a frivolous appeal. Judgment affirmed.

(40 La. Ann. 697)

STATE *ex rel.* STERN'S FERTILIZER & CHEMICAL MANUF'G CO. v. CITY OF NEW ORLEANS *et al.*

(*Supreme Court of Louisiana. July Term, 1888. 40 La. Ann.*)

TAXATION—EXEMPTION—STATUTES—CONSTRUCTION—RETROACTIVE LAWS.

The amendment to article 207 of the constitution of 1879, which exempts from taxation and license manufactures of ice, fertilizers, and chemicals, is not retroactive, and does not exempt them from taxes and licenses due prior to the adoption of the amendment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; HIGHTON, Judge.

Carlton Hunt, City Atty., W. B. Somerville, Asst. City Atty., and Jas. C. Morse, Asst. Atty. Gen., for appellants. Gus. A. Breaux and W. S. Benedict, for appellees.

McENERY, J. The city of New Orleans appeals from a judgment rendered against her, ordering the cancellation of the taxes and tax inscriptions in her favor, and against Stern's Fertilizer & Chemical Manufacturing Company, for the years 1880 to 1888, inclusive. The cause of action of the relator is based upon the amendment to article 207 of the state constitution, adopted at the late general election, and officially promulgated May 12, 1888. Article 207, as it originally stood in the constitution of 1879, exempted from taxation and license for 10 years the capital, machinery, and other property employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery, hats, flour, agricultural implements. The article, as amended, extends the exemption from the adoption of the constitution of 1879 for a period of 20 years, and includes in the exemption manufactures of ice, fertilizers, and chemicals. The relator contends that the amended article exempts the articles which they manufacture from the period of the adoption of the constitution of 1879. The intention in the submission of the amendment to the people by the general assembly, and its adoption by them, was to re-enact article 207, and to extend for a longer period the exemption from taxation; and license the capital, machinery, and other property employed in the manufacture of textile fabrics, leather, shoes, harness, hats, saddlery, flour, and agricultural implements; and to further amend the article by including in the list of exemption manufactures of ice, fertilizers, and chemicals. The object and intention in the adoption of the amendment was to preserve the original article as amended, to continue the exemptions, and to extend the period from taxation and license, and to include other manufactures of articles not found in the original article, and which were not exempt from taxation and license. The intention was evidently to continue for an additional period manufactures of articles already exempt, and to add others thereto; and the fixing of the period of exemption for all the articles manufactured from taxation, and the manufactures from

license, from the adoption of the constitution of 1879, was to make the article 207, as amended, consistent and uniform. The amended article 207 is not retroactive. The Stern's Fertilizer & Manufacturing Company owe taxes, as shown by the record, for a period extending from 1880 to 1888, inclusive. It was not the intention, in the adoption of the amendment to said article, to exempt said company and its property from taxes due the city of New Orleans or the state, prior to the adoption of the amendment. No presumption or implication will justify such a conclusion. Had there been an intention thus to exempt from taxation and license the manufactures of ice, fertilizers, and chemicals, it would have been stated in unambiguous terms. There would have been some legislation to relieve those who were exempted by the article as amended, and who had paid the tax and the license. It would be manifestly unjust to release those who had not paid from their obligations to pay, and to have retained the amount of those who had properly discharged their duty as citizens, and paid their license and tax. Some provision would have been made to avoid this inequality and injustice, had it been the intention in the adoption of the amendment to make the amended article retroactive. We therefore conclude that article 207 of the constitution of 1879, as amended, exempts from taxation and license the manufactures of ice, fertilizers, and chemicals only from the date of the promulgation (the 12th day of May, 1888) of the amendment to article 207 of the constitution of 1879. It is therefore ordered that the judgment of the lower court be avoided and reversed, and plaintiff's demand rejected, with costs in both courts.

#### ON REHEARING.

The plaintiff in the application for rehearing says: "And this makes it certain that the purpose was, as far as possible, to place all manufactories named on absolutely the same footing of exemption, not only for the period of extension, but for the entire period of 20 years from the adoption of the constitution of 1879." Was it the intention in the re-enactment of the article to remit the taxes and licenses due by plaintiff prior to the 12th May, 1888, and to return to other manufacturers exempted by the amendment the amounts they had paid into the state treasury during the same period? If so, language and terms would have been used to convey this intention. The manufactures of certain articles exempted in the original articles are also covered by the amended article when they had already been exempted for a period of 10 years. What, then, was the object in exempting them in the amended article for a time for which they had already been exempted? It was evidently the intention to extend the period of their exemption by the simple method of re-enactment, and the plaintiffs were included only as an amendment to said article; the period of exemption to commence only from the time the extension was given to the manufactures originally exempted. There is no language in the article to convey the meaning that it was the intention to release plaintiff from taxes and licenses due, or to return taxes and licenses already paid into the state treasury. In the case of *Dennis v. Railroad Co.*, 34 La. Ann. 954, this court quoted as follows from *Fertilizing Co. v. Hyde Park*, 97 U. S. 666, in the construction of a legislative contract: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negative, and doubt is fatal to the claim. The doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court." In the case of *Dennis v. Railroad*, it is stated that exemptions are granted either by general or special laws. When they are granted as a gratuity,—as a bounty,—they can be revoked at pleasure; while, when they enter into and form part of a contract, in the shape of a charter, they must continue in force as agreed upon. The rule of con-

struction in both cases is the same as to meaning and scope. 34 La. Ann. 954. By act 118 of 1882, submitting an amendment to article 146 of the constitution, it was adopted and amended so as to exclude the officers of the criminal district court from a participation in the judicial expense fund. Article 180, by an act passed at the same session of the general assembly, was also amended at the general election of 1884. Suit was brought by the officers named in the amendment to article 146, to restrain the treasurer from paying warrants drawn prior to the adoption of the amendments; claiming a preference out of the funds arising from the sale of stamps after the promulgation of the amendments. They assumed that article 180 created a new and abolished the old civil district court; that the effect of the amendment to article 146 was to establish an absolute preference on the judicial expense fund in favor of the officers of the new civil district court, over the outstanding warrants in favor of the officers of the abolished court. In this suit, *McGeehan v. State Treasurer*, 37 La. Ann. 156, this court said: "So far as the latter amendment [article 146] is concerned, we are clear that its only intention and effect were to relieve the fund from subjection to future criminal expenses. The stamp system and judicial expense fund were established by articles 145, 146; and they continue to-day, the same system and the same fund originally provided, unaffected by the amendment to the latter article, except as to the charges hereafter affecting them. When this amendment was adopted, the warrants then outstanding had a legal and valid right to be paid out of the accumulations of said fund in rotation of months, and, by preference, over all warrants of later date. No cunning of dialectics can evade the self-evident proposition that to give the amendment an interpretation destroying such vested rights would be to give it a retroactive effect." It is presumed that the manufacturers, not exempted by article 207, prior to its amendment from taxation and license, have paid their licenses and taxes. To obtain restitution, a special act of the general assembly would be required. Article 43. If it had been the intention to remit the taxes and licenses of plaintiff, and to return the licenses and taxes already paid into the treasury, the article would have made it mandatory upon the general assembly to enact the necessary legislation. It would not have been left to the discretion of the legislative branch of the government. The state, in its bounty, would have left no doubt as to its intended generosity and munificence. If there be a doubt, it is adversely construed. Rehearing refused.

(40 La. Ann. 671)

## SUCCESSION OF GUIDRY.

*(Supreme Court of Louisiana. July, 1888. 40 La. Ann.)*

## 1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—FAILURE TO GIVE BOND.

The law does not require that proceedings be instituted to remove an executor who has failed to furnish security, when ordered to do so, under the provisions of Rev. Civil Code, art. 1677. The law is self-operative. The failure to furnish the security within the delay fixed, *ipso facto* removes the delinquent. A vacancy is thereby created instantly, which can be filled, after due notices, by the appointment of a dative executor.

## 2. SAME—PRESENTMENT OF CLAIMS—PARENT AND CHILD—SUPPORT OF PARENT.

A child who has furnished alimony, and thus maintained an ascendant in need, is not entitled to recover the value thereof from the latter's insolvent succession. Having paid a debt he cannot claim to be a creditor. A transfer of his claim conveys no right which he did not possess.

*(Syllabus by the Court.)*

Appeal from district court, parish of St. Landry; E. T. LEWIS, Judge.

Succession of Marcelite Guidry, and opposition of Lastie Dupré, to account, presented by Laurent Dupré, dative executor, and the claim of Mrs. Alcée Dupré.

*Laurent Dupré*, for Marcelite Guidry, appellee. *L. J. Tansey*, for Mrs. Alcée Dupré, appellee. *Henry L. Garland*, for Lastie Dupré, appellant.

BERMUDEZ, C. J. The account presented by Laurent Dupré, as dative executor of the deceased, is opposed by Lastie Dupré, a mortgage creditor, for upwards of \$2,000. The opponent charges that Laurent Dupré is not the dative executor of the deceased, because his appointment is unwarranted and null, for the reason that the executor appointed by the deceased was never regularly removed from the trust by any judgment of court; and that, therefore, Laurent Dupré has no capacity to represent the succession. He further charges that the sum of \$1,440, allowed in the account, to Mrs. Alcée Dupré, for board, lodging, nursing, etc., to the deceased, during two years, including her last illness, is not due. He besides opposes other items, which do not appear to be seriously contested. The district court maintained the validity of Laurent Dupré's appointment, allowed half of the sum to Mrs. Dupré,—part with privilege on the proceeds of the real estate sold, and part as an ordinary claim. It also passed upon the other items. The opponent, having died, his executor appeals from this judgment, and Mrs. Dupré asks that it be amended, so as to allow her the entirety of the claim in her favor, on the account. So that there are only two questions involved—*First*, the validity of Laurent Dupré's appointment; *second*, the reality of Mrs. Alcée Dupré's claim, and the security allowed for payment.

1. It might suffice to say that the opponent cannot be heard to attack the appointment of the dative executor, not only because he does so collaterally, but also because he lays no claim himself to the trust; but it may be preferable to determine the question at issue. It appears that Mrs. Guidry had appointed Alcée Dupré as the executor of her will, dispensing him from giving security, and that he was confirmed and qualified as such; that Lastie Dupré, the present opponent, availing himself of the privilege accorded by Rev. Civil Code, art. 1677, obtained a peremptory order, which was duly served, requiring the executor to furnish security, within 30 days after notice, in the sum of \$2,780, exceeding by one-fourth the amount of his claim; that the delay allowed expired without such security being furnished; that thereupon Laurent Dupré petitioned for letters of dative testamentary executorship. His application was ordered to be published. At the end of the time fixed for opposition, none having been filed, he was appointed, took the oath, and furnished the bond required by law.

The contention is that before this application could have been filed, and the appointment conferred, it was an essential condition precedent, *sine qua non*, that Alcée Dupré, the regular executor, should have been proceeded against in a direct action, in which, if the circumstances justified, he could then be removed. In support of this position, counsel refer to a number of authorities, the correctness of which cannot be disputed; but which have no application to the present matter, for the reason that the issue now presented is raised on a state of facts controlled by a law, which was not in existence when those cases were decided, and which has served as a guide for the proceedings in the instant case. Indeed, the article referred to (article 1677, Rev. Civil Code) is the result of an amendment of article 1670 of the Code of 1825, made by the legislature of 1868 (page 117) posterior to the cases invoked. It justifies the proceedings instituted by Laurent Dupré, from beginning to end. It declares, in as emphatic language as could be used, that should the executor, who has been ordered to furnish security, fail to do so within the delay allowed, the failure shall *ipso facto* work an immediate removal, and the judge shall appoint a dative executor. The legislature possessed the power of enacting such a remedial law, and it has done so. To contend otherwise is to hold that the law means, "shall not *ipso facto*," when it says, "shall *ipso facto*;" in other words, to make it say the reverse of what it does. The law was made

self-operative. No proceeding was therefore necessary to remove Alcée Dupré. The moment that the delay allowed expired, after notice, without his giving the demanded security, he ceased to be the executor of the deceased; and a vacancy was created, which could be and was filled.

2. The next matter to be considered is the item of \$1,440, in favor of Mrs. Alcée Dupré, recognized by the dative executor, for expenses of last illness. It is contended that the claim, if it ever existed, belonged to Alcée Dupré; that it could not have been enforced by him, inasmuch as it was for alimony furnished by him to his necessitous mother, the deceased; that, if it could be urged, it formed part of the community property between him and his wife; that the claim cannot be recovered by the latter, but by the former only; that the *dation en paiement* which he made to her of it, since his mother's death, has not validated it any more than if it had not passed from him to her; and that it is not entitled to a privilege. There can be no doubt that Mrs. Guidry, being in penurious circumstances, her son was bound in law and in conscience to provide for her, as well in health as in sickness; for it is written that children are bound to maintain their father and mother and other ascendants who are in need. Rev. Civil Code, art. 229; Code Nap. art. 205. The French text of article 229, Rev. Civil Code, as found in the Code of 1825, and which is taken from article 205 of the Code Napoleon, reads: "*Les enfans doivent des aliments à leur père et mère et autres ascendans qui sont dans le besoin*;" literally meaning: "Children owe alimony to their father and mother and other ascendants who are in need." The word "*doivent*" ("owe") implies a debt imposed upon them by law in that respect, for the satisfaction of which a civil action lies. Rev. Civil Code, art. 233. The fulfillment of that obligation does not transform the child into a creditor, capable of claiming reimbursement in any contingency. He has paid a debt imposed upon him by law, and simply remains in the condition of a debtor who has discharged an obligation. The case would be different if, instead of being the only child, the son had brothers or sisters; for in that case, as each and all would have been bound to provide entirely, as it were, *in solido*, for the wants and necessities of the mother, the child performing his obligation could have had recourse against the other issue for contribution. He could, had the mother died solvent, have made good his claim against their share in the succession; but such is not the case here. Mrs. Guidry died insolvent, leaving property, burdened for much more than it realized, and which is the common pledge of her creditors. To cast upon that estate the charge in question would be to shift the burden of alimony from the shoulders of the children to that of the creditors. Had a stranger provided for Mrs. Guidry, as her son has done, he would surely have had the right of claiming payment; for the obvious reason that the law has not made it his duty to maintain the needy, and recognizes in him, where he has not done so in a spirit of liberality, the right of repeating, (claiming back,) even with a privilege, for a certain period, the amount of his disbursements.

After an elaborate discussion on the subject now under consideration, Marcadé concludes that the duty of maintaining the needy ascendants is a debt imposed by law on the descendants. Volume 1, p. 534, No. 709 *et seq.* Baudry Lacantinerie, a professor of eminence, says that those obligations are dictated by the law of nature. The father has given life to the son; and the latter must assist him in preserving his own, if his means are sufficient. This author looks upon the obligation as a sort of restitution. "*Parentibus alimenta non præstatis, sed redditis. Iniquissimum enim quis dixerit patrem egere, quum filius ejus abundaverit.*" Volume 1, p. 389, No. 589. Laurent, in his admirable commentaries on the French Code, propounds the question, "whether he who has supplied alimony can claim payment for the same; and says that the solution involves serious difficulties." He does not, however, hesitate to state that a first point is certain, namely, that, according to gen-

eral principles, there exists no room for repetition. He who has furnished the alimony, has paid what he owed; for alimony is a debt. Therefore, he to whom it has been furnished, has received what was due him. Repetition could be admitted only where one, believing himself bound, was not really so, and has in error supplied the alimony. In such a case, the principle of claiming what was unduly paid would control. Volume 3, p. 107, No. 79. Fuzier Herman, who edits with surprising ability a new edition of the French Code, now being published, to which are appended notes and references which exhibit great researches and exactness, announces that the care and assistance furnished by a son to his father in need can be viewed only as the fulfillment of a filial duty, and cannot create, in favor of the son, a claim against the succession of the father. Hence if the father, by his will, has acknowledged himself a debtor to his son, because the latter had supplied his wants, this disposition will be considered as constituting a liberality. Reference is made to a decision of the court of Rennes, November 9, 1878; and to Aubry & Rau, c. 6, p. 73, § 547, note 3. See Code Civil Annoté par Fuzier, Herman, art. 205, p. 283, § 3; Répétition des Aliments, Nos. 64, 65. These authorities settle the question beyond cavil. It will not avail, in the instant case, to say that Mrs. Dupré is a creditor, while her husband may not have been one. She holds by a *dation en paiement* from him, and has acquired no greater right than he himself possessed. As he could not have claimed, she cannot do so in his place, whether or not she may be separated in property. Admitting that she attended exclusively to Mrs. Guldry, and could have claimed remuneration, any earning and payment would have fallen into the community between them; and compensation, if due, could have been asserted only by the husband, as head and master. But it has been said that he had no claim to urge for the alimony supplied. The item of \$1,440, placed on the account, should have been stricken out entirely, as not due either to Alcée Dupré or to his wife; and the creditors of the deceased must be relieved from the burden of the same.

We do not consider that we are called upon to pass upon the correctness of the judgment of the lower court, reducing certain small items placed on the account, and which were opposed; as we hear no complaint from either side. It is therefore ordered and decreed that the judgment appealed from be reversed, so far as it allows Mrs. Dupré part of the item of \$1,440, figuring in her favor on the account; and that said amount be stricken entirely from said account, as not due by the succession. It is further ordered and decreed that, in other respects, said judgment be affirmed; the costs to be paid equally by appellant and appellee.

(40 La. Ann. 725)

STATE v. BROWN *et al.*

(Supreme Court of Louisiana. October 13, 1883. 40 La. Ann.)

**HOMICIDE—TRIAL FOR MURDER—JURY MAY FIND MANSLAUGHTER—INSTRUCTIONS.**

The refusal of the judge in a trial for murder to charge the jury that, under the laws of Louisiana, "in all trials for murder the jury may find a verdict of manslaughter" in accordance with section 785, Rev. St. 1870, is a fatal error, which will vitiate the verdict found against the accused, and entitle him to a new trial.

(Syllabus by the Court.)

Appeal from district court, parish of Caddo; A. W. O. HICKS, Judge.  
J. H. Shepherd, Dist. Atty., for the State. W. H. Wise, E. B. Herndon,  
and John W. Jones, for defendants.

POCHE, J. Henry Brown, the appellant, and several others, were jointly indicted for conspiracy and murder. Before his trial the case was continued as to one of the defendants, and a *nolle prosequi* entered as to the others, confining the trial to Henry Brown alone, who was convicted of murder, and sentenced to death. On appeal, his counsel complain of numerous errors to his prejudice; but the conclusion which we have reached as to one of those complaints obviates a discussion of all the others.

In his general charge to the jury the trial judge instructed them, as to the different verdicts which they could find, in the following language: "In cases of this character there are three verdicts the law has provided may be found by the jury according to the law and the evidence of cases: (1) Guilty. Death is the penalty to be pronounced upon such verdict. (2) Guilty without capital punishment. The penalty upon such verdict is confinement at hard labor for life. (3) Not guilty. Upon such verdict the defendant will be discharged without any punishment." As the judge had been entirely silent throughout his whole charge on the subject of manslaughter, counsel for the defense requested him to give the following instruction to the jury: "There shall be no crime known under the name of 'murder in the second degree,' but on trials for murder the jury may find the prisoner guilty of manslaughter;" which is a literal copy of section 785 of the Revised Statutes of 1870, and of a section of act 120 of 1855. The charge was refused by the judge, on the ground, substantially, that the ruling invoked by the defense was inapplicable to the state of facts developed during the trial, which admitted of no mitigated verdict, but called absolutely for a verdict of "guilty" or "not guilty;" and that to have given the charge as requested would have been simply the enumeration of an abstract legal proposition, which had no bearing upon the case on trial; and in an able and learned opinion he quotes, in support of his conclusion, a multitude of authorities, both from this and other courts of the country, from whose uniform rulings the principle has been formulated as follows: "A judge not only may, but should, refuse to charge an abstract legal proposition, which has no bearing upon the case on trial, whether the proposition be correct or incorrect, or whether it be correct in part and incorrect in part." *State v. Daly*, 37 La. Ann. 576.

But in his ruling the judge confounded the rule of jurisprudence, as established by the line of authorities which he invokes, with a rule of law emanating directly from the law-making power, made imperative in terms and in spirit on the courts of the state, applying directly to the case on trial, and unaffected by the state of facts as disclosed by the evidence in the opinion of the trial judge. The law's command is that the jury must be informed by the court that, on trials for murder, the jury may find the prisoner guilty of manslaughter, and the omission or the refusal to so inform them is a flagrant disobedience of the law, and is a fatal error. In such cases the jury are the sole judges of the state of facts disclosed on the trial, which may justify them to

v. 480. nos. 27, 28—57

return a verdict of manslaughter, and the court is powerless to avoid their verdict, because in its opinion the evidence called for the finding of the higher offense. (The verdict under the law would be responsive to the indictment, and it should stand although it might be illogical, unjust, or unjustifiable, under the evidence. Examples are not wanting of cases in which the jury have condemned some of the conspirators in a murder case for the highest offense charged, and the other conspirators for manslaughter only. *Ford's Case*, 37 La. Ann. 443.

The question is not one of a proper charge under the test of the evidence on the trial, but one of compliance with an absolute mandate of the law. Under the present state of our legislation, the jury have the option to find one of four verdicts, namely, "Guilty," "Guilty without capital punishment," "Guilty of manslaughter," and "Not guilty." But under the effect of the charge, as given to them in this case, they were restricted to only three; that of guilty of manslaughter having been completely eliminated from their consideration by the refusal of the judge to give them the instruction requested by counsel, and required by law. The practical effect of his charge to the jury was to require them, in case they found Henry Brown guilty of all of the charge for which he was on trial, it was murder, and nothing else, a positive mandate of the law notwithstanding. A charge of similar import came under the consideration of this court in the case of *State v. Oregon*, 10 La. Ann. 799, under an indictment of arson. In that case the judge omitted to charge the jury that, "in all cases where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, without capital punishment," as required by the statute of May, 1846, now embodied as section 1000 in the Revised Statutes. Among other things, the court said: "The upshot of the charge was to impress the jury with the idea that, if they found the prisoner guilty of arson at all, it was their duty not to qualify their verdict by adding the words, 'without capital punishment.' \* \* \* Aside from the general tenor of the judge's charge in this instance, there was error in instructing the jury that it was their duty to find an unqualified verdict, if the case was clear; \* \* \* and the charge amounted to an instruction that, if a person was found guilty of arson, he should always be punishable with death, overlooking the act of May 29, 1846, \* \* \* herein above quoted.

It must be noted that the case originated before the enactment of the statute of 1855, (section 785, Rev. St.) which we are now considering. In that case the judge merely omitted to charge the law to the jury; while in the instant case he not only omitted, but positively refused, the charge, notwithstanding counsel's urgent request. We have been at great pains to scrutinize our jurisprudence on this point, and to closely examine the large array of authorities relied upon by the district judge in support of his conclusions herein; but we have been unable to find, and we apprehend that it is impossible for any one to produce, a single judgment, of any American court of last resort, which upholds the trial judge of a criminal court in refusing to charge to the jury a statute of the state, defining the duties and powers of the jury in reference to the verdict which they may render in the particular case on trial. But, on the other hand, we find among the decisions quoted by our learned brother of the district court a general current of thought decidedly to the reverse. Thus in *Patton's Case*, 12 La. Ann. 288, (quoted by him,) we find the following: "The prisoner pleaded not guilty to an indictment for murder. Upon the issue thus joined the jury had power to find the prisoner guilty of manslaughter. Rev. St. p. 136, § 2. It was therefore pertinent and right for the judge to instruct the jury in the law both of murder and manslaughter, although his counsel chose to assert that the only issue for the jury to try was the insanity of the accused." See, also, *Stibuderman's Case*, 6 La. Ann. 286; *State v. Ford*, 30 La. Ann. 311.

We are thus forced to the conclusion that, under the rulings of the district court, the accused in this case has been denied one of the shields of protection which the law extends to him; and that he is entitled to relief at our hands. It is therefore ordered, adjudged, and decreed that the verdict of the jury in this case be set aside and avoided; that the judgment rendered thereon be annulled and reversed; and that the cause be remanded to the district court for further proceedings, according to law and to the views herein expressed.

(40 La. Ann. 744)

## STATE v. HOYER.

(Supreme Court of Louisiana. October 17, 1888. 40 La. Ann.)

## LARCENY—INDICTMENT—DESCRIPTION OF PROPERTY—ARREST OF JUDGMENT.

A description in an indictment for larceny of the property stolen, as "some bottled beer of the value of two dollars and fifty cents," is insufficient; and, being a matter of substance, a motion in arrest of judgment will be sustained.

(Syllabus by the Court.)

Appeal from district court, parish of Caddo; A. W. O. HICKS, Judge.

J. H. Shepherd, Dist. Atty., for the State. Land & Land, for defendant.

McENERY, J. The indictment against defendant charges him with having on the 24th day of December, 1887, in the parish of Caddo, feloniously stolen "some bottled beer, valued at two dollars and fifty cents, the property of Bourda & Quiggles." This is all the description and designation of the stolen property. It is insufficient. A minute and detailed description of the property stolen is not required, but there must be such a description, numerically and specifically, as to individualize the property with legal certainty, so that the jury can determine whether the property proved to have been stolen is the same as that described in the indictment; thus enabling the defendant, in case of acquittal or conviction, to plead the same to a subsequent indictment, relating to same property. The defect in the indictment being one of substance, the motion in arrest of judgment was properly sustained. *State v. Edson*, 10 La. Ann. 230; *State v. Monroe*, 30 La. Ann. 1242; *State v. Munton*, 21 La. Ann. 442. Judgment affirmed.

(24 Fla. 298)

## STATE ex rel. BOYD et al. v. DEAL, Assessor of Revenue.

(Supreme Court of Florida. August 11, 1888.)

## 1. STATUTES—ENACTMENT—APPROVAL BY GOVERNOR—CHARACTER OF ACT.

The governor acts as a part of the law-making power of the state in approving a bill passed by the legislature. The function is not of an executive, but of a legislative, character.

## 2. SAME—PRESENTMENT FOR SIGNATURE—LAW ALTERED AFTER PASSAGE.

The bill, as presented to the governor for his action, should be the same, in its legal effect, as to the same matter, as it was when it passed the two houses of the legislature. If, subsequent to its passage by such houses, and before its approval by the governor, provisions have been inserted in it which change the legal effect of it as to a matter regulated by it before such insertion, the entire approved bill will be void. If, however, the genuine provisions are distinct from and independent of the spurious, it seems that they will not be affected by the latter.

## 3. SAME.

A bill to revoke and abolish the existing municipal government of Palatka, and to reorganize its government, (chapter 8780, Laws 1887,) and containing 81 sections, passed the senate. In the house of representatives it was amended by striking out everything after the enacting clause, and inserting in lieu thereof eight new sections. This amendment was concurred in by the senate. Sections 9 to 81, inclusive, of the original bill, were enrolled with the eight amendatory sections,

and numbered in the enrollment as they were originally, and the amendatory sections were numbered from 1 to 8, consecutively. In this condition the bill was signed by the officers of the senate and house of representatives, and then presented to the governor, who approved it. The provisions of the spurious sections as to some matters covered by the genuine sections are different in their legal effect from those of the genuine sections. *Held*, the entire bill is of no effect as a law.

MAXWELL, C. J., dissenting.

(Syllabus by the Court.)

Original proceeding in *mandamus*.

*Calhoun & Davis*, for relators. *Sumner C. Chandler*, for respondent.

RANEY, J. A bill to be entitled "An act to revoke and abolish the present municipal government of the town or city of Palatka, and to reorganize a city government for the said town or city," and containing 31 sections, numbered from 1 to 31, consecutively, passed the senate at the last session of the legislature, and in this condition reached the house of representatives, where it was amended by striking out everything after the enacting clause, and inserting, in lieu of the matter so struck out, 8 new sections. This amendment was concurred in by the senate. In enrolling the bill, the amendatory sections were substituted for the first eight original sections of the bill; and such amendatory sections, and the 23 sections, numbered from 9 to 31, consecutively, of the original bill, were enrolled; and in this condition the enrolled bill was signed by the officers of the senate and house of representatives, when it was carried to the governor, who approved it on the 3d day of June.

Considering the bill as a whole, though it has the sanction of the governor, and is certified to by the officers of the two houses, yet, as is conclusively shown by the journals, it has never been adopted by the two houses referred to. Cooley, Const. Lim. 163, 164.

The question presented for decision is whether any part of this ostensible statute, as it appears in both the enrolled and the printed laws, is valid.

In *Jones v. Hutchinson*, 43 Ala. 721, the facts were that a bill providing "that all existing judgments of courts of record in this state, and all which may hereafter be rendered in said courts of record, be, and the same are, liens upon all of the property of the defendants therein, which is subject to levy and sale," originated in and was passed by the senate. In the house of representatives the following amendment was adopted: "Provided, that the lien shall extend only to property in the county where the judgment was rendered, and in the county where it is recorded in the office of the probate court," and, as thus amended, the bill passed the house, but the senate refused to concur in the amendment, and a committee of conference was appointed by the two houses. This committee reported against the proviso, and recommended that the bill should be passed without it; and this report was concurred in by the house, and the senate was notified of the house having receded from its amendment.

The bill was never enrolled as it passed; but, in making what was intended to be an enrolled copy, to be signed by the presiding officers of the two houses, and to be presented to the governor, the proviso was also enrolled as a part of the bill; and in this shape it was signed by the speaker of the house and president of the senate, and approved by the governor.

It is apparent that the bill, as it was signed by the officers of the two houses and approved by the governor, made all existing and future judgments of courts of record liens on the property of the defendants only in the county in which the judgment was or should be rendered, and in those counties where it should be recorded in the office of the probate court; while such bill, as it actually passed the two houses, made judgments of courts of record liens on

all property of the defendants in any county in the state, whether the judgment had been recorded in the county or not.

Nothing could be plainer than that the governor had acted on and approved a bill whose provisions were in legal effect one thing, whereas the bill which had passed the two houses of the legislature was entirely different in its legal effect; or, as stated by the supreme court of Alabama, the bill which was signed by the officers of the two houses and approved by the governor "was not the bill which had been passed by the two houses."

The whole bill was held to be of no validity; the court saying they were not to be understood as deciding that an error of this character would vitiate the whole act, where separate and distinct matter from that of the bill was inadvertently inserted, and did not affect the original bill as passed, or change its substance or legal effect.

In *Moody v. State*, 48 Ala. 115, where certain material amendments had been added to the bill after its introduction, but were omitted in the enrollment, and did not appear in the enrolled bill as signed by the officers of the two houses and the governor, the bill was held to be of no effect as a law.

In *Berry v. Railroad Co.*, 41 Md. 446, the facts were as follows: In 1868 a statute was passed incorporating the railroad company, and the nineteenth section of the act provided that, if the company did not complete the road within four years from the time of commencing its construction, the charter was to be null and void. The commencement was made in 1873, within the time prescribed by the act, and consequently, as the charter stood, the company had till some time in 1877 to complete the road.

In 1874 an amendatory act was passed which in its third section recited, by way of preamble, that it was feared that the time allowed by the charter for the completion of the road was insufficient; and this third section, as enrolled and approved by the governor, and as printed in the volume of laws, provided that if the road was not finished in five years from January, 1870, (thus diminishing instead of increasing the time allowed by the original act,) the charter and all amendments should be void. Upon an examination of the engrossed bill as it was finally acted upon by the two houses of the legislature, with the indorsements thereon by the proper officers as to the action of the houses, and the journals of both houses, it appeared beyond question that the extension of time for the completion of the road, as provided in the third section of the bill, was five years from the 1st day of January, 1875. The decision was that as the third section of the amendatory act of 1874, as sealed and approved by the governor, was materially different from the section as it passed the two houses of the legislature, it was void; but that as the other portions of said amendatory act, exclusive of said third section, were regularly passed by the legislature and approved by the governor, and were (as expressed in the head-note) entirely distinct and severable from the third section, they were valid and effective.

The material difference between the third section of the amendatory act, as it passed the two houses, and as it was when approved by the governor, was occasioned by omitting the word "five" after the word "seventy," in copying or enrolling the bill for signature and approval; and on account of this omission and material difference the court declared the particular section null and void, and held that the nineteenth section of the original statute was left unaffected, and prescribed the time for completion of the road, viz., four years from the time of commencement, in 1873.

What the provisions of the other sections of the amendatory act of 1874 were, does not appear in the report of the case. The doctrine, however, upon which they were held good, was that they were "entirely distinct and severable from that which is void."

In *State v. Platt*, 2 S. C. 150, it appears that the nineteenth section of "An act to revise, simplify, and abridge the rules, practice, pleadings, and forms

of courts in this state," as enrolled and signed by the presiding officers of the senate and house of representatives, and approved by the governor, provided, *inter alia*, that the courts for the county of Barnwell should be held at "Barnwell;" but the legislative journal showed that the section, as it actually passed the two houses, provided that the courts should be held at "Blackville." "The consequence is," says the opinion, "that so much of section 19 as attempts to designate a place of holding said court is without the force of law. In other words, the legal effect is the same as if an independent act, making Blackville the place of holding the courts, had passed the general assembly; and a totally different act, making Barnwell the place, had been submitted to the governor in lieu of that passed by the general assembly." In regard to the effect of the change made in section 19 upon the remainder of the bill, it is remarked by the court that, "from the stand-point of legal construction, we must regard it as a matter of indifference, so far as the general scope of the act is concerned, whether the selection fell upon Barnwell or Blackville, or whether the subject was included or excluded from the bill. It is evident that a bill, having in contemplation a complete change in the modes and forms of legal procedure, could not be prejudicially affected in its general usefulness, and perverted from the object it was intended to secure, by uncertainty as to whether the circuit courts for Barnwell county were to be held at the one place or at the other."

The ground upon which the invalidity of the proviso in the first of the above cases, and of the sections in the others, is put, is that the same subject-matter had not been acted upon by both branches of the law-making power.

There is no doubt as to the absolute invalidity of section 9, and all subsequent sections, of the ostensible statute before us. They are without the sanction of the two houses of the legislature.

The validity of the first eight sections must be passed upon.

"It will," says Judge Cooley, (Const. Lim. 5th Ed. 211 *et seq.*; 8d Ed. 177,) "sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner, and to what extent, the unconstitutional portion affects the remainder."

In the case before us the fact is that the ninth and subsequent sections have received the sanction of the governor alone; and some consideration of the provisions of the two sets of sections is necessary.

The first section of the act, as enrolled and printed, provides that, within 14 days after it becomes a law, the city council of Palatka shall divide the city into four wards, and that thereafter voters shall be allowed to vote only in the wards they reside in. Section 2 provides that at the next annual election held in the city there shall be chosen two aldermen from each ward, and the voters of each ward shall vote for only two aldermen from their ward; and at the same time there shall be chosen by all the voters of the city one alderman at large, to be voted for by all voters without regard to wards. Of the two ward aldermen chosen at the first election for each ward, the one receiving the highest vote is to hold his office for two years, and the other to hold for one year; and at each subsequent election one alderman is to be chosen for each ward, and his term is to be two years. The alderman at large is to be elected annually.

Provisions upon the above subjects are also to be found in sections 20 and 14. Section 20 provides that the council of Palatka, preparatory to organiza-

tion under this act, shall during the year 1887 divide the city into not less than four nor more than ten wards, and appoint polling places, and provide for holding elections therein; and within four days after the election the mayor and councilmen and officers to be elected shall qualify, and thereafter elections shall be held at such times and places as the mayor and council may ordain consistently with this act. Section 14 ordains that the council shall be composed of not more than nine councilmen, and that they shall be elected for a term of two years at a general election by the qualified electors of the city, and that not more than two residing in any one ward shall be eligible. That at the first election four of the councilmen shall be elected for one year, and the others for two years; the four receiving the highest number of votes at the first election to hold for the long term, and those receiving the next highest to hold for the short term.

As striking as are the dissimilarities in the above provisions of the sections which were adopted by the legislature and those which were not, there are still others to be noticed. The purpose and effect of the first eight sections were that they should become operative as to the existing government or officials of Palatka within the ordinary time prescribed by the constitution for a statute to go into effect. On the other hand, section 30 provides that "the present city or town government of Palatka shall not be revoked, abolished, or impaired until the mayor and city council, or a majority of said councilmen, shall be elected and qualified under this act." The title of the act is "An act to revoke and abolish the present municipal government of the town or city of Palatka, and to reorganize a city government for the said town or city." It is apparent that the purpose of section 30 was (and its effect would be if valid) that the existing government, under the general municipal law, should not be affected until the juncture mentioned in such section should be reached.

The fifth section authorizes the council to levy taxes to the maximum extent of 2 per cent. of the assessed value of the property in the city, and section 6 authorizes the issue of bonds for sanitary and municipal purposes by the council, with the approval of a majority of the registered voters. Section 17, on the other hand, allows taxation for ordinary municipal purposes to the extent of 2½ per cent. of the value of the property; and such purposes are declared to include all municipal purposes, except interest on debt, and tax for sinking fund, and a tax to pay any judgment against the city, or levied in obedience to a *mandamus*; for these additional levies may be made.

The eighth section reserves to or confers upon the city all the rights, powers, and privileges provided for by the general municipal incorporation statutes, not inconsistent with the provisions of the preceding seven sections. There is much legislation in the sections following the eighth as to matters concerning which no provision is made by the first eight sections; and such legislation is entirely inconsistent with the provisions of the general incorporation law on similar subjects. Section 16 gives the mayor and council power to create such officers, (other than those specially provided for by the act,) and to provide for their appointment or election; but their "compensation and terms of service shall be fixed before their election, and the compensation shall not be increased or diminished during their term of office." Admitting that the power to create the offices is implied by the authority given in the eight sections, or in the general municipal incorporation law, there is still no such limitation as to compensation in either. "No councilman shall be eligible to any other office during the period for which he was elected" is also a provision of section 16 not to be found elsewhere in any municipal laws applicable to Palatka. Section 17 gives power, not only to regulate, but to prohibit and suppress, theatrical and other exhibitions, shows, parades, and amusements; and power to punish violation of municipal ordinances by fine to the extent of \$200, or imprisonment to the limit of three months. No such

power as to suppressing or prohibiting theatrical and other amusements is to be found in the eight sections of the general municipal statute, and, though the maximum limit of fine prescribed by the latter is \$500, the maximum imprisonment is only 60 days.

It is apparent from the above review of the genuine and of the spurious sections, and of the general municipal law as adopted by one of the former sections, that the same special objects are provided for in a different manner in the two parts of the ostensible law. The two parts are connected in subject-matter. Had they both been actually enacted by the legislative power, and there was some defect of procedure as to the ninth and subsequent sections, vitally affecting their force as law, but no such informality as to the first eight sections, could it be said that the law-making power would have adopted the eight sections without the others? In so far as the express provisions of the sections subsequent to the eighth are inconsistent with those preceding them, or with the general municipal law, they would, if valid, control; and this rule each branch of the law-making power must be conclusively presumed to understand. Where the provisions of the valid and invalid parts of a statute are connected in subject-matter, and are such that they depend on each other and operate together for the same purpose, or are otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other, the whole act falls. The same result must, even more unquestionably, follow where the invalid provisions are of such a character as that, were they valid, they would overcome or nullify the provisions of the valid part on the same subject.

It is true that if a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other; but if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. The purpose in the case before us was to revoke the existing government of a city, and establish a municipality, with altered powers; and, in so far as both the time when the new powers were to become operative and what they should be, the provisions of the spurious portion of the act are entirely different from those of the other part.

It is a rule that if, when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained; and this rule is relied upon as one which supports the eight sections as an independent, valid law. *Cooley, Const. Lim.* 212.

If the meaning of this rule be that when the provisions of the genuine parts are such as to sustain an enforcement of the legislative intent shown by them, considered of themselves, they are to be sustained, although there may be in the invalid parts provisions on the same subject which indicate a different legislative intent, then doubtless the eight sections are valid. Such, however, is not the meaning of the rule. Its meaning is that when there is in the invalid portion nothing which shows a different legislative intent, as to the subject-matter of the genuine parts, than is shown by the latter, and the latter parts are sufficient to secure or authorize an enforcement of this extent, (or, in other words, their own execution,) without the aid of whatever there may be in the invalid parts, the genuine parts will stand.

A consideration of the causes cited by Judge Cooley, from whom we get the rule as expressed, will elucidate its meaning.

In *State v. Commissioners*, 5 Ohio St. 497, the facts were that a statute had been passed in 1853 which by its first section provided for the removal of the county seat of Perry county from New Lexington to Somerset, in case the majority of the electors voting at the next general election should vote in favor

of such removal. The manner of voting on the question at such election, and of canvassing the votes, and certifying the result, was prescribed by subsequent sections. The fifth section of the act provided that if a majority of the electors should vote against removal, the county commissioners should surrender certain obligations which had been previously given to them under an act of 1851, to secure the payment of money to erect county buildings at New Lexington, to which place the county-seat had been removed from Somerset, pursuant to an election held under the act of 1851. It is perfectly clear that the provisions of the act, other than the fifth section, which imposed a forfeiture, and was of itself unconstitutional, were, when considered of themselves or independent of the fifth section, operative or capable of being enforced, yet the whole act was held invalid. "The provisions of the fifth section," say the court, "are such as would naturally influence the vote upon the adoption of the first and main section; and it would be a fraud upon the voters of Perry county to procure their adoption of the first section by means of the threatened penalties of the fifth, and then declare the fifth section void, but allow it to accomplish its purpose by giving vitality and effect to the first, which without it would never have been adopted. The provisions of both sections are made equally to depend upon the result of the election. They were submitted by the legislature collectively to the voters, and could only be passed upon as a whole, and must therefore stand or fall together."

In *Slauson v. Racine*, 18 Wis. 898, the first section of the statute provides that certain lands in Racine township, and adjacent to the city of Racine, shall be annexed to the city; and the second section defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes at a different and less rate than other lands in the city. If lands are annexed, "they must," says the opinion, "be taxed as other lands in the city; and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation, and stronger language could not be well selected to show that the legislature intended the one to be subject to the condition stated in the other, and that they would not have annexed them unless they had supposed that effect could be given to the proviso." There is no doubt but that the act would have been operative to annex the lands, if it could be considered as entirely independent of the intent shown by the unconditional proviso.

These and other cases cited by Judge Cooley show that his meaning is what we suggest it to be. Cooley, Const. Lim. 212.

It is apparent that the eight sections are neither complete in themselves, nor capable of being executed in accordance with the legislative intent, as such intent appears from the whole act. The two parts are not wholly independent of each other. The effect of one is overcome by the provisions of the other. In each of the two parts are provisions in the same features of a single scheme.

If there were in those sections, which were not adopted by the two houses of the legislature, no provisions inconsistent with either the preceding eight sections, or with the provisions of the general municipal incorporation law, a case would be presented in which the eight sections would stand as a valid enactment; for we could then see, and would be authorized to say, that they exercised no influence upon the governor in the performance of his function of approving the bill. If, moreover, the ninth and subsequent sections related to some entirely distinct matters or features of which those of the eight sections were entirely independent, the same conclusion might be reached; but as the case stands it is clear that the matters and purposes of the provis-

ions of the two parts are not only not independent, but in some cases the matters are identical, and a different purpose as to them, or as to how they shall be affected, is undeniable.

No presumption, inconsistent with the view that the governor considered and approved the bill with the belief that all its parts had received the legislative sanction indicated by the signatures it bore, and that he ratified it as a whole, is permissible. However much more the bill may secure the commendation of some without the ninth and subsequent sections than with them, it cannot be held that the provisions of these sections, so inconsistent as they are with those of the former relating to the same subjects, did not influence his judgment and secure his approval of the measure. We cannot say what his action would have been had they not been before him as a part of the ostensible perfect bill submitted for his official action, nor can we affirm that in case of his vetoing the bill, if it had not had the ninth and subsequent sections, that the legislature would have passed it over the veto. Whether he would have approved, vetoed, or permitted it to become a law without his signature, or what would have been the action of the legislature in case of a veto, is necessarily a matter of speculation.

It cannot be said that the governor is no part of the law-making power. He is made a part by an express provision of the constitution, (section 28, art. 4.) His participation in the making of laws is expressly provided for as an exception to the general prohibition of the second article of the constitution against any person properly belonging to one department of the government exercising power appertaining to another department. By such section 28 every bill that may have passed the legislature must, "before becoming a law, be presented to the governor. If he approves it, he shall sign it; but, if not, he shall return it, with his objections, to the house in which it originated," and a two-thirds vote of the members present in each house is necessary to make it a law against such objections. If any bill shall not be returned within five days after it is presented to the governor, or if it shall not be filed by him in the office of the secretary of state in ten days after the adjournment of the legislature, should that body adjourn before the expiration of the five days, it is true the bill shall be a law in like manner as if he had signed it; yet the spirit of these limitations as to time was not to either disparage the importance of the functions of the governor as to legislation, or relieve him from a faithful performance of his duty in considering and forming an intelligent opinion of the bill presented, but it was to secure promptness of action on his part, and, in the case of the ten-day limitation, the purpose was also to extend his powers as to legislation beyond the end of the session of the legislature, whereas without it his powers would have expired with the session. The purpose of the section of the constitution was to require of the governor careful consideration of every bill before it can become a law, and the exercise of his judgment as a public official as to the wisdom of the proposed legislation, in the light of public interest; and to require an indication of such judgment by express approval, or by silent acquiescence after investigation, or by express disapproval. The authorities speak of the governor as being a component part of the law-making power in the exercise of these functions. *Fowler v. Peirce*, 2 Cal. 165; *Cooley*, Const. Lim. 184.

In May, 1887, Gov. Perry asked the opinion of the justices of this court (if it could be properly required) as to his duty to disapprove certain bills, as beyond the power of the legislature to pass at its then pending session, though otherwise unobjectionable. The constitution makes it our duty to interpret the constitution, at the request of the governor, upon any question affecting his "executive powers and duties." We declined to give the opinion, because the question asked affected a legislative, and not an executive, duty of the governor. Chief Justice McWHORTER, speaking for the several justices, (23 Fla. 298,) said: "Is the opinion you desire one relating to your executive

powers and duties?' The exact legal meaning of the word 'executive' has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution before the duty of executing it can exist. Any duty imposed by the constitution on the governor with reference to a bill, before it becomes a law, is not an executive duty. The enactment of laws is a legislative duty, and when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative, and is performed by you as a part of the law-making power, and not as the law-executing power."

If the provisions are not meaningless, why is he not a part of the law-making power? Both the approval of, and the silent acquiescence in, a bill involves the consideration of its provisions, and so does a disapproval. A failure to approve or to veto cannot be regarded as an omission to consider the bill, but can be regarded only as a silent acquiescence, after careful consideration, of all the provisions of the bill. Any other theory imputes to the governor absolute dereliction of duty. No bill can be approved or disapproved without an opportunity to consider it; and the consideration and approval or disapproval of a bill of one import or effect does not even involve an opportunity to consider another bill of substantially different legal import or effect. Unless substantially the same bill as was passed by the legislature is submitted to the governor for his approval or disapproval, it cannot become a law either by his approval or silence, or against his disapproval; and this is so because the constitution requires that, before a bill can become a law, it must be submitted to the governor.

No bill of the same import or legal effect as the first eight sections has ever been presented to the governor for his action; and, if we should sustain these sections, we would do so without his ever having had an opportunity to act upon them as a governmental measure of the import and effect which they, of themselves, carry. There, then, is no difference between this case and one in which an entirely distinct bill of the same legal effect as the 8 sections qualified by the other 23 sections had been presented to him.

The authorities cited above are consistent with each other, and affirm the invalidity of the first eight sections.

Whenever an ostensibly perfect bill is submitted to the governor for his action as a part of the law-making power, and he considers and approves its several parts collectively, and with the idea that they are all valid, and it subsequently appears that some of them are spurious, a court should hesitate before pronouncing any of its parts to have the force of law; and should not give them such effect unless it is entirely clear that the spurious parts are such as could not have influenced him to approve the other parts, or, in other words, unless the latter are entirely severable, or distinct and independent, from the former. Any other rule must result in trespass by the judicial department upon the legislative domain, and encourage not only negligence, but even efforts upon the part of interested, evil persons to secure the interpolation of matter which they might think would overcome some known executive objection, and yet not defeat the genuine parts of the bill.

The first eight sections, as well as the others, are void.

The motion to quash the return is denied, and the judgment of the court will be that the respondent go without day, and recover his costs, to be taxed by the clerk. *State v. Commissioners*, 22 Fla. 364, 370. It will be so ordered.

MAXWELL, C. J., (*dissenting*.) I do not concur in the opinion of a majority of the court, and will give my own views of the case. On the 12th of November, 1887, the relators, in their capacity as city council of Palatka, and as citizens of said city, filed their petition in this court for a writ of *man-*

*damus* to compel respondent, as assessor of the city, to assess the property therein under section 7 of chapter 3780 of the Acts of 1887. The substance of their petition is that the time for beginning the assessment has arrived; and that the city council, by resolution adopted in September, ordered the assessor to proceed with the assessment under the section mentioned; but that he refused, and still refuses, claiming that he should make his assessment in the manner provided by the general law for the incorporation of cities and towns, because, under section 30 of the act containing section 7, that act does not become operative until the mayor and city councilmen have been elected and qualified under it. The relators allege that said section 30 is no part of the law, inasmuch as neither that section nor any others, except those from 1 to 8 inclusive, were ever passed by the legislature; wherefore they say the assessment should be made as the city council ordered. To the alternative writ the respondent makes return that he refuses to make the assessment as ordered: (1) Because chapter 3780 is not a valid law, being local or special, within the meaning of the constitution; and no notice of intention to apply for the same was published 60 days, as the constitution requires; and, further, because, in the legislature which passed it, the senate was presided over by the lieutenant governor, and not by one of its own members, as provided by the constitution. (2) Because, if said chapter be a valid law, it does not go into effect until the mayor and councilmen have been elected and qualified thereunder, and that these have not been elected; and, further, because section 25 of the act provides that "the assessment shall be made \* \* \* under the laws by which property is assessed for state and county purposes." Chapter 3780 referred to is "An act to revoke and abolish the present municipal government of the town or city of Palatka, and to reorganize a city government for the said town or city," approved June 3, 1887.

At the hearing, the relators, to show that only the first eight sections of the act were passed by the legislature, produced in evidence, through the secretary of state, the original bill, and the engrossed bill, and the journals of the senate and house, of the session of the legislature in which the act was passed. From these it is shown that the bill originated in the senate, and was passed there, containing 31 sections, the last 23 of which are the sections from 9 to 31, inclusive of the act, as it now stands. The bill, as thus passed, went to the house; and in that body was amended by striking out all after the enacting clause, and inserting eight sections, which are the first eight sections of the act as it now stands. The senate concurred in the amendment; and the bill, thus amended, was the bill, and all of the bill, that was finally passed by both houses. It is shown by inspection of the engrossed bill that the change which resulted in the present act was brought about in the enrollment by substituting the eight sections of the amended bill for the first eight of the senate bill, and then adding the remaining twenty-three sections of the latter bill, which had not been passed.

The case thus presented involves the constitutionality of the act, which is assailed on two grounds: The first of these is that the act, being a local one, the constitution requires 60 days' notice before the introduction of the bill, and respondent says this was not given; and the second is that the law is unconstitutional because the lieutenant governor presided over the senate, instead of one of the members of the body elected by itself. In the case of the *State v. Commissioners*, 3 South. Rep. 193, (decided at the last term,) this court held, in reference to the same objections to the constitutionality of the charter for the city of Jacksonville, that the objections are not well taken. That ruling will apply to this case, and it is unnecessary to repeat here the reasons upon which the ruling was based. These objections aside, the question arises whether the act, in view of the evidence as to its passage, has constitutional standing as a legislative enactment. While every presumption is to be allowed in favor of the legislature to sustain its acts, there is abundant au-

thority to the effect that its journals and authentic papers may be resorted to for evidence of its action on the bills before it, that get into the statute book as laws, to ascertain whether they have or have not been passed in accordance with the requirements of the constitution; and that if, from such evidence, it be found that what purports to be a law was never passed, it may be pronounced to be of no validity. *Cooley*, Const. Lim. 163; *Gardner v. Collector*, 6 Wall. 499; *Spangler v. Jacoby*, 14 Ill. 297; *Berry v. Railroad Co.*, 41 Md. 446; *Osburn v. Staley*, 5 W. Va. 85.

It is clearly shown by the journals before us that the Palatka charter, as it passed the legislature, had only eight sections, these being the first eight in the approved act; and just as clearly shown that the other twenty-three sections of the approved act were not passed by the legislature. However it may have occurred, whether by design or mistake, the bill, as passed, is not the bill enrolled, signed, and approved. There can be no question but that the sections not passed have no validity. They appear under the form of law, but are utterly null and void. The question then is whether their infirmity attaches to the other eight sections, and invalidates the whole act. The decisions on this subject are diverse. In 43 Ala. 721, is a case (*Jones v. Hutchinson*) somewhat similar to this. The act there contained only one section, with a proviso. From the journals of the legislature it was shown that the proviso was not passed, while the other portion of the act was. The court held that the bill signed and approved was not the bill passed, and that, therefore, the whole act was void. *Moody v. State*, 48 Ala. 115, is to the same effect. On the other hand, in *State v. Platt*, 2 S. C. 150, it is held that when part of an act was properly passed by the legislature, and part not, the courts may either declare the whole act void, or only that portion not passed. The case in 41 Md., *supra*, was one in which part of a statute was sustained, while another part of it was declared null and void because it had not been passed by the legislature. In that case it is said: "As the entire published statute, except the third section, was regularly passed by the legislature, and approved by the governor, there can be no reason for declaring the other portions of it void, because the third section is found to be a nullity. Statutes may be void in part and good in part; and if the part that is valid is entirely distinct and severable from that which is void, the courts will uphold and enforce the former, as if passed disconnected from the latter." I think this the correct rule. The Alabama cases must have been decided on a distinction in the mind of the court, though not expressed, which placed an act, parts of which are invalid, because not passed by the legislature, on some different footing from an act with part regularly passed, but void because unconstitutional. In my opinion, there is no just distinction by which the familiar rule that courts may uphold one portion of an act while declaring another portion void should not apply to an act whose defect arises from one portion of it not having been passed by the legislature. If that portion can be stricken out, and, in the language of *Cooley*, "that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that rejected, it must be sustained." I can see no reason why this doctrine should not apply to all statutes alike, whatever may be the grounds of the invalidity of their bad parts. Whatever is void, is not law, say the courts. They further say that what is void in a law may be stricken from it; and that it is their duty, if what remains can be enforced independent of the part stricken, to uphold that much; but they nowhere say, and it would be inconsistency to say, that being void for one reason this is authorized, while if void for another a different rule may prevail. In every case where part of a law is sustained to the exclusion of another part, the whole has been approved by the executive,—the bad and the good alike. If it has the form of law in a case like the present, as well as in cases where the whole act was passed, it would seem to be making a distinction

without a difference to declare the former all void and the latter void only as to its bad parts. It is suggested that the conclusion which sustains this act disregards the position and rights of the governor; that as a component part of the legislative power his action is directed solely to the consideration of the bill presented to him; and, if a bill is presented which he approves, it is a bill that in its entirety must be considered a bill duly passed by the legislature, else no bill at all. This view, as I think, rests upon a misapprehension of the relations of the governor towards legislation. The provision of the constitution which connects him with legislation is this: "Every bill that may have passed the legislature shall, before becoming a law be presented to the governor. If he approves it, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which house shall cause such objections to be entered upon its journal, and proceed to reconsider it. If, after such reconsideration, it shall pass both houses by a two-thirds vote of members present, which vote shall be entered on the journal of each house, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the governor, (Sunday excepted,) the same shall be a law, in like manner as if he had signed it. If the legislature, by its final adjournment, prevent such action, such bill shall be a law, unless the governor, within 10 days after the adjournment, shall file such bill, with his objections thereto, in the office of the secretary of state, who shall lay the same before the legislature at its next session; and if the same shall receive two-thirds of the votes present it shall become a law." Section 28, art. 3.

This does not convey the idea, loosely expressed, it seems to me, by some authorities, that the governor is a component part of the legislature. The three departments of government—legislative, executive, and judicial—have separate, distinct functions, each independent of the other, with exceptions provided for, one of which is found in the foregoing section of the constitution; and also except so far as the constitution provides checks to restrain encroachments upon each other, or upon the rights or welfare of the people. The executive, by the checking power given to that department, restrains the legislative by the interposition of a veto. The judicial department puts its restraint upon both the others through its power to declare their acts unconstitutional and void. And the legislative department regulates the others by its authority to make laws, unlimited except by such prohibitions as are imposed by the constitution. Each acts for itself within its sphere, and when they are brought into connection, as the governor and legislature are in the passage of laws, or into contact, as the judiciary may be with the others in its authority to pronounce upon their acts or proceedings, it is chiefly in the way of restraint or check upon each other. This adjustment is considered the crowning excellence of the government of this country; the cardinal idea being that the safety of our institutions depends upon the holding of each department to its separate functions. It is the function of the legislative department to pass laws, and that function is subject to no restraint except the veto of the executive. When an act is passed and presented to the governor for his approval, it is not because that approval is necessary to make it a law; for it becomes a law irrespective of his approval, if he does not challenge it by a veto; and, even if he vetoes it, it may become a law independent of him by a two-thirds vote of the two houses of the legislature. It is clear, therefore, that the governor's agency in the passage of laws is not affirmative, but only a sign to indicate that he has no veto to interpose. Then, if all bills passed by the legislature may become laws without any affirmative action of the governor, does his approval of a bill, part of which has been passed by the legislature, but containing other parts not passed, fail to make law of the part passed? Why should it? The only reason given is that the bill presented to the governor was not the bill which passed, though included in it. How

that makes the question of the validity of the part passed, if it can stand by itself, different in principle from the case of a bill all of which was passed and approved, but some of it void, while the rest may be sustained, I am unable to conceive. I cannot enter into the reasons of the governor for his approval in the one case any more than the other. To do that would require us to say that he would not have approved the bill if it had been presented to him as actually passed. There can be no escape from this, except upon the naked rule that a bill presented to the governor, and approved by him, which contains substantive matter not passed by the legislature, is *ipso facto* entirely void. I think such a rule is against the analogies of the law; and that, in view of the mischief that may be perpetrated under it either by evil design or clerical mistake, good reason will not uphold it.

Applying the foregoing views to the act under consideration, I am now to inquire whether, if all the sections after the eighth are stricken out, a law is left complete in itself, answering the intent of the legislature, and in no wise dependent on those sections, or any of them. *Prima facie* there would be such a law, for those eight sections constitute the law as it actually passed the legislature. But, looking to the act itself, I come to the same conclusion. The first section provides for the division of the city into four wards, restricts voting to the ward in which the voter resides, and authorizes the mayor to appoint three inspectors of election in each ward. The second section provides that at the next annual election there shall be chosen two aldermen for each ward, and an alderman at large, who shall constitute the city council; and fixes the terms of the aldermen so that, at subsequent annual elections, one shall be chosen for each ward to serve for two years, but the one at large to be elected every year. The third section provides the mode of appointment of city marshal, fixes his salary, and directs how he may be removed or suspended. The fourth section fixes the salary of the mayor, and provides for the disposition of fines, forfeitures, etc. The fifth section invests the city council with power to levy taxes annually to the extent of 2 per cent. of the assessed value of the property in the city, and no more. The sixth section empowers the city council, with approval of a majority of the registered voters of the city, to issue bonds for sanitary and municipal purposes, the interest on same not to exceed the legal rate of interest of the state. The seventh section provides that the city assessor shall assess property in the city equally at its fair and reasonable valuation; and gives the city council power to act as a board of equalization. The eighth section is as follows: "Nothing in this act shall be so construed as to deprive the city of Palatka of its rights, powers, and privileges now allowed by law under the general incorporation act for cities and towns in this state; but all the provisions of said general incorporation law, not inconsistent with this act, shall apply to said city of Palatka." From this compendium of the eight sections it will be seen that the first seven provide for special matters pertaining to the government of Palatka, while the eighth provides for all other matters necessary to complete the organization, by continuing in force such provisions of the general law for the incorporation of towns and cities as are not inconsistent with the previous seven. Practically the general incorporation law is kept in force, modified only by the provisions of those seven sections. Taken together, they constitute a law complete in itself, and answering the purpose of reorganization expressed in the title of the act. I think, therefore, that these eight sections, disencumbered of the others, should be sustained as the act passed by the legislature, signed by its officers, and approved by the governor.

(84 Ala. 446)

**MORRIS v. STATE.***(Supreme Court of Alabama. December Term, 1887.)*<sup>1</sup>**CRIMINAL LAW—EVIDENCE—BEST AND SECONDARY.**

It is competent to show possession of an outstanding crop as *prima facie* evidence of ownership, though the title might be proved by a written conveyance.

Appeal from circuit court, Hale county; JOHN MOORE, Judge.

Indictment for larceny of an outstanding crop.

*Thos. R. Rouillac*, for appellant. *Thos. N. McClellan*, Atty. Gen., for appellee.

SOMERVILLE, J. Affirmed on authority of *Patterson v. Kicher*, 72 Ala. 406.

(84 Ala. 223)

**IVES et al. v. RICE.***(Supreme Court of Alabama. December Term, 1887.)*<sup>1</sup>**EQUITY—SALE UNDER DECREE—CANCELLATION.**

On petition to set aside a sale of land made 12 years after a decree declaring a vendor's lien, it appearing that before the sale the decree sought to be enforced had been fully paid and discharged, the sale should be set aside, and satisfaction of the judgment entered.

Appeal from chancery court, Lauderdale county; THOMAS COBB, Judge.

Bill to enforce a vendor's lien. A decree was rendered in favor of plaintiffs in November, 1873, and the land sold August, 1885. Defendant filed exceptions to set aside the sale, on the ground that the decree against him had been paid, and the court ordered that satisfaction be entered of the judgment formerly rendered against defendant, and setting aside the sale. Plaintiff appeals.

*Emmet O'Neal*, for appellants. *R. O. Pickett*, for appellee.

**PER CURIAM.** Excluding all illegal testimony to which objection is properly taken, there remains, in the opinion of the court, a sufficient amount of legal testimony to support the conclusion reached by the chancellor, that the decree sought to be enforced in favor of appellants against the appellee had been fully paid and discharged prior to the sale of the land. The sale was therefore properly set aside, and there was no error in the decree of the chancellor ordering the entry of satisfaction of the judgment in favor of the appellant, under which the sale was made. Affirmed.

<sup>1</sup>The publication of these cases has been delayed because copy of the opinions was not received.







